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## 7th Report on Economic and Social Rights

*Millennium Development Goals and the Progressive Realisation of  
Economic and Social Rights in South Africa*

2006-2009





**The 7th Economic and Social Rights Report: Millennium Development Goals and the Progressive Realisation of Economic and Social Rights in South Africa**





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## FOREWORD BY THE CHAIRPERSON

One of the fundamental characteristics of the Constitution of the Republic of South Africa, Act 108 of 1996 (Constitution) is the inclusion of economic and social rights. Section 27 (1) provides that everyone has the right to have access to health care services, sufficient food and water, and social security, including, if they are unable to support themselves and their dependants, appropriate social assistance. Similarly, section 26 (1) provides that everyone has the right to have access to adequate housing. In contrast, the rights to environment, land and education do not explicitly have “access” in their provisions. In fact, section 25 (5) and section 25 (6), in respect of land tenure security and land restitution, can be read as an entitlement. However, with the exception of the right to education, all these rights are qualified by a second subsection that provides that the *“state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right”*. Section 7 (2) of the Constitution specifically mandates the state to give effect to the rights in the Bill of Rights by obligating it to respect, protect, promote and fulfil these rights. Similarly, courts, tribunals and forums are entrusted with the obligation in terms of section 39 (2) to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation. Chapter 9 of the Constitution also establishes state institutions supporting constitutional democracy, of which the South African Human Rights Commission (Commission) is one such body.

Theoretically, this appears to be a near perfect system but the lived experienced of the poor and marginalised in South Africa would provide a different analysis.

The consensus by most economic and political analysts is that approximately 40% of South Africans are living in poverty with the poorest 15% in a desperate struggle to survive. Depending on the definition that one uses, the unemployment rate in South Africa ranges between 25% and 35%. In addition, South Africa is classified as one of the most unequal countries in the world, and it is characterised by extreme degrees of inequality in the distribution of income, assets and opportunities. For the majority of the citizens in South Africa, therefore, the progressive realisation of economic and social rights is fundamental to their daily survival. As a testament to this, the past couple of years have seen an increase in service delivery protests across the country with each one becoming more violent. In addition, social movements have re-emerged and are beginning to forcefully occupy a civil and political space. May 2008 bore witness to the most horrific scenes of xenophobic attacks and although the reasons for the attacks are not absolutely clear, history has shown that the lived experience of poverty, deprivation, marginalisation and social exclusion often manifests itself outwardly into feelings of racism, racial discrimination and xenophobia. Workers have also taken to the streets to fight for better wages and improved conditions of employment. In 2009, and in the midst of a recessionary climate, the strike season lasted much longer than usual as many bargaining councils failed to reach an agreement. The prolonged strikes are perhaps indicative of the subjective experience of workers slipping further and further into the abyss of an underclass, and once again shows the stark reality that South Africa is a society divided because of gross economic disparities with pockets of a first, third and an increasingly peripheral fourth world.

The Commission’s public hearings for its 7<sup>th</sup> Economic and Social Rights Report took cognisance of the social reality of the majority of people in the country and, in a departure from its previous reports, utilised the targets and indicators from the Millennium Development Goals (MDG) to test the progressive realisation of economic and social rights. However, in recognition that meeting these targets does not necessarily equate to the fulfilment of economic and social rights, the Commission has taken the bold step of adding more content to the understanding of progressive realisation. In drafting its 7<sup>th</sup> ESR Report, the Commission has defined 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), and move to a full realisation of the significant improvement of the capabilities of people in society to the extent that they can meaningfully participate in and shape society.

The findings of the Commission’s public hearings for its 7<sup>th</sup> ESR Report show that while there has been significant policy and legislation created which could enable the state to progressively realise economic and social rights, there are many policy failures, as well as gaps and weaknesses when translating policy into action. There is also no clear understanding throughout the system of government regarding the content of its constitutional obligation of progressive realisation, and there is little recognition of a rights-based approach to socio-economic rights in policy planning and implementation. Therefore, there is much work to be done to give meaning to words such as adequate, access, fulfilment, reasonableness, as they remain mere notions that are poorly defined and



understood. The slow pace at which the government is moving towards the ratification of the International Covenant on Economic, Social and Cultural Rights is disconcerting. It is hence recommended that the government moves toward the swift ratification of this important international instrument. Finally, in the absence of established norms and standards, much of the government's constitutional obligations remain loosely specified and, in the spirit of cooperative governance, it is hoped that this report will substantively contribute to improving the discourse on economic and social rights to the extent that these rights can be real for all who live in South Africa.

Appreciation is extended to all who participated in and contributed to the public hearings and the writing of the 7<sup>th</sup> ESR Report. In particular, I would like to thank Cameron Jacobs, Yuri Ramkissoon, James Motha, Rashida Kalake and Christine Jesseman from the Research, Documentation and Policy Analysis Programme; Southern Hemisphere Consulting for the writing of the report; the invaluable expertise of the numerous panellists and all those individuals who contributed by way of written submissions and oral testimony.

**Mabedle L Mushwana**

Chairperson, South African Human Rights Commission



## ABSTRACT

The South African Human Rights Commission (Commission) is a constitutional body governed by section 184 of the Constitution of the Republic of South Africa, Act 108 of 1996 (Constitution). In terms of its constitutional obligation, the Commission must require relevant organs of state to provide it 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, land and the environment.

Such monitoring and assessment is not only for the purposes of constitutional compliance but more importantly to achieve specific objectives, namely:

1. To determine the extent to which the organs of the state have respected, protected, promoted and fulfilled human rights.
2. 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.
3. To make recommendations that will ensure the protection, development and attainment of human rights.

For the 7<sup>th</sup> ESR report, the Commission decided to use the MDG as the indicator set for analysis. The rationale was primarily because the MDG provide benchmarks for measuring the progressive realisation of economic and social rights and therefore can provide renewed vigour for the determination of the violation of the rights. However, the strategy for the monitoring of ESR in South Africa requires that it goes beyond the quantitative targets of the MDG, and makes an evaluative assessment of the qualitative and substantive issues with regard to its progressive realisation.<sup>1</sup> While it is clear that there is a connection between the content of the eight MDG and the seven ESR enshrined in the Constitution, one must be mindful that the former are motivated by political commitments, whereas the progressive realisation of ESR is driven by constitutional imperatives and international law. Furthermore, even though there are minimum standards attached to both, ESR create the immediate and binding obligations to respect, protect, promote and fulfil the rights. In contrast, MDG are political and therefore are voluntary. It must also be borne in mind that human rights in general have not played a significant role in the construction of the MDG and consequently the minimum standards attached to both may be qualitatively different. In that respect, the targets and indicators attached to the MDG may appear attractive but when measured against the obligation of the progressive realisation of a right, it may mean that meeting the targets does not equate to the realisation of a right.<sup>2</sup> In part, this is what made the MDG such an attractive tool, as the various human rights obligations provide the natural context and lens through which the goals and targets can be critically viewed and understood.

The strategy of the Commission was thus to fuse the MDG with national indicators and the national policy and legislative framework to form a comprehensive measurement tool to assess the progressive realisation of ESR within a rights-based approach.

The primary methodology for the 7<sup>th</sup> ESR Report was the use of public hearings on each right, which were held from 8 to 12 June 2009. In preparation for the public hearings, terms of reference were drafted to assist stakeholders to make submissions to the Commission. These were sent out together with a working document titled "*Millennium Development Goals and the Realisation of Economic and Social Rights in South Africa: A Review*," which critically assessed the progress of ESR in the context of South Africa's commitment to meeting the MDG. The purpose of the working document was to provide a basis for those writing submissions.

The written submissions, together with the oral testimony of stakeholders at the hearings, formed the basis for the analysis. However, the use of focus groups as a methodology has its limitations especially in respect of measurement validity. It is for this reason that the results of the public hearings were supplemented by extensive secondary research of government documents, academic texts, international literature and key informant interviews and discussions.

1 The South African Human Rights Commission, *The Monitoring of Economic and Social Rights in South Africa, A Draft Strategy Paper*, SAHRC Research, Documentation and Policy Analysis Programme, (2008).

2 The South African Human Rights Commission, *Millennium Development Goals & the Realisation of Economic and Social Rights in South Africa: A Review*. Working Paper, Research, Documentation & Policy, Analysis Programme (2008).



Unlike other methodologies, the success of public hearings depends largely on the multi-faceted input from stakeholders. In the case of the ESR Public Hearings, all government departments and ministries, as well as civil society organisations, academic institutions and the general public were invited to make submissions and to attend the hearings. Unfortunately, the initial response to the call for submissions was very poor and the Commission was forced to extend the deadline. Through the considerable effort of the Commission's Research, Documentation and Policy Analysis Programme, the response improved from the national government and the non-state sector, but the response from provincial government departments remained very limited. The only exception was the Western Cape provincial government which prepared a comprehensive submission. In respect of the national government departments, two key departments did not participate at the hearings. These were the former Department of Minerals and Energy and the Department of Social Development, and although the Department of Rural Development and Land Reform participated at the hearings, it did not provide a submission. This made it difficult to interrogate the department's progress in respect of the county's crucial land reform program.

### **Principal Findings**

The findings are divided between the operation of government in respect of its constitutional obligation to progressively realise the rights in the Bill of Rights, and findings in respect of the rights themselves. In terms of the operation of government, it is argued that while some of the government's quantitative targets are positive, there are nonetheless significant impediments, with the result that the targets do not necessarily coalesce with a human rights understanding of progressive realisation. These impediments are as follows:

1. The conceptual misunderstanding by the government of its constitutional obligation to progressively realise economic and social 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 which includes women, persons with disabilities, persons living with HIV and AIDS, non-nationals, farm workers and indigenous populations.
4. The disjuncture between strategic planning and implementation which resides in the weak capacity of government departments to deliver on their intended outputs.

Whereas the above referred to the operations of government, the following highlight the challenges related to the progressive realisation of specific rights:



## Right to Environment

### Findings

- Ineffective policy implementation reduces the availability of a healthy environment and undermines the effective conservation of open spaces.
- Accessibility continues to be undermined by a lack of access to information and the government's lack of response to either requests for information or participation in decision making.
- The inadequacy of overarching planning frameworks as well as the inadequacy of inter-departmental and inter-sectoral collaboration reduces the appropriateness of environmental policies.

### Recommendations

- The amendment of relevant legislation is required to ensure that the responsibility for environmental sector obligations is a concurrent competence of all three spheres of government instead of just national and provincial government.
- An amendment of the Environmental Impact Assessment regulations and public participation guidelines in respect of the Promotion of Access to Information Act, 2 of 2000 is needed, to ensure greater engagement and more meaningful dialogue between Impact and Assessment Practitioners and the public and private sectors.
- An inter-governmental initiative, involving all three tiers of government, should develop guidelines for the streamlining of operational procedures and for improved co-ordination between different government departments and different spheres of government.
- A multi-stakeholder task team with the participation of the government, the private sector and the international donor community must be established to develop a well-resourced programme to deal with the existing and threatening mining impacts, particularly the impacts on watersheds and air quality.

## The Right to Water and Sanitation

### Findings

- Although the Commission recognises the improvement in the delivery of water services, there is still much that needs to be done in respect of the right to have access to adequate sanitation.
- There is no indication of continuous improvement and progressive realisation in service delivery to households in respect of the right to water and sanitation.
- Free Basic Water is provided only to those households that are registered as indigent, but vulnerable households are unaware of the indigent policy or do not register for fear of being stigmatised. The appropriateness of the Indigent Policy used in South Africa is questionable as it places the onus on poor households to prove that they are poor and to voluntarily register as an indigent household.
- There are severe capacity problems at municipal level which is hindered by gross under spending despite the urgent need for service delivery.



## Recommendations

- A strategy to ensure that the poor and vulnerable retain access to water, while simultaneously resolving issues around non-payment for services, is required. The Indigent Policy and register for the allocation of Free Basic Services should be replaced with a universal allocation approach or geographic targeting.
- A national regulation of water tariffs and credit control practices to promote social and environmental justice is needed to ensure uniformly low tariffs for low consumption and equitable rates across rich and poor municipalities.
- As a matter of great urgency, the assessment and resolution of capacity problems at a municipal level is required. Steps should therefore be taken to ensure greater financial and technical support as well as the allocation of skilled personnel to under-capacitated and poor municipalities.
- Service delivery would improve and be benefitted by research in the following areas:
  - Environmental, institutional and economic dimensions of service delivery;
  - Climate change and the availability of water resources including pollution, water quality and water resource development;
  - The institutional framework of water management and service provision, organisational capacity and human resource development and training;
  - Levels of water consumption and costs and affordability of water services for low income households, including the non-payment for services; and
  - Options for cross-subsidisation and elasticity of demand at different levels of consumption across different bands of user groups.

## The Right to Food

### Findings

- Most of the state's food security programmes facilitate access to food through capacity-building and income generation. Though the intention of these programmes is to address immediate needs, they tend to be temporary in nature and fail to address the long term food needs of South Africans.
- Adequate co-ordination between government departments and between government and civil society is lacking. This is demonstrated by the variance between allocation and spending in some government departments, unfilled posts, under-skilled staff and the general inefficiency of service delivery.
- The state is not moving as expeditiously and effectively as possible to give effect to the right to have access to sufficient food.
- At provincial level, programmes are not always based on clear, measurable targets and indicators, and programmes that are said to focus on food insecurity sometimes do not have indicators designed to give effect to that focus.

## Recommendations

- The government must implement a more rigorous integrated planning process involving all relevant national, provincial and local government departments including NGOs and FBOs to ensure that targets and outputs are measurable and meaningful.
- Service delivery efficiency and effectiveness must be improved by focusing on the development of service delivery skills and capacities, particularly at a provincial and local government level.
- It is recommended that the scope of programmes be expanded to include food-stressed people outside the categories of vulnerable people so that they have access to food.
- The government must assess the negative impacts of the land tenure and land reform policies in respect of the impact on food security.



## The Right to Social Security

### Findings

- The oral and written submissions brought before the Commission during the public hearings demonstrated that the South African social security system is not substantially reducing poverty.
- Although it is acknowledged that the social security safety net has been expanded to reach more people, this expansion does not necessarily equate to progressive realisation.
- The full realisation of the right to social security will require much broader multi-departmental and multi-sphere efforts to integrate anti-poverty strategies.
- It is clear that ineffective governance by key South African government agencies is a major factor militating against both the realisation of the right to social security and the first Millennium Development Goal.

### Recommendations

- The organisational mindset of the Department of Social Development needs to be reoriented towards embracing a human rights-based approach to social security.
- As much as possible, social security goals should be firmly linked to solid opportunities for economic advancement.
- The Department of Social Development needs to undertake the process of developing a comprehensive Road map for social security. *Inter alia*, the Road map should clearly articulate how the government intends to meet the specific MDG and how the constitutional right to social security will be progressively realised.
- The South African government must ratify the International Covenant on Economic, Social and Cultural Rights.

## The Right to Health

### Findings

- There is inconsistency in data gathering on health issues, and the consequent unreliable statistics and lack of disaggregation of certain indicators make it difficult to measure the progressive realisation of the right to health care services.
- South Africa is not even close to halfway on meeting the target for the child mortality rate, after nine years of commitment to the MDG and with only six more years to go.
- South Africa is a far way from reaching the target of reducing the maternal mortality rate by three quarters. In fact the trend is suggesting that it is increasing.
- The growth in HIV prevalence among the 25+ age group, which shows an increase of 1.3% from 15.5% to 16.8% since 2002, is disconcerting.
- New patients living with and affected by HIV/AIDS find it difficult to access ARV programmes due to a lack of additional resources, and therefore their right to adequate health care is compromised.
- Access to health care services for the poor is severely constrained by expensive, inadequate or nonexistent transport, by serious shortages with regards to emergency transport, and by long waiting times at clinics and other health care facilities.
- There is insufficient access to health care for vulnerable groups such as women, sex workers, prisoners and older persons.



## Recommendations

- The long term vision for one inclusive national health system should be pursued.
- The reasons for the increase in the child mortality and maternal mortality rates must be investigated by the Department of Health.
- Basic skills and competencies at primary health care level, in respect of basic mental health problems need to be developed.
- A standardised manner of gathering data must be agreed and collaborated upon by government and civil society.
- Sufficient funding must be sourced for tertiary health care facilities as well as primary health care facilities to adequately serve the needs of the most vulnerable.
- A review of legislation governing the planning and implementation of health care for all is recommended.

## The Right to Land

### Findings

- The land reform programme is not appropriate to the needs of many of the landless.
- The government's narrow focus on meeting land redistribution targets and the shift away from a pro-poor policy which promotes transformation shows a limited understanding of the constitutional obligation to progressively realise the right to access to land in an equitable manner.
- The failure of almost half of the land reform projects is problematic in terms of the progressive realisation of socio-economic rights, as the right to land is delivering neither the restoration of dignity nor economic benefits to hopeful beneficiaries, and is not contributing to improved rural development.
- The failure of the government to secure land rights for those living on farms and in communal areas, and to act decisively against evictions, is very worrying.
- Poor post-settlement support programmes have contributed to the assessment that the right to land is not being progressively realised.

## Recommendations

A new phase of land reform located within a wider agrarian reform is needed and will require new institutional arrangements. These will have to encompass the following:

- A policy review in terms of the understanding of communities in rural areas.
- A review in respect of the arrangements with regard to traditional leaders.
- Improved land use planning and consideration of land use planning and restitution/redistribution when considering land resettlement and the provision of mining rights.
- Implementation and reporting annually on the recommendations of the Commission's 2007 hearings on Land Tenure Security, Safety and Labour Relations in Farming Communities.
- Creation of substantive rights in land for occupiers.
- Proactive creation of new, sustainable settlements in farming areas.



## The Right to Housing

### Findings

- Significant gaps exist in the housing provisions for a variety of categories, such as people who qualify for a subsidised house and are waiting in the queue for one; backyard dwellers and people in rural areas. They are therefore not able to access and enjoy their rights.
- The methods of informal settlement upgrading and the process of upgrading are increasingly becoming synonymous with evictions.
- The housing policy is one dimensional and is based on the concept of a household. It does not recognise the multiple needs in communities, including single person households.
- The housing policy has not adequately addressed the problem of inner-city accommodation for low income groups.
- The Housing Demand Data Base is very problematic and lacks transparency.
- The quality of the housing that has been built is a significant problem and compromises the right to adequate housing.

### Recommendations

- The Department of Housing must recommit itself to a positive and indirect approach to doing away with slums, as promoted by both the Housing Act and Breaking New Ground.
- Housing policies must take diversity into account and need to be tailored to the needs of each individual, family and special needs group.
- The rental housing policy for low-income groups particularly needs to be restructured, to guarantee security of tenure for tenants.
- The National Housing Code must be reviewed to eliminate discriminatory phrasing against asylum seekers and refugees.
- The Housing Demand Data Base needs to be brought online throughout the country, and the relevant government authorities need to explain the transition from the waiting list process to people who are on the list.



## The Right to Education

### Findings

- Statistics show that education in South Africa is not providing the broad access to quality education that would enable the equitable sharing of opportunities.
- The poor performance of learners and teachers in literacy and numeracy and the declining numbers of Grade 12 learners who are eligible for entrance to higher education provides evidence that sufficient standards of quality are not being met.
- The lack of decent infrastructure infringes on a child's right to education, and educational opportunities remain bound to historical patterns of inequality.
- The increased access to education has come at the expense of quality.
- In 2007, the average literacy score in Grade three was 36%, but only 15% of children passed both numeracy and literacy.
- There are concerns around the quality of teaching in schools.

### Recommendations

- The definition of 'basic education' should include a learner's entire schooling career, which would be consistent with international trends.
- The funding, implementation, monitoring and enforcement of the school funding policies should be reviewed to achieve greater accessibility to education.
- The government should develop measures to ensure the equitable allocation of funding and the provision of infrastructure between and within provinces.
- The Department of Basic Education must provide nutrition programmes at all schools, from Grade R, primary to secondary, to realise the right of access to food of all children.
- The Admission Policy for Ordinary Public Schools should be revised to reflect the right of children without South African birth certificates to access education.
- The Department of Basic Education must monitor the quality of education by assessing throughput rates, matriculation pass rates, the grades at which young people are passing or failing, and the teaching pedagogy at schools.



## STRUCTURE OF THE REPORT

The report is structured as follows:

The first chapter provides a background to the writing of the report.

The second chapter focuses on the nature and content of the constitutional obligations in respect of the various rights, through deconstructing progressive realisation and its nexus to the notion of reasonableness as expounded in the various constitutional court judgments. Part of the intention of this chapter is to shift the debate in human rights discourse from using “progressive realisation” as a generic term to unpacking it into its constituent elements. In the General Comments, the Committee on Economic, Social and Cultural Rights provided the normative content and criteria for monitoring the specific economic and social right.<sup>3</sup> Although these criteria vary depending on the specific right, the core denominators are accessibility, availability, acceptability and appropriateness. These criteria are applied within the rights-based approach when assessing the progressive realisation of the specific rights. However, it should be noted that these criteria are not legally binding and there is a need to develop a new enforceable methodological framework for monitoring the fulfilment of socio-economic rights.

Chapter 3 is a discussion of the four specific findings that emerged through the analysis of the public hearings and focuses on the impediments to the enjoyment and fulfilment of economic and social rights. These impediments are:

1. The conceptual misunderstanding by the government of its constitutional obligation to progressively realise economic and social 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 which includes women, persons with disabilities, persons living with HIV and AIDS, non-nationals, farm workers and indigenous populations.
4. The disjuncture between strategic planning and implementation which resides in the weak capacity of government departments to deliver on their intended outputs.

These impediments are elaborated upon in chapter 3 in which the status of each right is explicated.

Chapters 4–11 concern the individual rights. Each chapter contains an overview of the international and South African commitments and obligations governing the right, and includes a listing of relevant South African legislation, policies, programmes and institutions. This is followed by a description of the MDG relevant to the right and the status of the right in respect of the main themes arising. A predominantly quantitative analysis of South Africa’s progress towards fulfilling the MDG is then provided, followed by a discussion on the progressive realisation of the respective right. This last sub-section attempts to analyse the progressive realisation within the framework of the 4 As which have been used in international discourse, particularly in the General Comments to the ICESCR for interpreting the progressive realisation of ESR. This analytical framework has been used in the absence of any other, and although useful, it is not entirely satisfactory. Firstly, the 4 As have not been applied to the rights to land, environment, water and food in the general comments, and therefore one has to interpret them as meaningfully as possible. Secondly, they differ, as although access, availability, and acceptability are common, the general comment on the right to education uses “adaptability” while the general comments to the rights to health and social security use “appropriateness”. Thirdly, they are not clearly distinct from one another and at times the analysis appears to be somewhat superficial. This has highlighted the need for the Commission to continue on its own path towards identifying a structured framework for analysis based on well defined indicators and measured against a set of desired outcomes.

Chapter 12 is the final chapter and provides some general concluding observations of all the economic and social rights.

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See General Comment 4 (Housing), 12 (Food), 13 (Education), 14 (Health), 15 (Water), and 19 (Social Security).



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## LIST OF ACRONYMS

ABET	Adult Basic Education Training
ACESS	Alliance for Children's Access to Social Security
ACHPR	African Charter on Human and People's Rights
AIDS	Acquired Immune Deficiency Syndrome
ALP	AIDS Law Project
AMPS	All Media Products Survey
ANC	African National Congress
APRM	African Peer Review Mechanism
ART	Antiretroviral Treatment
ARV	Antiretroviral
BNG	Breaking New Ground
CALS	Centre for Applied Legal Studies
C.A.P.E	Cape Action for People and the Environment
CASE	Community Agency for Social Enquiry
CASP	Comprehensive Agricultural Support Programme
CBO	Community Based Organisation
CCMA	Commission for Conciliation, Mediation and Arbitration
CCMT	Comprehensive Plan for HIV and AIDS Care, Management and Treatment
CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
CGE	Commission on Gender Equality
CLRA	Communal Land Rights Act
CIP	Comprehensive Infrastructure Planning Process
CoRMSA	Consortium for Refugees and Migrants in South Africa
CMR	Child Mortality Rate
CO <sub>2</sub>	Carbon Dioxide
CPI	Consumer Price Index
CRLR	Commission on the Restitution of Land Rights
CRU	Community Residential Unit
CSDA	Centre for Social Development in Africa
CSG	Child Support Grant
CSIR	Council for Scientific and Industrial Research
DAFF	Department of Agriculture, Forestry and Fisheries
DDSP	District Development Support Programme
DEMIS	District / Regional-Based Education Management Information System
DICAG	Disabled Children's Action Group
DCS	Department of Correctional Services
DCGTA	Department of Cooperative Governance and Traditional Affairs
DEAT	Department of Environmental Affairs and Tourism
DFA	Development Facilitation Act
DHS	Department of Human Settlements
DLA	Department of Land Affairs
DME	Department of Minerals and Energy
DoEn	Department of Energy
DoH	Department of Health
DoHA	Department of Home Affairs



DoM	Department of Mineral Resources
DOTS	Directly Observed Treatment, Short-course
DSD/DoSD	Department of Social Development
DRD&LR	Department of Rural Development and Land Reform
DWAF	Department of Water Affairs and Forestry
DWEA	Department of Water and Environmental Affairs
DPLG	Department of Local Government
EAP	Environmental Assessment Practitioners
ECD	Early Childhood Development
EDI	Education Development Index
EFA	Education for All
EFV	Efavirenz
EHP	Emergency Housing Programme
EIA	Environmental Impact Assessment
EMIS	Education Management Information System
EMS	Emergency Medical Services
EPWP	Expanded Public Works Programme
ESR	Economic and Social Rights
ESTA	Extension of Security of Tenure Act 62 of 1997
FAO	Food and Agriculture Organisation
FBW	Free Basic Water
FBSan	Free Basic Sanitation
FET	Further Education and Training
FIVIMS	Food Insecurity and Vulnerability Information and Mapping Systems
FMSP	Forced Migration Studies Programme
GAIN	Global Alliance for Improving Nutrition
GDARD	Gauteng Department of Agriculture and Rural Development
GDP	Gross Domestic Product
GEGPRI	Gender, Education and Global Poverty Reduction Initiatives Project
GHS	General Household Survey
GPI	Gender Parity Index
HCPMA	Housing Consumers Protection Measures Act 95 of 1998
HDA	Housing Development Agency
HIV	Human Immunodeficiency Virus
HPV	Human Papillomavirus
HSS	Housing Subsidy Operational System
ICESCR	International Covenant on Economic, Social and Cultural Rights
IDASA	Institute for a Democratic South Africa
IES	Income Expenditure Survey
IFSNP	Integrated Food Security and Nutrition Programme
IFSS	Integrated Food Security Strategy
IMCI	Integrated Management of Childhood Illnesses
IMR	Infant Mortality Rate
IQMS	Integrated Quality Management Systems
JIOP	Judicial Inspectorate of Prisons
KZN	KwaZulu-Natal
LARP	Land and Agrarian Reform Project



LER	Learner-to-Educator Ratio
LRA	Labour Relations Act 66 of 1995
LRAD	Land Redistribution for Agricultural Development
LRC	Legal Resources Centre
LTSM	Learning Teaching Support Materials
LUMB	Land Use Management Bill
LURITS	Learner Unit Record Information Tracking System
MDG	Millennium Development Goal/s
MDR-TB	Multi-Drug Resistant Tuberculosis
MIG	Municipal Infrastructure Grant
MMR	Maternal Mortality Rate
MPRDA	Minerals and Petroleum Resources Development Act 28 of 2002
MTEF	Medium Term Expenditure Framework
NCCEMD	National Committee on Confidential Enquiries into Maternal Deaths
NDP	National Drug Policy
NEEDU	National Education Evaluation and Development Unit
NEMA	National Environmental Management Act 107 of 1998
NFCS	National Food Consumption Survey
NFES	National Food Emergency Scheme
NGO	Non-Governmental Organisation
NHBRC	National Home Builders Registration Council
NHFC	National Housing Finance Corporation
NHI	National Health Insurance
NEIMS	National Infrastructure Management System
NSFAS	National Student Financial Aid Scheme
NSNP	National School Nutrition Programme
NSP	National Strategic Plan for HIV/AIDS
NTCP	National TB Control Programme
NSDP	National Spatial Development Perspective
NDoSD	National Department of Social Development
NURCHA	National Urban and Reconstruction Agency
OBE	Outcomes-Based Education
OHCHR	Office of the High Commissioner for Human Rights
OECD	Organisation for Economic Co-operation and Development
OSD	Occupational Specific Dispensation
OVC	Orphaned and Vulnerable Children
PAIA	Promotion of Access to Information Act 2 of 2000
PEP	Post-Exposure Prophylaxis
PEM	Protein-Energy-Malnutrition Programme
PHC	Public Health Clinics
PHP	People's Housing Process
PIE	Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998
PLAAS	Institute for Poverty, Land and Agrarian Studies
PMTCT	Prevention of Mother-to-Child Transmission
PPIP	Perinatal Problem Identification Programme
PTOs	Permissions to occupy
QIDS	Quality Improvement and Development Strategy



RDP	Reconstruction and Development Plan
RED	Reaching Every District
RHLF	Rural Housing Loan Fund
RNC	Revised National Curriculum
RoD	Record of Decision
SADHS	South African Demographic and Health Survey
SAHRC	South African Human Rights Commission
SANBI	South African National Biodiversity Institute
SAPS	South African Police Services
SASSA	South African Social Security Agency
SAIRR	South African Institute for Race Relations
SANAC	South African National AIDS Council
SCR	Smear Conversion Rate
SGB	School Governing Body
SHF	Social Housing Foundation
SKEP	Succulent Karoo Ecosystem Programme
SLAG	Settlement Land Acquisition Grant
SLAPP	Strategic Litigation Against Public Participation Suits
SocPen	Social Pension System
SPFS	Special Programme for Food Security Projects
SRoD	Social Relief of Distress
START	Strategic Timing of Antiretroviral Treatment
Stats SA	Statistics South Africa
STEP	Subtropical Thicket Ecosystem Planning
STD	Sexually Transmitted Disease
STI	Sexually Transmitted Infection
TAC	Treatment and Action Campaign
TB	Tuberculosis
TRAs	Transitional Relocation Areas
UNCRPD	UN Convention on the Rights of Persons with Disabilities
UCT	University of Cape Town
UNGASS	United Nations General Assembly Special Session
UNHRC	United Nations Human Rights Council
UNICEF	United Nations Children's Fund
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNSD	United Nations Statistics Division
VCT	Voluntary Counselling and Testing
VIPs	Ventilated Pit Latrines
WBWS	Willing Buyer Willing Seller
WFP	World Food Programme
WHO	World Health Organisation



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# Chapter 1



*Background to the 7th ESR report*



## CHAPTER 1: BACKGROUND TO THE 7<sup>th</sup> ESR REPORT

### 1. THE MANDATE OF THE COMMISSION

The South African Human Rights Commission (Commission) is a constitutional body governed by section 184 of the Constitution of the Republic of South Africa, Act 108 of 1996 (Constitution). Section 184 (1) and (2) clearly underlines the mandate, functions and powers of the Commission whereas section 184 (3) is specific in respect of the Commission's requirement to monitor and assess economic and social rights (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 only for the purposes of constitutional compliance but to ensure the advancement of social and economic rights so that the poor and vulnerable in society may enjoy the full benefits of democracy. This will include the specific objectives of:

1. Determining the extent to which the organs of state have respected, protected, promoted and fulfilled human rights.
2. Determining 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. Making recommendations that will ensure the protection, development and attainment of human rights.

#### 1.1. The 7<sup>th</sup> ESR Report

In 2008, the Commission drafted a Strategy for the Monitoring of Social and Economic Rights in South Africa, the aim of which was to develop a more structured framework for its monitoring and assessment mandate. Past monitoring activities of the Commission were seldom contextualised or rooted within a framework of objectives and indicators, and hence the strategy proposed for its 7<sup>th</sup> ESR Report was to utilise the indicators attached to the Millennium Development Goals (MDG) with the various human rights obligations providing the natural context and lens through which the goals and targets can be critically viewed and understood. This also fitted aptly with the Commission's strategic principles of poverty eradication, development, equality and human dignity.

The Commission's section 184 (3) monitoring mandate that refers to housing, health care, food, water, social security, education and environment has high levels of synergy with the MDG. However, by using the human rights obligations as the critical context, the strategy necessitated the monitoring of socio-economic rights to go beyond the mere quantitative targets of the MDG and towards an approach that makes an evaluative assessment of the qualitative and substantive issues with regard to the progressive realisation of economic and social rights.<sup>4</sup>

The MDG are an appropriate tool to use as they represent, through the Millennium Declaration, a structured and coherent response to contemporary global challenges such as widespread poverty, and have been heralded as a means for benchmarking and assessing progress in human development.<sup>5</sup> In the Millennium Declaration, 189 member states of the United Nations signed and reaffirmed the commitment of the international community to eradicate poverty.<sup>6</sup> The Declaration is a consolidation of eight interconnected development goals and constitutes a set of agreed and measurable targets and quantifiable indicators. The eight goals are designed to: (1) eradicate extreme poverty and hunger; (2) achieve universal primary education; (3) promote gender equality and empower women; (4) reduce child mortality; (5) improve maternal health; (6) combat HIV and AIDS, malaria and other diseases; (7) ensure environmental sustainability; (8) develop a global partnership for development.

While the MDG have galvanised unprecedented efforts to meet the needs of the world's poorest at a political level, there are a number of reasons why the Commission decided to look beyond them in its assessment of

<sup>4</sup> South African Human Rights Commission (note 1 above).

<sup>5</sup> United Nations Office of the High Commissioner for Human Rights. *Claiming the Millennium Development Goals: A Human Rights Approach*, 2008.

<sup>6</sup> United Nations Millennium Declaration. General Assembly Resolution 55/2.2000.



South Africa's achievement of the progressive realisation of ESR. Firstly, while it is clear that there is a connection between the content of the eight MDG and the seven ESR enshrined in the Constitution, it is important to consider that the former are motivated by political commitments whereas the progressive realisation of ESR is driven by constitutional imperatives and international law. Secondly, even though there are minimum standards attached to both, ESR create the binding obligation to respect, protect, promote and fulfil the rights. In contrast, the political nature of the MDG means that there is no legal compulsion to meet the various targets. Thirdly, the minimum standards attached to both mean different things. The targets and indicators attached to the MDG may appear attractive but measured against the obligation of the progressive realisation of a right, it may mean that meeting the targets does not equate to the realisation of a right.<sup>7</sup> For example, Goal 2 of the MDG ignores the requirement for free primary education and Target 7 focuses on improving the lives of 100 million slum dwellers, but a human rights-based approach would have provided greater focus on providing security of tenure for all.<sup>8</sup>

However, the Millennium Declaration does place both human rights commitments and development goals at the centre of the international agenda for the new millennium.<sup>9</sup> The Declaration made substantial reference to human rights, and world leaders made a commitment to respect all internationally recognised human rights and fundamental freedoms. Accordingly, the goals are underpinned by international law and consequently should be seen as part of a broader integrated framework of international human rights entitlements and obligations. If viewed through a rights-based lens, it can be argued that the intention of the Millennium Declaration is to help focus efforts to address discrimination, exclusion, powerlessness and accountability all of which lie at the root of poverty and other development problems.<sup>10</sup> However, it must be emphasised that concerns have been raised that the practical application of the Millennium Declaration through the MDG has not provided enough attention to women and marginalised groups, nor has it addressed national and global power inequalities, and it may run the risk of lowering human rights standards.

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 the plans, policies and processes of 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.<sup>11</sup>

The strategy of the Commission for the 7<sup>th</sup> ESR report was thus to fuse the MDG with national indicators and the national policy and legislative framework to form a comprehensive measurement tool to assess the progressive realisation of ESR within a rights-based framework. The contextual framework will thus in essence consist of a fusion of international, regional and national indicators and be biased towards human rights understandings within the South African and other developing contexts.<sup>12</sup>

## 1.2. The Methodology

The primary methodology used as the basis for compiling the report was the public hearings on each right which were held from 8 to 12 June 2009. In research, a public hearing can best be described as a focus group which is intended to stimulate discussion among participants and bring to the surface responses that otherwise may lay dormant. Focus groups offer unique insights for critical inquiry as a deliberative, dialogic and democratic practice. In the context of human rights, a focus group as a problem posing formation serves to identify and interrogate the lived experience of the poor and change specific lived contradictions through ensuring that the voice of the poor is heard. Focus groups provide a number of advantages:

7 The South African Human Rights Commission (note 2 above).

8 United Nations Office of the High Commissioner for Human Rights. (note 6 above).

9 United Nations Office of the High Commissioner for Human Rights, *Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation*, (2006) <http://www.ohchr.org/documents/publications/faqen.pdf>.

10 United Nations Development Programme, *Millennium Development Goals: A compact among nations to end human poverty*, Human Development Report, (2003).

11 [www.unhcr.org](http://www.unhcr.org). 2009.

12 South African Human Rights Commission (note 1 above).



1. The open response of a focus group provides an opportunity to obtain large and rich amounts of data in the respondent's own words.
2. It allows respondents to react and build on the responses of other group members.
3. The direct interaction provides opportunities for further clarification, follow-up and probing.
4. It can be used as an important tool for empowerment and the advancement of social justice as it can serve to expose and validate the lived experience of the poor.

The process and development of the public hearings entailed, in the first instance, the production of a working document. The purpose of the working document was to stimulate thinking by respondents around the MDG and economic and social rights by providing them with a conceptual and critical analysis of the subject matter that would inform their written submissions. Concomitant, the working document provided stakeholders with the Commission's position on the progressive realisation of economic and social rights and its relation to the MDG. The working document also set the tone for the nature and content of the terms of reference in respect of the principles and critical questions that the stakeholders were expected to answer in their written submissions.

The written submissions together with the transcription of the hearings formed the basis for the analysis. Although the content of the submissions and the oral testimony of the hearings is invaluable, it is nonetheless limited in respect of reliability. To overcome this limitation, the research analysis was supplemented by extensive secondary research of government documents, academic texts, international literature and key informant interviews and discussions. The analysis took the form of a quantitative assessment of data as well as qualitative analysis of text in respect of the public hearings. In the latter, the critical analysis of text as well as the oral testimony revealed core themes that emerged across the various rights. In the former, a quantitative analysis was conducted on departmental budgets, strategic plans and annual reports. Both the quantitative and qualitative analysis informed the development of the particular report structure, using the definition of progressive realisation and the 4 As as the evaluative tool to determine such progressive realisation.

### **1.2.1. The Working Document**

To guide the nature and content of the submissions, the Commission drafted a working document, titled "*MDGs and the Realisation of Economic and Social Rights in South Africa: a Review*," which critically assessed the progress of ESR in the context of South Africa's commitment to meeting the MDG. The purpose of the working document was to stimulate thinking for those who intended to make submissions, as it served as a foundational source of information on the relationship between the MDG and the Bill of Rights from the Commission's perspective.

The working document was specifically attached to requests directed at relevant national and provincial government departments. However, it was made available on the Commission's website which allowed anyone who was interested in making a submission to gain ready access to it.

### **1.2.2. The Terms of Reference**

In line with its mandate in respect of section 184 (3) of the Constitution, the Commission called for written submissions from relevant national and provincial departments for the period April 2006 to March 2009. It also invited written submissions from civil society, academia and any other relevant interested party for the period from April 2006 to March 2009. The deadline for receipt of submissions by the Commission was 12 May 2009. The Terms of Reference (ToR) outlined the theme of the hearings "*The MDGs and the Realisation of Economic and Social Rights in South Africa*" and identified that the submissions should cover the following human rights: environment, water and food; social security; health; land and housing; and education.

The Commission requested that the submissions provide:

- (a) An assessment of the progress that the state has made in the realisation of ESR from both a quantitative and a qualitative perspective; and
- (b) An understanding of the content of the obligation placed on the state to achieve the progressive realisation of economic and social rights.



Participants were asked to forward all their enquiries to Senior Researcher, Mr Cameron Jacobs. Written submissions could either be e-mailed, faxed, posted or hand delivered to the Commission's Head Office.

### **1.2.3. The Respondents**

Categories of respondents were purposively selected and requested to make written submissions and they included all government departments and ministries, as well as civil society organisations, academic institutions and the general public. The written submissions were then categorised according to the subject matter, and respondents from a sample of each category were invited to make an oral submission at the public hearings.

### **1.2.4. Advertising and Postponing the Public Hearings**

The Commission advertised in the *Sunday Times* in December 2008 requesting organs of state, civil society and any other interested stakeholders to make submissions. The initial announcement was that it would hold public hearings on 02 to 06 February and 09 to 11 March 2009 at the Commission's Head Office located at Human Rights House, Johannesburg. It was also stated that submissions covering the period April 2006 to January 2009 would be accepted from relevant national and provincial departments as well as the public and other interested parties within the Terms of Reference. The final deadline for receipt of submissions by the Commission was 06 February 2009.

However, the initial response to the call for submissions was very poor, with only four government departments having made timeous submissions. This left the Commission with no option but to extend the deadline. In February 2009, the Commission released a press statement on the postponement, as well as an advertisement in the *Mail and Guardian* newspaper requesting stakeholders to make submissions on the progressive realisation of economic and social rights. The Commission was also hosted on a community radio station advertising the hearings and other aspects of the work of the Commission. The Commission also posted an advert on its own website calling for organisations and individual parties to prepare submissions. The public hearings were then re-advertised with new dates for both the public hearings and written submissions. The final deadline for receipt of written submissions by the Commission became 12 May 2009, and the public hearings were held from 08 to 12 June 2009 at the Commission's Head Office located at Human Rights House in Johannesburg.

### **1.2.5. The Public Hearings**

In research, a public hearing is a variant of a focus group which has the advantage of offering unique insights for critical inquiry as a deliberative, dialogic and democratic practice. The hearings were held in three languages, namely, English, Zulu and Sesotho and translators were provided for participants. In order to maintain consistency and uniformity, the format for each of the hearings was similar. The morning began with registration and tea, followed by a welcome speech by a Commissioner from the Commission. In the first session, submissions were made by the national government which were then interrogated through questions from the panellists. The second session entailed public engagement on the first session and subsequently inputs from other departments, civil society organisations and the academia were made. The session after lunch was reserved for civil society, academia and the public in general, followed by inputs from government departments and questions from the panellists. Further discussions were held with the public before closure of the session. Each session was finalised by a summary of the most important issues that emerged.

The programme for each day of the hearings is provided as an appendix to this report but for ease of reference the schedule for the hearings was as follows:

1. Environment, Water and Food: 08 June 2009.
2. Social Security: 09 June 2009.
3. Health: 10 June 2009.
4. Land and Housing: 11 June 2009.
5. Education: 12 June 2009.



## Participation: Submissions and Public Hearings

Submissions were made by departments and civil society organisations. In respect of the submissions from the government, only fourteen departments across all spheres of government provided the Commission with written submissions. The key departments and their provincial counterparts from whom the Commission requested submissions are listed below:

**Table 1: Key Government Departments**

Department of Agriculture
Department of Basic Education
Department of Environmental Affairs and Tourism
Department of Housing
Department of Minerals and Energy
Department of Local and Provincial Government
Department of Water Affairs and Forestry
Department of Rural Development and Land Affairs
Department of Health
Department of Social Development

Out of the nine provincial governments in South Africa, four did not make any submissions to the public hearings: these are the Eastern Cape, the North West Province, KwaZulu-Natal (KZN) and the Free State. The Western Cape was the only province that showed a real commitment to the process and respect for the work of Commission. 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. It also made oral submissions to each of the sessions at the hearings. Gauteng, Limpopo, and the Northern Cape made one submission each. Two National departments did not make written submissions, namely the Departments of Social Development, and Rural Development and Land Affairs. The national department of Social Development did not attend the public hearings, but made a submission to the hearings. The Department of Rural Development and Land Affairs sent a representative who was identified the day before the public hearings. This setback for the Department of Rural Development and Land Affairs led to the department's submission being prejudiced by the short notice as the representative did not have sufficient time to prepare in respect of the Commission's terms of reference.

As time for questions and answers was limited, and significant questions were raised, government departments were requested to present their answers in writing to the Commission. However, none of the government departments provided the written responses as per the request of the Commission.

### 1.2.6. The Review and Reporting Process

Following a process of selection, an external provider, Southern Hemisphere Consulting, was appointed to write the report on the hearings. The provider received a guideline for report writing, as well as all the background documentation and the written submissions. The provider also attended each hearing and received the transcripts.

A report structure was approved by the Commission, and the first draft of the report was submitted on the 14 September 2009. Comments were received from the Commission on the 5 October 2009, and a final report was submitted by the external provider on the 7 December 2009. The Economic and Social Rights Unit of the Commission then edited the report for its launch and dissemination to the Parliament of South Africa.

According to the South African Human Rights Commission Act of 1994, the Commission has a constitutional mandate to submit reports to the President of South Africa and Parliament in respect of meeting its objectives. Parliament provides an effective oversight function over the Commission and its functions. The ESR report is one such report that the Commission is obliged to submit to Parliament as stipulated by section 184 (3) of the Constitution.



### 1.2.7. Limitations of the Methodology

As indicated above, the strategy of the Commission for the 7<sup>th</sup> ESR report was to fuse the MDG with national indicators and the national policy and legislative framework to form a comprehensive measurement tool to assess the progressive realisation of ESR within a rights-based framework. Consequently, the report also assessed the government's progress in terms of meeting the targets set in the MDG.

As a framework for analysis of the progressive realisation of the right, the 4 As were adopted. The rationale for using the framework is that it is used in international discourse, particularly in the General Comments to the ICESCR, for interpreting the progressive realisation of the rights to housing, health and social security. However, the limitation of using the 4 As is that it is not standardised across all the rights. As a result, it is difficult to draw general conclusions. As a means to overcome this limitation, general conclusions were drawn from the principal themes that emerged from the analysis of the period under review.

The primary methodology was the public hearing and although it is a very useful technique for critical enquiry, it does pose certain challenges in respect of the reliability of what is being measured. However, this does not render the findings or the report any less valid but the limitations do point to need for the Commission to develop specific indicators for each right.

# Chapter 2



*The nature and content of the constitutional obligation*



## CHAPTER 2: THE NATURE AND CONTENT OF THE CONSTITUTIONAL OBLIGATION

### 2. INTRODUCTION

The purpose of this chapter is to expand on the nature and content of the constitutional obligations in respect of the various economic and social rights, through deconstructing progressive realisation and its nexus to the notion of reasonableness as expounded in the various constitutional court judgments. Part of the intention of this chapter is to shift the debate in human rights discourse from using “progressive realisation” as a generic term to unpacking it into its constituent elements. Generally, one of the major obstacles to monitoring and assessing economic and social rights has been the obtuse way in which state obligations have been defined in international law. The consequence of such vague language within the rights discourse has been three-fold.<sup>13</sup> Firstly, there has been very little attempt by international or national human rights institutions to add value to the content of the fulfilment and enjoyment of human rights and to hold nation states accountable to their obligations. Secondly, and perhaps because it has been considered a futile battle to do otherwise, many have instead focussed their attention on the immediate obligations associated with economic and social rights. These are the duties to respect, protect and promote. It has been argued elsewhere that while this has been effective, it has diverted attention away from issues and standards of resource availability, progressive realisation and minimum core obligations.<sup>14</sup> Thirdly, nation states are reluctant to accept legal accountability in the area of social and economic policy, and as a result hardly engage in human rights discourse and prefer to talk about development challenges without offering any binding solutions. The most obvious example is the Millennium Development Declaration. This chapter will be divided into a discussion and analysis on the relevant jurisprudence and how rights have been interpreted, the shortcomings of such interpretation especially as it relates to the obligation of progressive realisation and, finally, unpacking progressive realisation in the context of a human rights-based approach.

#### 2.1. Progressive Realisation and Reasonableness

##### 2.1.1. Relevant South African Jurisprudence

The economic and social rights enshrined in the Constitution are to a large extent phrased similarly to the rights in the International Covenant of Economic, Social and Cultural Rights of 1966. The rights in the Constitution can be divided into three main types, namely qualified rights, unqualified rights and rights that deal with prohibitions on the state:<sup>15</sup>

- (a) Section 26 (1) provides the right of everyone to have access to adequate housing and section 27 (1) provides that everyone has the right to have access to health care services, sufficient food and water, social security, including, if they are unable to support themselves and their dependants, appropriate social assistance. These rights are qualified by a second subsection that provides that the *“state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right”*.
- (b) The second category of rights are unqualified rights, and include the economic and social rights of children in section 28 (1) (c); the right to basic education in section 29 (1) (a) and the economic and social rights of detained persons and sentenced prisoners in section 35 (2) (e).
- (c) The third category is phrased as prohibitions on the state to certain actions. Section 26 (3) prohibits the eviction of people from their homes without an order of court made after relevant circumstances are taken into account and section 27 (3) prohibits the refusal of emergency medical treatment.

##### *Interpretation by the Constitutional Court of ESR*

The Constitutional Court of South Africa has adjudicated on claims on ESR and thereby contributed to the interpretation of these rights. The four most important cases are:

1. *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC)
2. *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (10) BCLR 1075 (CC)

<sup>13</sup> Jacobs, C. *Demystifying the Progressive Realisation of Socio-economic in South Africa*. Paper presented to the Australia National University, (October 2009).

<sup>14</sup> See Felner, E. A New Frontier in Economic and Social Rights Advocacy? Turning Quantitative Data into a Tool for Human Rights Accountability. In *International Journal on Human Rights*. Year 5, No 9, December 2008.

<sup>15</sup> Ibid.



3. *Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development and Others* 2004 (6) BCLR 569 (CC)
4. *Lindiwe Mazibuko and Others v City of Johannesburg and Others* 2009 ZACC 28, Case No CCT 39/09 (CC)

The Grootboom judgment<sup>16</sup> focused on the right of access to adequate housing of a group of extremely poor people, 510 children and 390 adults, who were living in bad conditions<sup>17</sup> in an informal settlement in Wallacedene, Cape Town. In a desperate attempt to ameliorate their living conditions, they moved onto vacant land that was privately owned and earmarked for low-cost housing. Eviction proceedings were successfully instituted against the community. The community then sought refuge on a sports field with nothing but plastic sheeting to protect them from the elements. They applied to the High Court for an order against all spheres of government to be provided with temporary shelter or housing until they got permanent accommodation. They relied on the right of access to adequate housing in section 26 (1) and the right of children to shelter in section 28 (1) (c) of the Constitution. The Cape High Court found that there was only a violation of the right of children to shelter and not the right to adequate housing, and hence the claim under section 26 (1) was rejected. The government then appealed the decision to the Constitutional Court but the court found that the state was in breach of its obligation in terms of section 26 on the basis of the reasonableness approach.

In the Grootboom judgment, the Constitutional Court developed a test for reasonableness as a guide to decide whether the government's programme met constitutional requirements. In paragraph 39 of the judgment, the court held that a government programme: "*must clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available*". The court further held that "*a co-ordinated state housing programme must be a comprehensive one determined by all three spheres of government in consultation with each other as contemplated by Chapter 3 of the Constitution.*"<sup>18</sup> The programme must furthermore be *coherent and capable of facilitating the realisation of the right*<sup>19</sup> and passing legislation is not sufficient to fulfil the constitutional requirement of reasonableness.

*"The state is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the executives. These policies and programmes must be reasonable in their conception and their implementation."*<sup>20</sup>

Furthermore "*the programme must be balanced and flexible and make appropriate provision for attention to housing crisis and to short, medium and long term needs. A programme that excludes a significant segment of society cannot be said to be reasonable.*"<sup>21</sup>

Finally, the test caters for those most in need: "*Those, whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right.*"<sup>22</sup>

The court held that the state had instituted an integrated housing development policy in which medium and long term objectives cannot be criticised. However, it argued that the housing programme lacked any component providing for those in desperate need. It therefore found that the absence of such a component was unreasonable and therefore concluded that the nationwide housing programme fell short of the obligations imposed upon national government.<sup>23</sup>

The TAC case<sup>24</sup> pertained to the access to adequate health care. The Treatment Action Campaign (TAC) challenged the limited nature of government measures introduced to prevent mother-to-child transmission of HIV on two grounds. They argued:

16 *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC).

17 They had no water, sewage, refuse removal and only 5% of the shacks had electricity.

18 Government of the Republic of South Africa (note 17 above) 40.

19 Ibid 41.

20 Ibid 42.

21 Ibid 43.

22 Ibid 44.

23 Jacobs, C. (note 14 above).

24 *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (10) BCLR 1075 (CC).



1. The government unreasonably prohibited administering the antiretroviral drug, nevirapine, at public hospitals and clinics, except for a limited number of pilot sites.
2. The government had not produced and implemented a comprehensive national programme for the prevention of MTCT of HIV.<sup>25</sup>

The High Court and the Constitutional Court applied the test for reasonableness developed in the Grootboom case and decided that the government's programme did not comply with the right of access to health care services and the duty to take reasonable measures under section 27 (2) of the Constitution.

The Constitutional Court elaborated on the reasonableness test of government programmes by adding a transparency requirement. *"In order for it to be implemented optimally, a public health programme must be made known effectively to all concerned, down to the district nurse and patients."*<sup>26</sup>

The Khosa case<sup>27</sup> dealt with the right to social assistance. A group of permanent residents challenged the constitutionality of some provisions of the Social Assistance Act 59 of 1992 and the Welfare Laws Amendment Act 106 of 1997. These provisions:

- Restricted access to social assistance to South African citizens only.
- Excluded permanent residents, elderly people and children, who would otherwise have qualified for social grants if there was no requirement of citizenship.
- Excluded primary caregivers who are not South African citizens from accessing the Child Support Grant (CSG) for children in their care, even where these children are South African citizens.

Yet, foster care parents did not have to comply with a requirement of citizenship. In other words, children of non-citizens would have to be removed from their families to join a foster family in order to benefit from the CSG. The Constitutional Court decided that:

1. Permanent residents are a vulnerable group.
2. The laws that exclude them from access to the benefit of social assistance treat them as inferior to citizens.
3. The costs of including permanent residents in the social security scheme would be small.
4. Excluding permanent residents from access to a social security scheme was not consistent with section 27 of the Constitution.
5. Excluding children from access to these grants on the basis of their parents' nationality was unfair discrimination and violates their right to social security under section 28 (1) (c).

The reasonableness approach was here applied to the question of who is entitled to ESR, which is different from the Grootboom and the TAC cases where the reasonableness criteria was applied to the question of the normative content of the ESR.

The Phiri case<sup>28</sup> dealt with the interpretation of the right to have access to sufficient water. The applicants were five residents of Phiri in Soweto who challenged the installation of pre-paid meters which they argued were not covered by the city's bylaws. They also wanted the monthly free water allocation increased from six kilolitres to 50 kilolitres. The applicants raised four arguments as to why the city's Free Basic Water policy should be declared invalid:

1. The applicants contended that the court should determine a quantified amount of water as "sufficient water" within the meaning of section 27 and that this amount is 50 litres per person per day.
2. They also contended that the standard set in the National Water Standards regulations is a minimum standard and that the court is free to determine a higher amount.
3. They furthermore contended that six kilolitres of free water per month is unreasonable within the meaning of section 27.

25 Khoza, S. (ed) *Socio-Economic Rights in South Africa*, 2<sup>nd</sup> edition, (2007), 32.

26 Minister of Health (note 25 above) 123.

27 *Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development and Others* 2004 (6) BCLR 569 (CC).

28 *Lindiwe Mazibuko and Others v City of Johannesburg and Others* 2009 CCT 39/09 (CC).



- Finally, they contended that the city's indigent registration policy, which allows for an additional 4 kilolitres per month per household to indigent households is unreasonable, because it is demeaning or, in effect, under-inclusive.

The court refused to determine a quantified amount that would constitute sufficient water in terms of section 27 as the argument by the applicants was regarded in effect as an argument similar to a minimum core argument. The court stated that the right of access to sufficient water requires the state to take reasonable legislative and other measures progressively to achieve the right of access to sufficient water within available resources. It does not confer a right to claim "sufficient water" immediately.<sup>29</sup> The court furthermore said:

*"Moreover, what the right requires will vary over time and context. Fixing a quantified content might, in a rigid and counter-productive manner, prevent an analysis of context. The concept of reasonableness places context at the centre of the enquiry and permits an assessment of context to determine whether a government programme is indeed reasonable. Secondly, ordinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right. This is a matter, in the first place, for the legislature and executive, the institutions of government best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to social and economic rights. Indeed, it is desirable as a matter of democratic accountability that they should do so for it is their programmes and promises that are subjected to democratic popular choice."*<sup>30</sup>

It ruled that the City of Johannesburg's Free Policy fell within the bounds of reasonableness and therefore was not in conflict with either section 27 of the Constitution or with the national legislation regulating water services. The installation of pre-paid meters in Phiri was therefore found to be lawful.

The court added an interpretation to progressive realisation: *"The concept of progressive realisation recognises that policies formulated by the state will need to be reviewed and revised to ensure the realisation of social and economic rights are progressively realised."*<sup>31</sup> The court found that the relevant policies by the City of Johannesburg had been under constant review and were currently undergoing a revision.

### ***Critique of the Reasonableness Test***

It has been argued that economic and social rights are non-justiciable because of their budgetary consequences which would lead to judicial encroachment on legislative and executive terrain.<sup>32</sup> In the TAC case the Constitutional Court reaffirmed the justiciability of these rights.<sup>33</sup> It rejected the government's argument and reiterated that the separation of powers underlying the Constitution is not absolute. All arms of government should be sensitive to and respect this separation. This does not mean, however, that courts cannot or should not make orders that have an impact on policy.<sup>34</sup> The Constitutional Court found that in economic and social matters courts are constitutionally obliged to ascertain the meaning of the rights in question, to evaluate compliance with the duties they impose as well as to state and to remedy non-compliance where this is found. However, as can be seen from above, the court refrained from determining precisely what the achievement of any particular social and economic right entails and what steps the government should take to ensure the progressive realisation of the right. Such an evasive stance has often been criticised by civil society especially in respect of the court's refusal to elaborate on the minimum core content inherent in the rights to have access to housing and health care services. Instead, it has insisted in both the Grootboom and TAC cases that it was the standard of reasonableness, rather than core content of these rights, that was relevant to solving the matters at hand.<sup>35</sup>

29 Ibid 59.

30 Ibid 60-61.

31 Ibid 40.

32 Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996 (4) SA744 (CC) paragraph 77 and Minister of Health (note 25 above) 96-97.

33 Minister of Health (note 25 above) 25.

34 Ibid 98.

35 Bilchitz, D. *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights*. Oxford University Press. (2007) 143-177.



Despite clearly affirming its interpretative authority in the TAC case, the Constitutional Court has, perhaps surprisingly, shown little vigour in carrying out the interpretative function in relation to the specific economic and social rights. Neither has the Constitutional Court related its understanding of economic and social rights to specific benchmarks, timeframes or minimum standards, from which either the extent of citizens' socio-economic entitlements or of the state's socio-economic obligations may be derived. Instead, the court has spent most of its energy devising and applying the abstract compliance measuring standard of reasonableness. The failure to link this standard explicitly to a more detailed elaboration on the content of individual rights and obligations is lamentable, as it removes the compliance-measuring standard from its context and fails to acknowledge the explicit prioritisation of socio-economic interests abundantly evident from a purposive reading of the constitutional text.<sup>36</sup>

The recent Phiri case is just another example of the court's reluctance to give content to economic and social rights. The court furthermore determined its role narrowly when reviewing progressive realisation of these rights.<sup>37</sup> Thus the positive obligations imposed upon government by the social and economic rights in our Constitution will be enforced by courts in at least the following ways: If government takes no steps to realise the rights, the courts will require the government to take steps; If the government's adopted measures are unreasonable, the courts will similarly require that they be reviewed so as to meet the constitutional standard of reasonableness. From *Grootboom*, it is clear that a measure will be unreasonable if it makes no provision for those most desperately in need; If the government adopts a policy with unreasonable limitations or exclusions, as in Treatment Action Campaign No 2, the court may order that those are removed. Finally, the obligation of progressive realisation imposes a duty upon the government to continually review its policies to ensure that the achievement of the right is progressively realised.

### 2.1.2. International Law

"Progressive realisation" in the Constitution refers to a right that cannot be realised immediately. The goal of the Constitution is that the basic needs of all in our society should be effectively met. In order for the state to meet the progressive realisation criteria it must take steps to achieve this goal. *"It means that accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time. Housing must be made accessible not only to a larger number of people but to a wider range of people as time progresses."*<sup>38</sup>

The content of section 26 (2) and 27 (2) is similar to Article 2 (1) in the United Nation's International Covenant on Economic, Social and Cultural (ICESCR) of 1966. It reads *"Each state party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures"*. South Africa has signed but not yet ratified the Covenant. In short, South Africa is politically bound to not go against the content of the Covenant but is not as such legally bound by the convention. However, in the interpretation of the socio-economic rights in the Constitution, and particularly when applying the reasonableness test, the courts refer to the Covenant and the General Comments on the ICESCR by the Committee on Economic, Social and Cultural Rights.<sup>39</sup> General Comment 3 refers to progressive realisation and stipulates *"it thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources"*.<sup>40</sup>

On a more informal level, bodies of experts have also formulated similar guidelines, the most important being the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights of 1986. The Limburg principles strengthen the concept of progressive realisation by adding that state parties are obliged to move expeditiously towards the realisation of the ICESCR and that they are under no

36 Pieterse, M. Coming to Terms with Judicial Enforcement of Socio-Economic Rights, *South African Journal on Human Rights*, (2004), 407.

37 Lindiwe Mazibuko (note 29 above) 67.

38 Government of the Republic of South Africa (note 17 above) 45.

39 The General Comments of the Committee on Economic, Social and Cultural Rights are non-legal statements adopted by the Committee that elaborate the meaning of the obligations in the Covenant.

40 The Committee on Economic, Social and Cultural Rights, General Comment No 3, The Nature of States Parties' Obligations (Fifth session, 1990), U.N. Doc. E/1991/23, annex III at 86 (1991), U.N. Doc. HRI/GEN/1/Rev.6 at 14 (2003), paragraph 9.



circumstances to interpret this obligation as a licence to indefinitely defer the realisation of the rights outlined in the Covenant.<sup>41</sup> It furthermore requires the “effective use of available resources”.<sup>42</sup> Available resources refer to both the resources within a state and those available from the international community through international cooperation and assistance.<sup>43</sup>

Taking measures within available resources recognises that resources are not limitless, and that the state must do the best it can within the resources it has. The state can defend an allegation that it is not making sufficient progress in realising socio-economic rights on the grounds that it does not have sufficient resources and is doing all that is reasonably possible in the circumstances. What “pie” of resources gets taken into account to assess whether government is doing all that is reasonably possible? The government cannot indefinitely delay taking clear measures that will advance the rights. It must also make sure that it correctly prioritises its budget and other resources to enable it to fulfil its constitutional commitments. It cannot claim that it lacks “available resources” when its budgetary and financial policies clearly favour privileged groups in society at the expense of disadvantaged groups. The government’s first priority should be to ensure that vulnerable and disadvantaged groups have access to at least a basic level of socio-economic rights, for example, shelter, primary health care, basic education and nutrition. This is what the UN’s CESCR calls the state’s “minimum core obligations”.<sup>44</sup>

It is controversial whether the socio-economic rights in section 26 and 27 in the Constitution impose minimum core obligations on the state. The CESCR developed minimum core obligations in interpreting the positive obligations of the state to realise socio-economic rights under the ICESCR. The UN Committee further held that socio-economic rights contain a minimum core obligation that must be fulfilled by state parties.<sup>45</sup> This would require every state party to fulfil minimum essential levels of ESR and a failure to do so may constitute a *prima facie* failure to discharge its obligations under the International Covenant on Economic, Social and Cultural Rights. This means that minimum core obligations are in fact components of progressive realisation and the two cannot be divorced from one another.<sup>46</sup>

The minimum core obligation can be defined as the minimum standards for defining the right in question to ensure that the basic subsistence needs of the population are met. Therefore, progressive realisation should be seen 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 in society to the extent that they can meaningfully participate in and shape society*.<sup>47</sup>

However, in the Grootboom, TAC and Phiri cases, the Constitutional Court rejected the minimum core argument. The court said that:<sup>48</sup>

- The drafting and language of the socio-economic rights provisions in the Bill of Rights does not support the idea that these rights impose a minimum core duty on the state.
- It would be difficult to determine a “core”, as rights varied a lot and needs were diverse.
- Deciding on a minimum core duty for a particular right requires a lot of information that courts often do not have access to.

In *Grootboom*, the court stated that the minimum core idea was, however, relevant to assessing the reasonableness of the measures taken by the state.<sup>49</sup>

In discussing the Grootboom case, Bilchitz suggests an alternative interpretation of progressive realisation to the one applied by the Constitutional Court. It involves understanding the notion of progressive realisation is comprised of two components: the first component is a minimum core obligation to realise the levels of housing required to meet minimum interest; the second component is a duty on the state to take steps to improve the adequacy of

41 The Limburg Principles on the Implementation of the Covenant on Economic, Social and Cultural Rights Part 1 (B.22).

42 Ibid (B23).

43 Ibid (B25).

44 Khoza, S (note 26 above).

45 General Comment (note 41 above) 3 (10).

46 The South African Human Rights Commission (note 2 above).

47 Ibid.

48 Government of the Republic of South Africa (note 17 above) 37-39.

49 Government of the Republic of South Africa (note 17 above) 33.



the housing in accordance with standards. In other words, progressive realisation means the movement from the realisation of the minimum interest in housing to the realisation of the maximum interest. It means that each person is entitled as a matter of priority to basic housing provision, which the government is required to improve gradually over time.<sup>50</sup> Bilchitz also argues that this resonates with the approach adopted by the UN committee on Economic, Social and Cultural Rights. Faced with interpreting the idea of progressive realisation, the UN Committee was concerned that states could use this idea to deprive the rights of all content. To avoid this consequence, it held that the notion of progressive realisation does not exempt states from immediately providing, as a minimum, for the survival needs of its population under all circumstances. The notion of progressive realisation must thus be read to include as a base-line the provision of minimum essential levels of a right which the state is then required to build upon.

At this stage, it is difficult to conclude on the exact content and correctness of the interpretation of economic and social rights and particularly the application of the reasonableness and progressive realisation by the Constitutional Court and the Executive. While the Constitutional Court seems to apply a cautious role, the norms and standards of many of the government's constitutional obligations remain loosely specified. This unfortunately leads to the government's tendency to employ the notion of progressive realisation as a "get-out clause" when resources are scarce. The lack of a clear vision on how rights are to be realised over time, with concrete outcomes and longer term planning, is evidence that the government has not paid enough attention to their realisation.

The apparent attitude of the state that business will continue as usual until rights are contested (either through protest or litigation), is not a sustainable pathway to development and to strengthening a constitutional democracy.

## **2.2. From Access to Fulfilment and Qualitative Improvement**

There is a need to define a new approach to the monitoring and assessment of the progressive realisation, fulfilment and enjoyment of economic and social rights. The MDG and indicators are stepping stones to providing a framework for measuring indices of poverty and human under-development. However, they lack the quality elements of the enjoyment and fulfilment of the rights, which the rights-based approach to a large extent provides.

A human rights-based approach is 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. Of central importance to a rights-based approach is seeing individuals as rights-holders and states as duty-bearers. It seeks to analyse inequalities which lie at the heart of development problems and redress discriminatory practices and unjust distributions of power that impede development progress. Mere charity is not enough from a human rights perspective. Under a human rights-based approach, the plans, policies and processes of development are anchored in a system of rights and corresponding obligations established by international law. This helps to promote the sustainability of development work, empowering people themselves, especially the most marginalised, to participate in policy formulation and hold accountable those who have a duty to act.<sup>51</sup>

The full enjoyment of economic and social rights can be said to be the end-goal of progressive realisation. However, a rights-based approach to development is not only about outcomes and content, it also emphasises the importance of process, including the principles of participatory democracy and access to information. These criteria will be applied in the assessment of the progressive realisation of the specific rights.

### **2.2.1. Access**

"Access" is paramount in any research trying to ascertain whether the state is fulfilling its obligation to achieve the progressive realisation of the right in question.<sup>52</sup> Contextually, access implies that it must be possible for every person to obtain the right and therefore, the state's obligation in progressively realising the right would be to establish the necessary conditions that will allow such access. The necessary minimum conditions are arguably the dimensions or constituent elements of "access." These include:

50 Bilchitz, D. (note 36 above) 193.

51 Office of the United Nations High Commissioner for Human Rights (note 10 above).

52 Jacobs, C. (note 14 above) 11-12.



- physical accessibility of goods and services;
- economic accessibility and affordability of services;
- non-discrimination; and
- information accessibility.

Taking this into account, access can be defined as the *minimum conditions required in order for the state to meet its constitutional mandate of progressively realising economic and social rights*.

### 2.2.2. Progressive Realisation

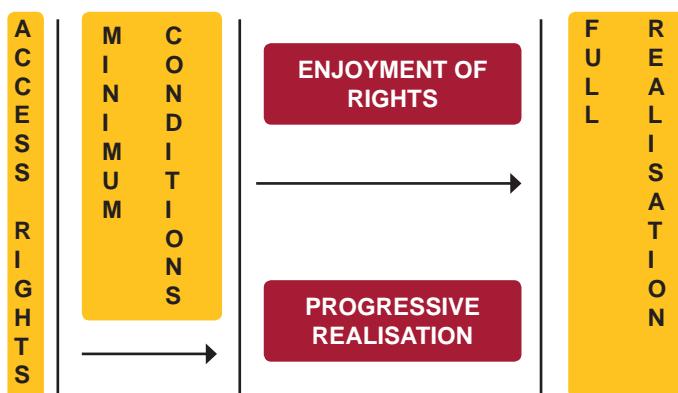
In General Comment No. 3 of the UN Committee for Economic, Social and Cultural Rights, progressive realisation “*imposes an obligation to move as expeditiously and effectively as possible*” toward the full realisation of the right.<sup>53</sup> The UN Committee further held that socio-economic rights contain a minimum core obligation that must be fulfilled by state parties.<sup>54</sup> This would require every state party to fulfil minimum essential levels of these rights and a failure to do so may constitute a *prima facie* failure to discharge its obligations under the International Covenant on Economic, Social and Cultural Rights. This means that minimum core obligations are in fact components of progressive realisation and the two cannot be divorced from one another. The minimum core obligation can be defined as the minimum standards for defining the right in question to ensure that the basic subsistence needs of the population are met. Therefore, progressive realisation should be seen 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 in society to the extent that they can meaningfully participate in and shape society*.

### 2.2.3. Fulfilment and Enjoyment

Fulfilment is defined as the minimum conditions that are required for the state to meet its obligations in order for individuals and groups to obtain access to an economic and social right. The enjoyment of the right should be seen as the articulation of such fulfilment.

These concepts and how they articulate with one another within the spectrum starting from access to the right to its full realisation can be graphically represented as follows:

**Figure 1: Spectrum of Progressive Realisation of Rights**



In the General Comments, the Committee on Economic, Social and Cultural Rights has provided normative content and criteria for monitoring specific economic and social rights.<sup>55</sup> Although these criteria vary depending on the specific right, the core denominators are accessibility, availability, acceptability and appropriateness (or quality). These criteria will be applied within the rights-based approach in the following chapters when assessing the progressive realisation of the specific rights.

In conclusion, it should be noted that these criteria are not legally binding and there is a need to develop a new enforceable methodological framework.

53 General Comment (note 41 above) 3 (9).

54 Ibid 3 (10).

55 General Comment (note 4 above).

# Chapter 3



*Impediments to the enjoyment of rights*



## CHAPTER 3: IMPEDIMENTS TO THE ENJOYMENT OF RIGHTS

### 3. INTRODUCTION

One of the advantages of a focus group as a research technique is its utility value as an important tool for empowerment and the advancement of social justice as it can serve to expose and validate the lived experience of the poor. In addition, focus groups often produce data that are seldom produced through individual interviewing and observation and that result in powerful interpretative insights.<sup>56</sup> This revelation was particularly acute across all the rights in the public hearings, as what became apparent were not only challenges to the nature and content of the particular rights, but four external impediments that hinder access, enjoyment and the fulfilment of the rights. One can perhaps infer that the nature of the impediments is such that despite the justiciability of economic and social rights, South Africa as a country is still far from practicing a *bona fide* human rights culture. The purpose of this chapter is to explicate these impediments and to highlight how they have undermined the respective rights. The impediments that have been identified across all the rights 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.
3. The social exclusion of the poor and vulnerable which includes women, persons with disabilities, persons living with HIV and AIDS, non-nationals, farm workers and indigenous populations.
4. The disjunction between strategic planning and implementation which resides in the weak capacity of government departments to deliver on their intended outputs.

#### 3.1. The Conceptual Misunderstanding of Progressive Realisation

Outcomes of government programmes need to be measured against the constitutional obligation to meet socio-economic rights and are assessed on the basis of the extent to which they are progressively moving towards fulfilling these rights. The full enjoyment of the rights can be said to be the end-goal of progressive realisation. However, a rights-based approach to development is not only about outcomes and content, it also emphasises the importance of process, including the principle of participatory democracy and access to information. One of the main problems with assessing the progressive realisation of rights, as highlighted in Chapter 2, is that the norms and standards of many of the state's constitutional obligations remain loosely specified. This implies lacuna in how the state understands the notion of progressive realisation, the nature and content of the respective rights, as well as its obligations in respect of constitutional accountability.

As a consequence, the findings indicate that the state possesses a limited understanding and appreciation of what it means to adopt a rights-based approach to socio-economic development and how to fulfil its constitutional obligations in terms of the Bill of Rights. In fact, one can cogently argue that many of the gains that have been made in the arena of economic and social rights in South Africa have not come about through efforts on the part of the state but rather as the result of litigation. This is indicative of a lack of a clear vision on how rights are to be realised over time, with concrete outcomes and longer term planning, and is further evidence that the government has not paid enough attention to their realisation.

The apparent attitude of the state that business will continue as usual until rights are contested (either through protest or litigation) is not a sustainable pathway to development and to strengthening a constitutional democracy. The neglect of critical issues, some of which have been raised for over ten years, and the lack of enforcement of court orders, result in people feeling neglected and unheard, often culminating in "service delivery" protests or acts of xenophobic violence. These are expressions of frustration that indicate that the state is not adopting a rights-based approach where people feel empowered to participate meaningfully. The extent to which the state appreciates community efforts to mobilise in defence or in advancement of their rights is not clear. Indications are that these are not appreciated, as evidenced in the intolerant attitude and harassing behaviour toward the social movements, such as the Treatment Action Campaign which was prevented from participating in key health forums by the government due to its challenges regarding the provision of anti-retroviral medication to all people infected with HIV.

56 Kamberelis, G. & Dimitriadis, G. Focus Groups: Strategic Articulations of Pedagogy, Politics & Inquiry. In Denzin, N.K. & Lincoln, Y.S. (eds). *The Sage Handbook of Qualitative Research*. (2005).



In respect of the nature and content of the government's obligation, the findings show that while there is significant policy and legislation which could enable the state to progressively realise economic and social rights, there are many lacuna when translating policy into action. For example, in respect of the right to social security, the public hearings revealed a broad belief that the South African government interprets its obligation in terms of targeting specific social grants as opposed to ensuring that the poor have the maximum possible opportunities to lift themselves out of poverty. While it is argued that a safety net is crucially important, it is also held that the progressive realisation of the right to social security must encompass the significant improvement of the capabilities of people to the extent that they can meaningfully participate in and shape society. The same can be applied to the right to education in which broad access to quality education, which could improve the capabilities of young people to play a meaningful role in society, is not being fulfilled.

In conclusion, in this period under review the evidence suggests that there is still no clear understanding throughout the government system regarding the content of its constitutional obligation of progressive realisation. Consequently, a human rights-based approach is seldom integrated with policy design and implementation. Therefore, there is much work to be done by the government to give meaning to words such as adequate, access, fulfilment and reasonableness, as they remain mere notions that are poorly defined and understood. To reiterate, in the absence of established norms and standards, much of the state's constitutional obligations remain loosely specified and this in turn may have implications for its levels of constitutional accountability. Even though the Constitution acts as the guiding framework for policy and legislation, it often appears as if the state is more mindful of political targets than it is of its constitutional obligations. This is particularly apt in respect of the right to provide adequate housing in which the chasing of targets resulted in the erection of houses that were of poor quality, delivered on the urban edge, and in dormitory type neighbourhoods without adequate infrastructure or services.

### **3.2. The Inadequate Fulfilment of Public Participation and Access to Information**

*"A human rights-based approach is not only about expanding people's choices and capabilities but above all about the empowerment of people to decide what this process of expansion should look like."<sup>57</sup>* This implies that the principle of participatory democracy is paramount in a rights-based approach to development, and public participation is thus critical. This approach has been addressed in most areas of government legislation and programmes. Examples are the Environmental Impact Assessment process in the environmental legislation, the inclusion of School Governing Bodies in Education and the implementation of public hearings in the development of new legislation.

However, the findings highlighted the inconsistent application of public participation in decision-making processes. Whereas public participation is defined as the *creation of opportunities that enable all members of the community and the larger society to actively contribute to and influence the development process and to share equitably in the fruits of development*,<sup>58</sup> the findings revealed that the nature of public participation in South Africa is often neither meaningful nor effective. For participation to be meaningful, participants require access to information, to be empowered to make informed decisions and to be engaged in high-level types of issues and implementation concerns. The lack of meaningful participation and citizen engagement results in frustration and mistrust and it can be argued that it is a contributing factor to the protests that have been erupting in communities over the last few years. For example, the participation of housing beneficiaries and stakeholders in determining the scope of housing provision has been inadequate and mostly instructive on the part of the state. This is indicative of a top-down approach in which beneficiaries and those affected by evictions and relocation are only engaged in pseudo-participation. This was echoed by the Constitutional Court in the Joe Slovo judgment which ordered the housing authorities to engage the community in meaningful participation. It must be emphasised that access to information is critical if the public is to adequately engage the government on questions of the progressive realisation of rights as well as to participate in decisions about their lives. However, despite the existence of the Promotion of Access to Information Act (PAIA), a recurring concern across all the rights has been the inadequate access to information. For example, several submissions in respect of the right to environment, water and food highlighted the lack of public access to information that is essential for the monitoring of social and environmental issues. These submissions further stated that government departments were often unresponsive and ignored requests

<sup>57</sup> United Nations Development Programme. *A Human Rights-based Approach to Development in UNDP Programming*, (2006), <[http://www.undp.org/governance/docs/HR\\_Pub\\_Missinglink.pdf](http://www.undp.org/governance/docs/HR_Pub_Missinglink.pdf)>.

<sup>58</sup> United Nations Development Programme. *Popular Participation as a Strategy for Promoting Community-level Action and National Development*, (1981).



for access to information and even went so far as to abuse the confidentiality clauses of PAIA to deny access to information.

### **3.3. The Social Exclusion of the Poor and Vulnerable**

Addressing the needs of the most vulnerable and disadvantaged in society is considered to be one of the cornerstones in the advancement of a rights-based approach. However, evidence suggests that in attempting to meet the vast needs in our society, inadequate and insufficient consideration has been given to the needs of the most vulnerable. The marginalisation of particularly vulnerable groups through inadequate access, coverage or service emerged in the public hearings as a broad and serious concern. Particular emphasis in the public hearings was on the equality of access and gender inequality. Such groups include women, child-headed households, people in isolated communities, farm workers, people with disabilities, non-nationals and people living with HIV and AIDS.

#### **3.3.1. Equality of Access**

Unfortunately, the findings revealed that equality of access, particularly for the poor and vulnerable is not in accordance with the principles of creating a transformative society based on human dignity, equality and freedom. The MDG targets do not help in this regard either, as the lack of disaggregated data obscures the reality of service delivery for the socially vulnerable and marginalised groups in society. Effectively, this means that meeting the target would not necessarily translate into the progressive realisation of the right. To cite an example of the right to water, the MDG and goals framed by the DWEA do not address issues of geographic distribution. This means that the worst performing municipalities in terms of service delivery might not improve access at all by 2014 but South Africa could still reach its target of halving the proportion of the population without access to water. These municipalities usually serve the poorest of the poor. With regard to education, the statistics revealed that South Africa has almost reached MDG 2 with a 98% net enrolment rate in primary education. Whilst this is impressive, economic and physical access to schooling remains a challenge for many poor children across the country largely because policy implementation to improve access has not been consistent at a school level. For example, the introduction of No-Fee Schools and Exemption policies have the potential to guarantee access for poor and vulnerable children. However, the policy vision has not been achieved consistently for all poor learners and schools. Furthermore, large groups of vulnerable children are also unable to access education including children with disabilities, refugee and non-national children, children who are infected with and affected by HIV/AIDS, orphans and child-headed households. This is because the principle of non-discrimination and standards of adaptability to meet their special needs are not being applied.

#### **3.3.2. Gender Inequality**

- Civil society groups contended that there exists a directly proportional relationship between the cut-off age of 15 years for receiving the child support grant and the higher school drop-out rate, for girl children in particular. More alarming is that for young girls the loss of the benefit may encourage dependency on older males and subject them to all forms of exploitation. This underlines the importance of extending eligibility for CSG to 18 years.
- The dismal figures on the maternal mortality rate are a key indicator that women's health is inadequately addressed in the health care system. The maternal mortality rate is increasing and a recent study showed that 38.4% of the deaths could have been prevented.
- With regard to land, women are the biggest losers in the government's failure to secure land rights as they often have to rely on male farm workers to gain access to land, and they also customarily have no rights to land in traditional areas.
- In terms of housing, there are no medium and long term housing options for women survivors of domestic violence. Although the Department of Social Development does make provision for short-term sheltering for women and children, they either become homeless when they leave the shelters or are forced to move back in with the perpetrator resulting in the continuation of the cycle of violence.

### **3.4. The Disjuncture between Strategic Planning and Implementation of Policy**

At times the problems with service delivery result from flawed policies, as is highlighted with regard to the rights to land and housing. These tend to be one dimensional as opposed to being designed to meet the diverse needs of beneficiaries. While the government has been responsive in addressing policy gaps in some respects, this has often amounted to tinkering with the policy, which has had limited impact in respect of significant changes to



outcomes. One can hence argue that the root causes of policy failure have not always been clearly understood and the findings in this report highlight significant gaps between strategic planning and implementation. Firstly, the report has found a significant gap in the availability of good quality data on which to base proper plans and this can only be regarded as a serious impediment to proper and efficient planning. In respect of data, it was also found that the failure to disaggregate on the basis of vulnerability often means that discrimination remains hidden. Secondly, the monitoring of implementation as a learning tool has been identified as another issue of concern and the lack thereof results in little reflection between planning periods. In addition, the report has found a lack of systematic monitoring measures and the choice of indicators is often very limited. When it comes to monitoring it seems that quantitative indicators tend to prevail and this provides little insight into the quality of service provision of government programmes and the evaluation thereof. The monitoring of the enforcement of court orders is also a major concern. Thirdly, one of the main gaps that has been raised in all the chapters is the vertical and horizontal co-ordination of and cooperation between government departments. Even though the government has attempted to address this issue by implementing the Cluster system, it remains very problematic. At times the cause of this lies in the allocation of powers and mandates to the various tiers of government which do not match expectations of programme design. In fact, the Department of Cooperative Governance and Traditional Affairs raised this as one of the main barriers to housing and infrastructure delivery. At other times it is a simple matter of communication – for instance a clinic is built without ensuring that the municipality can provide infrastructure.

#### **3.4.1. Data Validity and Reliability**

The hearings found that there is a lack of reliable data as well as a proliferation of conflicting data which must be addressed in the interest of measuring progressive realisation. This is a serious inhibitor for effective planning as it means that there is a high probability that such planning occurs without a statistically informed basis. In its submission, Statistics South Africa identified the following main concerns in respect of the quality and availability of data:

- There is insufficient data with which to populate the indicators for the MDG or other user needs of similar magnitude;
- Where data are available they are oftentimes of unknown quality, and depending on the source, often contradictory; and
- There is no dependable system or process yet in place for sustainable production of sufficient and good quality data.

In respect of the various rights, the following concerns around the quality and availability of data were raised:

- In respect of social security, the Children's Act (2005) makes provision for a child head-of-household, or the designated adult, to collect any social security payment for which the household is eligible. Child-headed households, a dramatically increased phenomenon in South Africa in recent years, are among the most vulnerable but the lack of social security information around such households greatly impedes critical programmatic planning and intervention.
- With regard to health, the inconsistency in data gathering and consequent unreliable statistics is a major problem. In fact, there is little agreement on which figures are reliable and those used by civil society and government are different. In addition, the lack of a proper baseline makes it difficult to measure the progress in reaching the MDG. This is particularly the case with statistics on child mortality and maternal mortality. Furthermore, there is a lack of disaggregation of indicators on child and maternal mortality in terms of specific disabilities, which impairs the utility of the information with regard to appropriate planning.
- The data on land reform is very poor and the Department of Rural Development and Land Reform only reports on two global indicators, namely, hectares of land transferred and number of land claims settled each year. The national data base of land reform projects from which one could gain the project type, location, size, land and membership is not available for public scrutiny and is not used for reporting. The extent to which this data is critically analysed to effect improved planning is unknown.
- Housing statistics are too global and need to be further disaggregated in respect of key demographics and geographic location. Furthermore, the constant and consistent tracking of population trends and population movements is critical for the purpose of planning.
- In respect of the right to education, concerns were raised regarding the ability of the Department of Basic Education to provide the reliable and accurate data necessary for assessing progress in implementation.



### 3.4.2. Planning, Monitoring and Evaluation

Planning, monitoring and evaluation are integrally linked processes but they seem to be conceived and implemented separately in government. This disjuncture means that planning does not draw on the lessons learned from monitoring and evaluation activities. Monitoring is a key instrument of accountability and if done poorly it would inhibit the government's ability to account for its actions and the results thereof. One of the general issues is the lack of a results-based framework for monitoring and evaluation, and the tendency has been to focus on quantitative outputs as opposed to measuring outcomes. Some of the main gaps arising from the findings regarding planning, monitoring and evaluation are raised below:

- When planning around mining and granting prospecting licences, there appears to be inadequate consideration of the cumulative impacts that such mining will have on the surrounding communities.
- Inadequate monitoring and evaluation systems led to a lack of enforcement of conditions under which environmental authorisations were granted by provincial and national departments.
- Regarding conservation, a lack of information on the state of conserved areas hinders efforts to adequately conserve open spaces and the plant and animal species that inhabit these spaces.
- Although much attention has been given to addressing the backlog of the provision of water and sanitation in South Africa since 1994, there are varying accounts of the level of service delivery that has been achieved to date. Some organisations have reported discrepancies in statistics.
- Poor planning and fragmented policies in respect of design and implementation are seen as root causes for many of the challenges in housing service delivery.
- The poor definition of indicators is another problem raised in housing and terms that mean different things are used interchangeably. For example, the figures for housing opportunities (which include serviced sites) and the figures for houses (which include a top structure) are often both counted when referring to the numbers of houses built.

In conclusion, a solid monitoring and evaluation plan is central to good planning. A number of systems and structures are currently being institutionalised in order to improve the monitoring and evaluation in various government departments, such as the National Demand Data Base in housing, but they are still in their early stages and their use needs to be tracked. There are also systems for the monitoring of schools and tracking of learners but human resource constraints have been highlighted as one of the main impediments to effective monitoring of schools, particularly at a district level. Effectively, impact studies need to occur to assess the extent to which the outcomes of policies are relevant to meeting the needs of beneficiaries. This has been raised as particularly important with regard to land reform and support for small scale farmers. In these impact studies the following questions need to be addressed:

- (a) Has the quality of life improved when people receive land, houses, hospitals, social grants, and etcetera?
- (b) What are the next needs that emerge once certain basic needs are satisfied?
- (c) How should the government plan to address those needs considering that there is still a massive backlog in meeting the basic needs of others?
- (d) What are people's aspirations and what can they realistically expect to achieve in their lifetime?

These critical questions could be answered by periodic evaluations and systematic monitoring of government programmes.

### 3.4.3. Intergovernmental Relations and Communication

The realisation of economic and social rights requires significant intergovernmental cooperation and communication. The gaps in this regard are consistently raised in the submissions and literature on government performance. Examples from the various themes are provided below.

With regard to vertical integration between the various tiers of government, the following key points emerged:

- The Department of Cooperative Governance and Traditional Affairs raised the problem of vertical integration which is contained in how the powers and functions of the three tiers of government are defined in the White Paper on housing. Housing, for example, is not specified as a municipal function, and as such, municipalities see housing provision as an unfunded mandate and many are not accredited to provide



housing in accordance with the 'Breaking New Ground' policy.

- In respect of the right to education, the relationship between the national and provincial structures impacts on the implementation of education policy and legislation. The national government has exclusive legislative responsibility for tertiary education, and concurrent responsibility with the provinces for all other levels of education. Whilst the national government works with provinces to formulate national policy, the provincial governments are responsible for the implementation of the nationally determined policy. This system has been criticised for its insufficient national-provincial alignment because provinces are not obliged to observe national priorities, particularly regarding the allocation of financial resources.

Issues regarding horizontal co-ordination and communication within and between government departments are:

- With regard to the implementation of Developmental Social Welfare, the hearings revealed the lack of any strong linkages between the receipt of a social grant and the provision of opportunities for recipients to prepare for the labour market. This is in turn indicative of a lack of synergy between the Departments of Social Development, Education, Labour and Public Works.
- In terms of the right to health, integrated services for vulnerable groups are often lacking mainly because AIDS orphans, detainees, refugees, and persons with disabilities are cross-cutting groups that need to be targeted by various departments. However, these groups are often not prioritised in any one department and, due to the lack of any coherent integrated service, many do not receive the requisite service. For example, it is recommended that AIDS orphans need to be specifically prioritised by the Department of Health, particularly in terms of providing VCT and ART. Furthermore, health care for detainees, persons with mental and physical disabilities, refugees and sex workers need to become particular focal areas for the Department of Health.
- Horizontal co-ordination and communication between the Department of Basic Education and other departments has also negatively affected the planning and implementation of key programmes in the past such as the National School Nutrition Programme (NSNP) and the learner transport programme. This impacts on the learners' physical and economic access to education.

### 3.5. Conclusion

It is the government's ultimate responsibility to deliver or facilitate the provision of services if the socio-economic circumstances of people in the country are to improve. However, the above discussion on the four impediments cogently shows the multiplier effects on service delivery in respect of all economic and social rights. For example, the hearings on social security revealed the poor governance of social development programmes at both the national and provincial levels. This included a range of difficulties from extremely poor service at social grant pay points, to inadequate inter-departmental co-ordination on anti-poverty measures. In sum, it is clear that the poor service co-ordination and programme implementation at key departments is militating against the progressive realisation of the right to social security and to the achievement of MDG 1. Similarly, in respect of the right to health, the hearings revealed that since the transformation to the primary health care model, there have been difficulties with internalising roles at each level of government and this in turn has had a negative impact on service delivery. Some of the concerns include whether community care workers have been sufficiently trained as without sufficient numbers of adequately trained and motivated health workers, no health care system can fulfil its human rights obligation. Service delivery needs to be strengthened at a district level, thereby effectively operationalising the primary health care approach. To fulfil the requirement of progressive realisation, the Department of Health must make sure that health workers at community clinics are appropriately trained to implement the policies and legislation and that they are properly managed. More specifically, it has been reported that they need to be trained in how to diagnose disabilities, disability education and management, as well as how to collect a pap smear and how to train women in the use of female condoms. The very same can be applied to the other rights, as the chapter has already demonstrated, but the crux of the matter is that whilst the state has made policy commitments in respect of the various economic and social rights, any real improvements to the lived experience of beneficiaries will remain at a rudimentary level unless these chief impediments are eradicated. A priority on the agenda for the government therefore must be a real and unanimous understanding of progressive realisation, the nature and content of the various rights and what it means for a government to be held constitutionally accountable for its action or inaction. This must then be operationalised at the level of policy and programme activities aligned to a competent administrative implementation structure, so that the lived experience of the most vulnerable is positively transformed.

# Chapter 4



*The right to environment*



## CHAPTER 4: THE RIGHT TO ENVIRONMENT

### 4. INTRODUCTION

The right to a healthy environment is essential to one's health and wellbeing and further to the enjoyment of other human rights. However, the flawed social planning of South Africa's apartheid era led to the confinement of the majority of the country's population on approximately 13% of the state's land. This resulted in severe degradation of the natural environment and the unsustainable use of natural resources in these areas. Most people in South Africa had little or no access to potable water or sanitation and the country's resources were not equitably allocated. Conversely, large tracts of land were protected for its agricultural or tourism potential, but conservation was executed on an *ad hoc* basis. This means that South Africa has a network of reserves that are not representative of the country's diverse habitats and nor are they connected via corridors, which would substantially increase their robustness and chance of survival.

Despite the fact that South Africa is blessed with an abundance of mineral and energy resources, many South African citizens do not have access to electricity, and the country still relies heavily on the manufacturing and mining industries for economic growth. As such, South Africa is one of the world's top 20 emitters of the greenhouse gas, carbon dioxide (CO<sub>2</sub>). These emissions, coupled with the poor management of open spaces which would usually act as carbon sinks, contribute greatly to climate change. Recognition is needed of the fact that the effects of climate change will impact for the most part on Africa's poor and most vulnerable.

South Africa is a developing country and will need to maintain a certain level of economic growth to ensure that employment figures increase and that there is a progressive realisation of economic and social rights. However, South Africa has much to do by way of sustainable management and forward planning if it is to conserve open spaces and water resources sufficiently while addressing issues of poverty and inequality in the country.

#### 4.1. The Meaning and Content of the Right

The right to a healthy environment is fundamental to the enjoyment of all human rights, and is closely linked with the right to health and well being. 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 human dignity.

Section 24 of the Constitution of the Republic of South Africa establishes that "everyone has a right –

- (a) *to an environment that is not harmful to their health and well-being; and*
- (b) *to have the environment protected for the benefit of the present and future generations, through reasonable legislative and other measures that –*
  - i Prevent pollution and ecological degradation;*
  - ii Promote conservation; and*
  - iii Secure ecologically sustainable development, and the 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, but further recognises the environmental rights of future generations. This has implications for the current management of the natural environment and utilisation of natural resources.

Responsibility for service delivery in the environmental sector lies jointly with national and provincial government.

##### 4.1.1. National and International Legislation and Agreements

Constitutionally entrenched environmental rights are supported by an array of national legislation, policies and strategies and international conventions to which South Africa is a signatory. The African Charter on Human and Peoples' Rights states that "*all people have a right to a generally satisfactory environment which is favourable to their development*".<sup>59</sup> Article 3 of the Universal Declaration of Human Rights states that, "*everyone has the right to*

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Others are the African Peer Review Mechanism (APRM); The World Summit on Sustainable Development Plan of Implementation.



life, liberty and security of person<sup>60</sup> and the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights states that, “The right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations”.<sup>61</sup>

South Africa is also party to the UN Framework Convention on Climate Change (UNFCCC), the aim of which is “to achieve stabilisation of the concentrations of the greenhouse gases in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system”.<sup>62</sup> South Africa is listed as a non-annex 1 country, which means that as a developing country, South Africa is not required to reduce its CO<sub>2</sub> emissions, but is required to report to the UNFCCC on *inter alia*, national circumstances and national inventories of greenhouse gas levels.

South Africa has also ratified the Convention on Biological Diversity (CBD) and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), both of which are aimed at conserving biological diversity and ensuring the sustainable use of biological resources.

The National Environmental Management Act 107 of 1998 (NEMA) is a broad framework for environmental governance in South Africa. NEMA is a set of principles that informs any subsequent environmental legislation of the implementation of that legislation and the formulation and implementation of environmental management plans at all spheres of government.<sup>63</sup> As with the Bill of Rights, the core principles of NEMA are framed within a human rights perspective which maintains that environmental management must place people and their needs first and must ensure that all development is environmentally, socially and economically sustainable. The legislation therefore provides for present and future generations. Sustainable in this context means that the “*negative impacts on the environment and on people's environmental rights be anticipated and prevented, and where they cannot be altogether prevented, are minimised and remedied*”.<sup>64</sup>

Section 4 of NEMA<sup>65</sup> further requires that:

- Steps are taken to prohibit unfair discrimination in respect of the distribution of environmental impacts and access to environmental resources required for basic needs and human well-being.
- All interested and affected parties participate in environmental decisions in an informed and meaningful manner.
- Decisions take into account the interests, needs and values of all interested and affected parties.
- Decision-making is open and transparent and makes provision for public access to information.
- Different government departments and different spheres of government coordinate and harmonise environmental policies, legislation and actions, and negotiate unresolved conflicts between these.
- Global and international environmental responsibilities are discharged in the national interest.
- The use of natural resources serves the public interest and the environment is protected as the people's common heritage.
- Special attention is given to the management and planning procedures relating to sensitive and/or vulnerable ecosystems, such as the coastal areas, estuaries and wetlands, especially areas of resource use and development pressure.
- Responsible parties pay special attention to the needs and interests of vulnerable and disadvantaged persons, especially the role of women and the youth in environmental management and development.

In addition to the environmental management provisions made in NEMA, a suite of associated legislation has been passed to govern different sectors of the natural environment such as, the National Environmental Management Biodiversity Act 10 of 2004, the National Environmental Management Protected Areas Act 57 of 2003, the National Environmental Management Air Quality Act 29 of 2004, and the Marine Living Resources Act 18 of 1998, all of which fall under the biodiversity and conservation branch of the Department of Water and Environmental

60 Universal Declaration of Human Rights 1948.

61 Vienna Declaration and Programme of Action 1993.

62 Initial Communication under the United Nations Framework Convention on Climate Change, South Africa, (2000), <<http://unfccc.int/resource/docs/natc/zafnc01.pdf>>.

63 Grubb, A. *The National Environmental Management Act 107 of 1998*, Enviropedia, <[http://www.enviropaedia.com/topic/default.php?topic\\_id=163](http://www.enviropaedia.com/topic/default.php?topic_id=163)>.

64 Ibid.

65 Ibid.



Affairs (DWEA).<sup>66</sup> These pieces of legislation seek to enable the sustainable use of natural resources, to provide protection to species and habitats and to monitor air quality in South Africa.

The National Energy Act 34 of 2008 and the National Energy Regulator Act 40 of 2004 are important sets of legislation governing energy generation. The former provides for the sustainable use of resources for the purpose of energy generation to support economic growth and poverty alleviation strategies. The latter is aimed at regulating the energy sector.

Also important in the energy sectors is the Integrated Energy Plan for South Africa (2003), the National Energy Efficiency Strategy of South Africa (2005) and the White Paper on Energy Policy (1998), which aims to “*provide affordable and sustainable energy services that are focused on demand, and acknowledges that energy production and distribution should not only be sustainable but should lead to the improvement of living standards of all South Africans*”.<sup>67</sup> Likewise, the White Paper on Renewable Energy (2003) is designed to supplement the White Paper on Energy and is aimed at “*ensuring that an equitable level of national resources is invested in renewable technologies, given their potential and compared to investments in other energy supply options*”.<sup>68</sup> In support of this, the Department of Mining<sup>69</sup> (DoM), launched several renewable energy programs, a renewable energy trading system, and a monitoring and evaluation project.

South Africa has also developed a Climate Change Response Strategy, as part of which DWEA launched a Carbon Disclosure Project.<sup>70</sup> The National Climate Change Response Strategy for South Africa clearly contextualises the problem of climate change in sub-Saharan Africa and highlights South Africa’s international obligations as a signatory to the UNFCCC. It further lists interventions that are required to mitigate certain impacts of climate change. However, the strategy fails to set implementable and measurable targets to ensure that those interventions are being effectively implemented.

#### **4.1.2. Legal and Policy Developments between 2006 and 2009**

There have been numerous amendments to existing legislation governing the environmental sector since 2006. In 2009, amendments to NEMA and the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) came into effect, which gave decision-making power for the granting of prospecting and mining licences to the Minister of Mining, under NEMA regulations. The DWEA would be required to provide comments in respect of a mining or prospecting licence application, within a specific time period.

Despite the fact that the DoM is of the opinion that these amendments will “*provide for better cooperation between the government departments whereby the NEMA principles will be followed in terms of obtaining environmental authorisations*”,<sup>71</sup> many environmental organisations believe that the fact that the new amendments will allow exemptions from the EIA regulations for mining applications leaves the environment with little protection.<sup>72</sup> GroundWork’s submission to the Commission stated that “*coupled with new Minerals Petroleum Resources Development Act, EIA legislation could result in significant developments such as oil refineries and mining not having to undergo a process of public participation or EIA*”.<sup>73</sup> Importantly, only one mining application per area will be considered at any given time and the DoM has initiated a programme of identification and rehabilitation of derelict and ownerless mines.

The DWEA also implemented bioregional planning and integrated coastal management, which is a systematic process of spatial mapping and development. Various resource-use policies and regulations, including guidelines for the management of threatened and endangered species and new waste regulations were also implemented. Further development in environmental legislation included amendments to the National Environmental Management: Protected Areas Act and the policy for the Allocation and Management of Medium Term Subsistence

66 Formerly the Departments of Environmental Affairs and Tourism (DEAT), and Water Affairs and Forestry (DWAF).

67 Department of Environmental Affairs. *State of Environment Report*, 2006 <<http://soer.deat.gov.za>>.

68 Department of Minerals and Energy. *White Paper on Renewable Energy*, (2003). <[www.dme.gov.za/.../energy/renewable/white\\_paper\\_renewable\\_energy.pdf](http://www.dme.gov.za/.../energy/renewable/white_paper_renewable_energy.pdf)>.

69 Former Department of Minerals and Energy.

70 National Business Institute. *Carbon Disclosure Project Report*, (2008) <<http://www.nbi.org.za/welcome.php?pg=2&pgm=M&id=10921>>.

71 Department of Mineral Resources: submission to the SAHRC, ESR Public Hearings, (2009).

72 “EIA for mines move seen as smoke and mirrors,” *Legalbrief*, (25 March 2008), <<http://www.legalbrief.co.za/article.php?story=20080325084915647>>. groundWork: Friend of the Earth, submission to the SAHRC: (2009).



Fishing Rights and the promulgation of the National Environmental Management: Integrated Coastal Management Act and the National Framework for Sustainable Development.

Legislative developments in the energy sector since 2006 include the passing of the National Energy Act (2008) and a Free Basic Alternative Energy Policy (2007). The Department of Energy (DoEn) also developed a National Energy Efficiency Strategy, an Energy Security Master Plan for Electricity (2007–2025) and a Nuclear Energy Policy (2008).

Over the last decade a number of cross-sectoral programmes have also been initiated, increasingly linking biodiversity conservation with development and poverty alleviation.<sup>74</sup> There is also a clear trend to bioregional and transnational conservation planning and a focus on the protection of large threatened biological communities.<sup>75</sup>

Over the next financial year DWEA's focus will be on compliance monitoring, law enforcement and capacity building across all spheres of government.

#### 4.2. The Relevant MDG, Targets and Indicators

Target 9 of the MDG 7 speaks to environmental management and protection. The target and indicators are presented in table 2 below.

**Table 2: Targets and Indicators of Millennium Development Goal 7**

<b>Goal 7: Ensure Environmental Sustainability</b>	
<b>Goals and Targets</b>	<b>Indicators</b>
Target 9: Integrate the principles of sustainable development into country policies and programmes and reverse the loss of environmental resources	<ul style="list-style-type: none"> <li>▪ Proportion of land covered by forests and ratio of area protected to maintain biological diversity to surface area</li> <li>▪ Energy use per \$1 GDP, carbon dioxide emissions (per capita)</li> <li>▪ Consumption of ozone-depleting chlorofluorocarbons and proportion of population using solid fuels</li> </ul>

#### 4.3. Main Themes Arising

On embarking on a process of monitoring the progressive realisation of ESR and assessing South Africa's performance in achieving the MDG, the following main themes were highlighted during the Commission's research and during the public hearings:

- Poor policy implementation: this and the preference given to development over environmental protection, which undermines the progressive realisation of environmental rights, were highlighted as challenges for environmental NGOs. Issues raised in the chapter<sup>76</sup> include a lack of political will, corruption, inefficient intergovernmental co-ordination and a lack of skill and capacity at all levels of government.
- Public access to information and unresponsiveness: several submissions highlighted the lack of public access to information that is essential for the monitoring of social and environmental issues. Furthermore, government departments were seen as unresponsive, often ignoring requests for access to information or abusing the confidentiality clauses of PAIA to deny access to information.
- Public participation: a concern continuously raised during the public hearings was the inconsistent application of public participation in decision-making processes. Submissions highlighted the fact that public participation was often not meaningful or effective. Furthermore, it was considered inappropriate that EAPs manage the EIA processes as they were paid by developers.
- Cumulative impacts: inadequate consideration of the cumulative impacts in regions was highlighted as a concern for communities.

<sup>74</sup> Examples include the Working for Water, Working for Wetlands, LandCare, Coast Care and Integrated Sustainable Rural Development programmes.

<sup>75</sup> The focus is on eight biodiversity 'hotspots'. Three large-scale biodiversity planning programs have been initiated aiming at integrating conservation objectives into regional development plans: The Cape Action for People and the Environment (C.A.P.E), the Succulent Karoo Ecosystem Programme (SKEP) and the Subtropical Thicket Ecosystem Planning (STEP). Transfrontier Conservation Areas further consolidate protected areas on a vast scale and create a foundation for regional conservation-based economies.

<sup>76</sup> References are provided in the main text.



- Mining: the significant threat of mining to the health of communities surrounding mining areas and on South Africa's water resources was raised as a matter for urgent attention.
- Monitoring: inadequate monitoring and evaluation systems led to a lack of enforcement of conditions under which environmental authorisations were granted by provincial and national departments.
- Conservation: a lack of information on the state of conserved areas hinders efforts to adequately conserve open spaces and the plant and animal species that inhabit these areas.
- Low-carbon energy strategies: there is insufficient priority given to low carbon energy strategies and the lack of meaningful initiatives to reduce South Africa's high level of CO<sub>2</sub> production.

The above factors impact negatively on the progressive realisation of environmental rights and affect the availability, accessibility, appropriateness and acceptability of environmental law. Ineffective policy implementation reduces the availability of a healthy environment and undermines the effective conservation of open spaces. Accessibility continues to be undermined by a lack of access to information and the government's lack of response to requests for information or to participate in decision making. The inadequacy of planning frameworks as well as the inadequacy of inter-departmental and inter-sectoral collaboration reduce the appropriateness of environmental policies. These factors collectively undermine progressive achievement of environmental rights.

#### 4.3.1. Planning Systems

##### *Information gathering and monitoring*

National and provincial government is responsible for the implementation of the functions of the environmental ministry, with a few functions allocated to local government. Responsibility for information gathering and monitoring is distributed between different government departments and different spheres of government. The DWEA's information and monitoring system cuts across departmental and hierarchical boundaries<sup>77</sup> and also establishes a special environmental management inspectorate, the Green Scorpions. In addition, recent amendments to NEMA allocate broadened authority to environmental management inspectors, known as "peace officers," which means that they may exercise powers of search, seizure and arrest and may also issue admission of guilt fines.<sup>78</sup>

##### ***Budgetary Planning and Oversight: the Department of Water and Environmental Affairs<sup>79</sup>***

Budget data used here were obtained from the DWEA's annual reports.<sup>80</sup> Annual financial statements are recorded for a financial year (beginning 01 April and ending 31 March). This report illustrates both changes in the allocated budget for each financial year beginning in 2005/06, as well as the annual percentage change in allocation.

<sup>77</sup> DWEA has a National Compliance Monitoring System under a Directorate of Compliance Monitoring, including an SA Air Quality Information System. In 2006 the Department declared a Vaal Triangle Airshed Priority Area, which is supported by an equality monitoring network. C.A.P.E has developed a Monitoring system for its partners and DEA and DP has developed a biodiversity monitoring system for Cape Nature, which was going to be piloted in 2009.

<sup>78</sup> Implications of Amendments to NEMA, *Legalbrief*, (06 October 2009), <<http://www.legalbrief.co.za/article.php?story=20091006092618930>>.

<sup>79</sup> Based on the allocation and expenditure of the former Department of Minerals and Energy.

<sup>80</sup> Based on the allocation and expenditure of the former Department of Environmental Affairs and Tourism (DEAT).



**Table 3: Growth and Variance for the Former National Department of Environmental Affairs and Tourism (2005/06 to 2008/09)**

Financial Year	Inflation	Allocation	Spending	Variance %	Nominal Growth	Real Growth
		R'000				
2005 / 2006	3.4	1 753 307	1 755 686	100.1	-	-
2006 / 2007	4.7	2 061 804	2 059 664	99.9	17.6	14.2
2007 / 2008	7.1	2 790 521	2 788 757	99.9	35.3	30.6
2008 / 2009	6.8	3 206 557	3 198 878	99.8	14.9	7.8

Budget expenditure for the DWEA indicates that there has been a consistent increase in the budget allocation from the National Treasury between 2006/07 and 2008/09, but a decrease in 2007/08. In 2007/08, the DWEA overspent on its allocated budget by 1%. Between 2005/06 and 2008/09, the DWEA spent at least 99% of its total budget.

Trends in annual growth and real percentage rates for the DWEA are erratic. From 2005/06 to 2006/07, the expenditure increased from R1.75 billion to R2.1 billion, with an annual percentage growth rate of 17.3%. Taking inflation into consideration for the year, the real growth was 13.9%. Between 2006/07 and 2007/08, the DWEA spent R729 093 million more than in 2005/06. The annual percentage growth in spending was therefore 30.7% when adjusted for inflation. This was mainly due to increased expenditure in the Sector Services and the International Relations programme for infrastructure development in national parks, the weather service and poverty relief projects. Transfers and subsidies to departmental agencies such as South African National Parks (SAnParks) and Cape Nature and to households, accounted for a significant portion of the total spending, constituting 76% of the annual budget 2008/09 and 62% in 2011/12.

As illustrated in the above table, growth in budget allocation in the environmental sector has been continuous but inconsistent in terms of the percentage increase between 2005 and 2009. Real growth (adjusted for inflation) was at 14.2% between 2005/06 and 2006/07 and increased greatly to 30.6% between 2006/07 and 2007/08. Between 2007/08 and 2008/09, the level of growth in the allocation of funds decreased by about 74%. The growth in the spending followed a similar trend. Overall, the figures illustrate a real increase in the allocation of funds and spending between 2005 and 2009, but the impact of inflation means that the proportion of this increase was lower than required.

It is important to note, however, that new allocations were made to the DWEA budget from the National Treasury including, R33.9 million in 2009/10, R121.4 million in 2010/11, and R533.3 million in 2011/12, to provide for inflation adjustments, budget adjustments, research on climate change and to fund the operations of Buyisa-e-Bag, a company tasked with the development of a national climate change policy, and collection, re-use and recycling of plastic bags. In 2011/12, an additional R300 million was allocated for the funding of a polar research vessel, which accounts for the increase in payments for capital assets, and R60 million was allocated for the extension of the SAnParks infrastructure development programme.

#### ***Budget Allocation, Expenditure and Variance: the Department of Energy<sup>81</sup>***

Budget data was obtained from the Annual Reports of DoEn.<sup>82</sup> Annual financial statements are recorded for a financial year (beginning 01 April and ending 31 March). This report illustrates both changes in the allocated budget for each financial year beginning in 2005/2006, as well as the annual percentage change in allocation.

<sup>81</sup> Based on the allocation and expenditure of the former Department of Minerals and Energy.

<sup>82</sup> Formerly known as the Department of Minerals and Energy.



**Table 4: Growth and Variance for the Former National Department of Minerals and Energy (2005/06 to 2008/09)**

Financial Year	Inflation	Allocation	Spending	Variance %	Nominal Growth	Real Growth
		R'000				
2005 / 2006	3.4	2 253 371	2 172 405	96.4	-	-
2006 / 2007	4.7	2 635 100	2 607 675	99.0	16.9	13.5
2007 / 2008	7.1	2 974 937	2 947 367	99.1	12.9	8.2
2008 / 2009	6.8	3 786 241	3 747 709	99.0	27.3	20.2

Budget expenditure for the DoEn indicates that there has been a continual increase in the budget allocation from the National Treasury between 2005/06 and 2008/09. Of this allocation, the DoEn managed to spend at least 98% of its total budget. However, the annual increase in the budget allocation to the DoEn is erratic. Between 2005/06 and 2006/07, there was a 14.5% increase in budget allocation. This increase dropped slightly in 2007/08 to 11.4% and increased in 2008/09 to 21.5%. The table also illustrates the variance between budget allocation and expenditure in the DoEn between 2006/07 and 2008/09, illustrating slight under spending in 2005/06, but almost all of its allocated funds spent during the remaining years.

Table 4 indicates that there was a continuous increase in the allocation of funds and spending in the energy sector between 2005 and 2009. Real growth between 2005/06 and 2006/07 was 13.5%, but slightly lower between 2006/07 and 2007/08 at 8.2%. The allocation of funds and spending increased by approximately 27% between 2007/08 and 2008/09 and overall, allocation and spending in the energy sector was higher than the impact of inflation between 2005 and 2009.

#### **Total Government Revenue and Total Expenditure for years 2005/06 to 2007/08**

Government expenditure patterns for the years 2005 to 2007 do not indicate how much was spent on Environmental Affairs and Tourism and the Department of Minerals and Energy related matters.

#### **4.4. Progress Made in Terms of the Relevant MDG**

<b>TARGET 9</b>	<b>Integrate the principles of sustainable development into country policies and programs and reverse the loss of environmental resources</b>
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South Africa has succeeded in integrating the principles of sustainable development into country policies and programmes. Environmental rights are enshrined in the Constitution and a sophisticated array of environmental legislation and policies. This legislative framework further tends to emphasise the social dimensions of natural resource management, such as fair and equitable access to resources and participation in decision-making.<sup>83</sup> However, there is scope for giving clearer expression to a human rights approach in the environmental policy framework by focusing more on the plight of vulnerable and marginal groups.

Responsibilities for implementation are clearly outlined though responsibilities are distributed between different departments and different spheres of government. This creates opportunities for adapting overhead frameworks to local conditions, but also substantial challenges for coordinated implementation. The consolidation of the Department of Environmental Affairs with the Department of Water Affairs will contribute towards improved co-ordination between these closely linked portfolios, although there is still much uncertainty as to whether these merged departments will exist as separate directorates.

<sup>83</sup> Conservation and forestry policies, for instance, have changed significantly since 1994 and tend to emphasise the need for local communities to benefit from protected areas/forests, and natural resources utilisation, and seriously make provision for participation in decision-making or co-management of the resources.



Most of the departments concerned with executing environmental policies have fairly sophisticated strategic and implementation plans. Nonetheless, the failure of effective planning in the energy sector and the lack of accountability, monitoring and the evaluation of legislation and policy in the environmental and energy sectors is cause for concern. Furthermore, there is a need for the setting of concrete goals and targets, particularly at a provincial level.

The integration of environmental planning frameworks at a provincial level, and the inconsistency in planning that often exists between local and provincial government, is another weakness. Municipalities have very limited responsibility for the implementation of environmental functions, such as pollution monitoring, and claim the responsibility of wider environmental protection as an unfunded mandate.

These factors create much scope for inappropriate decision-making that impacts directly on environmental rights, and exposes the environmental decision-making process to unnecessary complexity. Lastly, effective planning depends on the availability of reliable information. In this respect, the lack of statistics in certain sectors, such as the energy sector, is indicative of insufficient monitoring and poor information systems.

#### ***Change in land area covered by forest***

According to the UN site for MDG indicators, the proportion of land covered by forest in South Africa remained at 7.6% between 1990 and 2005.<sup>84</sup> It is unclear whether this lack of change in the proportion of preserved forest area is a true representation or is reported as such due to the lack of statistics and a lack of monitoring and information in the sector.

The Mid-term Country Report for South Africa reiterates the point on the lack of statistics, as Stats SA was still in the process of developing natural resources accounts. The DWEA submission also presents no figures regarding the change in land area covered by forest. The National State of the Environment Report,<sup>85</sup> however, indicated that, with the exception of mangrove forests, close to 100% of South Africa's forest habitat was under some form of protection, although a recent study indicated that the DWEA's Participatory Forest Management programme was not achieving the objective of entrenching sustainable resource use on the ground.<sup>86</sup>

#### ***Land area protected to maintain biological diversity***

Overall, the proportion of terrestrial and marine area under protection increased from 5.3% to 6.1% between 1990 and 2007. There was a 90% increase in the proportion of terrestrial land protected during this period and a substantial increase in the proportion of marine area protected during the same period.<sup>87</sup> However, although the proportion of areas under protection has increased, less than 6% of terrestrial land is under protection and while 23% of South Africa's coastline is protected, only 9% is fully protected in terms of extraction and fishing.

Furthermore, there is no information provided on the state or physical condition of protected environments, that is, the size of the areas under protection, the level of connectedness via corridors and the type of area protected. However, it should be noted that much progress has been made to consolidate protected areas during this period and to develop conservancy agreements with private land owners to strengthen corridor development and climate change adaptability. In 2003, the government set targets for an increase of the total terrestrial area under protection to 8% by 2010, and 10% by 2015.<sup>88</sup>

#### ***Carbon dioxide emissions, total, per capita and per \$1 GDP***

The South African MDG Mid-Term Country Report contains no recent statistics for any of these indicators. The International Energy Agency of the Organisation for Economic Co-operation and Development (OECD) commented that "*the lack of good data is a major weakness in the energy policy making process in South Africa*<sup>89</sup> and impacts directly on the ability to track South Africa's progress on the MDG indicators. Furthermore, the lack of statistics hinders transparency in the energy sector.

84 United Nations Statistics Division. *Millennium Development Goals Indicators*, <<http://mdgs.un.org/unsd/mdg/Data.aspx>>.

85 (note 68 above).

86 Robertson, J. & Lawes M.J. *User perceptions of conservation and participatory management of iGxalingenwa forest*. (2005), 32(1): 64-75.

87 United Nations Statistics Division (note 85 above).

88 SAHRC (note 2 above).

89 United Nations Educational, Scientific and Cultural Organisation (UNESCO). *South Africa Millennium Development Goals: Mid-term Country Report*, (2007).<[http://planipolis.iiep.unesco.org/upload/South%20Africa/South\\_Africa\\_MDG\\_midterm.pdf](http://planipolis.iiep.unesco.org/upload/South%20Africa/South_Africa_MDG_midterm.pdf)>.



The South African economy depends on large-scale, energy intensive mining, primary minerals processing and manufacturing, which translates into above average energy consumption per unit of GDP.<sup>90</sup> Coal represents about 88% of the total primary energy production and about 90% of the electricity generation in South Africa. This dependence on coal makes the country one of the world's top 15 carbon emitters with per capita emissions higher than those of China and India, and exceeds the global average.<sup>91</sup> There is no evidence of any decrease in total emissions of per capita carbon emissions since 1994, and no indication that initiatives to curb carbon emission are being implemented.<sup>92</sup>

#### 4.5. Findings on the Progress Made by the State on the Realisation of the Right

##### 4.5.1. Poor Implementation of Legislation and Policy

Several submissions to the Commission emphasised the poor implementation or disregard for environmental policies in environmental decision-making.<sup>93</sup> Precedence given to development over social and environmental issues, which undermines the progressive realisation of environmental rights, was highlighted as a concern for NGOs. The lack of proper implementation of legislation is due to one or more of the reasons presented below.

There is a lack of understanding by some government officials of progressive realisation, particularly of environmental rights. This translates into insufficient commitment and political will. For example, the South Durban Community Environmental Alliance (SDCEA) from the south of Durban in KZN provided evidence in their submission of two violations of the conditions of the operating permit by the Engen Refinery in the residential area. Despite this, no action was taken by local or provincial government to regulate the refinery or confiscate their operating permit.

Corruption and political interference are often stated as barriers to progressive realisation. For example, the Development Facilitation Act (DFA), designed to fast track development applications, is considered by some as a useful mechanism to overcome unreasonable barriers to development. Others argue, however, that the DFA has created scope for political interference in administrative decision making and that it is inappropriately used to bypass EIA regulations for inappropriate developments. These views were supported by the former director-general of DWEA, who stated that "*government officials tended to be easily bribed by industry to get favourable rulings on environmental impact assessments*".<sup>94</sup>

Poor co-ordination between different government departments and directorates and between spheres of government on policy implementation is problematic. This means that departments have conflicting plans or programmes, and directives from national government cannot always be implemented at a provincial or local level due to the lack of communication, capacity, expertise and resources at these levels.

Poor capacity in terms of human resources, skills and financial resources, particularly at provincial and municipal levels, undermines policy implementation. Key departments at a provincial level, for example Gauteng, have a high staff turnover, high vacancy levels and poorly skilled staff.<sup>95</sup> This lack of capacity and expertise impacts greatly on service delivery and has led to a backlog in decision-making on EIA applications.<sup>96</sup> To illustrate this point, an article in the *Business Day* in late 2008 reported that of the 8943 EIA applications received by the DWEA since 2006, decisions on 44% were still pending.<sup>97</sup>

90 The manufacturing sector accounts for about 25% of GDP and the mining industry about 10%.

91 Department of Environmental Affairs (note 68 above).

92 South African Human Rights Commission (note 2 above).

93 For instance, low cost housing developments within the 500m buffer around tailings dams. Also permission given to luxury housing and estate developments in Gauteng in contradiction of environmental policies and planning frameworks. Also mentioned were precedence given to mineral exploitation over sustainability and conservation objectives.. Interviews with government officials, city planners, and environmental NGOs in Gauteng Province. unpublished research, (2009).

94 "Environmental Assessments 'Easily Bought'" *Business Day* (25 November 2008).

95 For instance, the DME has 69 people working on mine safety, health and the environment, and from Mpumalanga alone there are 5000 mining applications, pers comm, DWEA official, (2009).

96 See for example, "Delays have cost KZN 10bn" *The Mercury* (07 August 2008) and "Skills Shortage Leads to EIA Backlog" *Business Report* (27 August 2007).

97 *Business Day* (note 98 above).



#### 4.5.2. Public Access to Information

The consensus amongst most civil society organisations was that information required for the effective monitoring of social and environmental issues was inaccessible. The procedure for obtaining or accessing relevant information is lengthy and time-consuming and generally does not yield positive results. Animal Rights Africa, for example, stated that their organisation “*has been denied access by national and provincial conservation authorities to records containing information relating to the management of elephants and ivory stockpiles which ARA require in order to play a role as an effective watchdog. Access has apparently been refused on the basis of third party confidentiality*”.

Organisations generally lack sufficient resources, particularly funding, to litigate in an effort to obtain necessary information. In the event that organisations do attempt litigation, these organisations can run into financial difficulties due to a lack of sufficient funds. Strategic litigation against public participation suits, or SLAPP suits, as described in one submission to the Commission, are suits initiated by well-resourced organisations or individuals. The submission described SLAPP suits as “*suits without substantial merit that are brought by private interests to stop citizens from exercising their political rights or to punish them for having done so. The longer the litigation can be stretched out, the more litigation that can be churned, the greater the expense that is inflicted ... the closer the SLAPP filer moves to success. The purpose of such gamesmanship ranges from simple retribution for past activism to discouraging future activism*”.<sup>98</sup>

Reasons are often not provided for refusing access to information. PAIA was slated as ineffective by some organisations as it contains clauses that allow companies / government departments to refuse any requests for information based on issues of confidentiality. For example, groundWork, an NGO based in KZN explains, “*in Pietermaritzburg, FFS used oil refiners but have also refused to provide community people with information on the production processes, claiming confidentiality. When this process was challenged through an appeal process with the Department of Agriculture and Environmental Affairs in KwaZulu-Natal the appeal was turned down*”.

#### Public Participation

One issue raised continuously during the hearings was the varying degrees 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. The SDCEA explained in their presentation to the Commission that “*there is no discussion, they privatise the discussion. There is no proper informing and they go to the chiefs or the historical rural areas, where the Inkosis are in control and they get [their] permission and they go ahead. And the dangers of it are not being told, so public participation is actually privatised without proper consultation*”.<sup>99</sup> A similar concern was raised by the KZN Subsistence Fishers Forum, who denies being included in the “*intensive public participation process*” during the EIA for the Harbour Widening Project in Durban, despite formally requesting that the Transnet National Ports Authority include the organisation in the public participation process.

Consultation was not considered extensive or meaningful and public complaints were often not taken into account when making decisions. The submission from the Belhar Community Forum explains that “*the lack of willingness and cooperation to meet our communities halfway, in most cases [the government] just goes through the motions without real commitment as if they are doing our communities a big favour*”.<sup>100</sup>

#### Lack of Responsiveness

Organisations were concerned that emails, letters and other forms of correspondence that were sent to government departments and EAPs were not responded to, even when a confirmation of receipt was requested. Tracy Humby from the Nelson Mandela Institute at the University of Witwatersrand, called this process “*stonewalling*” and described it as “*a strategy whereby government departments persistently fail to respond to queries or inputs made by interested and affected parties on environmental issues. Whether pursued as a deliberate strategy or as the result of negligence, indifference or simply the lack of manpower, the result frustrates interested and affected parties, stretching their already-sparse resources to the limit and effectively marginalising them from decision-making processes*”.<sup>101</sup>

98 Humby, T. The Relationship between Realisation of the Right to Environment and MDG 7, submission to the SAHRC, (2009).

99 SDCEA.

100 Belhar Community Forum, submission to the SAHRC, (2009).

101 Tracy Humby (note 99 above).



Therefore, it seems that decisions are taken without concerns being responded to or important matters being addressed. The Legal Resources Centre (LRC), in their presentation to the Commission explained “we write letters, we do not get responses for nine or ten months. We write an objection and the next response we get is to say that the very thing that we were objecting to has been granted. So the problem that you find is that, for instance in the Belfast area we might be dealing with nine applications, and we now very soon [are] going to be dealing with nine review procedures, when one of that could have been avoided had we just been listened to”.<sup>102</sup>

### ***Environmental Impact Assessments and Assessment Practitioners***

Apprehension over the effectiveness of EIAs was raised, as development was seen to take precedence over social and environmental issues and concerns. Bobby Peek from groundWork explained that “because of our current economic paradigms, 96% of EIAs are approved because ‘development’ is considered paramount, and short-term gains are considered over long-term effects”. Furthermore, “when EIAs are considered, there should be some sort of scoring card which balances the various factors that should be taken into account. As it stands, there do not appear to be any guidelines as to how the merits of an EIA are considered, and this means that different authorities make different decisions. It also means that individuals responsible for making these decisions might be swayed by an applicant (or by an [interested or affected party], although they are less likely, in most circumstances to have access or means to the decision makers)”.<sup>103</sup>

EIAs currently do not consider cumulative impacts or alternatives to particular developments. This lack of strategic planning means that the cumulative impact of developments on the environment and ultimately on human health and the health of other species is not considered. This leads to pressure on the public health care system and affects the health of employees and children attending school, leading to increased absenteeism and decreased productivity.

The role of an Environmental Assessment Practitioner (EAP) was called into question by organisations. EAPs are currently paid by developers and not the government, but they are meant to serve the public sector and the public. Given that the EIA process was borne out of a spirit of inclusiveness and an intention to ensure that development is more socially and environmentally sustainable, the way in which these processes are being applied is concerning. EAPs often do not respond to comments and decisions are taken without EAPs responding to concerns raised by stakeholders.<sup>104</sup> Some EAPs were thought to represent the developer’s agenda. GroundWork stated in their submission that “*the system is fundamentally flawed because the EAP is paid by the applicant. No matter how many oaths the EAP might take, it is inevitable that his / her loyalties will ultimately lie with the applicant rather than anyone else. An EAP’s worth is ultimately decided by how many EIAs they manage to get through, not by how fairly they treat and consider views from interested and affected parties and the public in general*”.<sup>105</sup>

### ***Impacts of Mining***

Social and environmental impacts of mining were discussed in two presentations and 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. The impact of mining on water resources was highlighted several times. Concerns were raised over the lack of proper water treatment facilities and the fact that abandoned and closed mines were still impacting on water resources. The LRC explained that “*one of the biggest threats to the integrity of water resources in South Africa is industry, and in particular the mining industry, which has long been a concern to environmentalists. Sources of water such as rivers and wetlands, which feed into water storage dams, are becoming increasingly polluted with chemicals that are directly harmful to those ingesting them and also in the long-term harmful for agriculture in the areas surrounding the water mass. The effects of pollution by mining activities are long-term*”.<sup>106</sup>

In their submission, DWEA stated that recent legislative amendments have done much to harmonise environmental and mining policies. GroundWork, nonetheless, stated that the new Minerals and Petroleum Resources Development Act does not deal adequately with the policy conflicts concerned.<sup>107</sup>

102 Legal Resources Centre, presentation to the SAHRC ESR public hearings, (2009).

103 groundWork (note 74 above).

104 Environmental NGO, pers.com, (C.Steenkamp op.cit.).

105 groundWork (note 74 above).

106 Legal Resources Centre, submission to the SAHRC, (2009).

107 groundWork (note 74 above).



#### 4.5.3. 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.<sup>108</sup> 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. The absence of efficient evaluation systems means that the effectiveness of programmes and policies that are implemented by the DWEA and other government departments, at a local, provincial and national level, are not scrutinised. The appropriateness and effectiveness of legislation and policies is therefore unclear.

#### 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. Insufficient attention is also given to the development of marine protected areas<sup>109</sup> and terrestrial conservancies<sup>110</sup> and some habitats and biomes, which are under-represented.<sup>111</sup> Management of protected natural resources can be improved in places. For instance, marine resources are plundered by criminal networks while fishermen are prevented from making a living from the resource legally. The KZN Subsistence Fishers Forum, for example, explained that "*it is truly absurd to think that after nearly 15 years of democracy, we are still struggling to secure our rights to fish while the thieves are quite literally looting away freely*".<sup>112</sup> Furthermore, efforts to establish participatory forest management regimes were not generating the results expected.<sup>113</sup> Lastly, meat production for mass consumption is environmentally unsustainable, particularly at the scale currently being practiced.<sup>114</sup>

#### 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 producer of greenhouse gases in Africa. Cheap energy from the burning of coal may provide short term benefits but 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 options<sup>115</sup> and government has not set in place a meaningful programme to achieve a reduction of the country's CO<sub>2</sub> production.<sup>116</sup>

In 2009, the national energy supplier, Eskom, applied to the National Energy Regulator of South Africa (NERSA) for a 45% tariff increase to cover its costs and expansion programmes, which will extend South Africa's reliance on coal for energy-generation purposes. In January 2010, NERSA held a series of public hearings to allow interested and affected parties to comment on the proposed tariff increase. Most submissions indicated that the majority of South Africans would not be able to afford such a tariff increase, that great job losses would be incurred as a result and that South Africa's over-reliance on coal was of great concern.<sup>117</sup>

108 The lack of monitoring of the Engen Refinery in Durban South and responses to violations of permit conditions was mentioned as an example by the South Durban Community Environmental Action and groundWork (SDCEA and groundWork submissions). Also, some thirty mines are currently operating without licences and approximately 580 waste licences and permits are in backlog. (groundWork submission; DWEA official, 2009).

109 Marine protected areas do not adequately protect marine biodiversity. 23% of SA's coastline is protected, only 9% of which is fully protected from extraction and fishing. None of the coastal protected areas extend further than 30 kilometres offshore. <<http://soer.deat.gov.za/themes.aspx?m=415>>.

110 Less than 6% of terrestrial land in the country is under protection. Most of this is constituted by scheduled protected areas, such as national parks (type 1), or protected catchment areas (type 2).

111 The State of Environment website indicates that "110 SA vegetation types out of 447 are not protected at all and only 67 vegetation types are adequately conserved." <<http://soer.deat.gov.za/themes.aspx?m=415>>.

112 KZN Subsistence Fishers Forum, submission to SAHRC, (2009).

113 Robertson, J. & Lawes, M.J. (note 87 above).

114 Animal Rights Africa, submission to the SAHRC, (2009). Note: ARA made a much more substantial submission, little of which has bearing on the MDG and which could therefore not be referred to. Their reference to the relative impacts of meat production and veganism, however, has direct relevance to sustainability.

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

116 S. Fakir, pers.com, (2009).

117 See for example "Eskom hikes draw strong opposition at hearing" *Business Report* (12 January 2010); "Pricey power may court collapse" *Fin24*, (14 January 2010), <[http://fin24.com/articles/default/display\\_article.aspx?Channel=News\\_Home&ArticleId=1518-25\\_2567711&IsColumnistStory=False](http://fin24.com/articles/default/display_article.aspx?Channel=News_Home&ArticleId=1518-25_2567711&IsColumnistStory=False)>.



#### 4.5.4. Implications: Availability, Accessibility, Appropriateness and Acceptability

The expansion of protected areas and effective protection of the natural environment translates into the availability of a healthy environment and natural resources. However, environmental policy is not implemented effectively and living environments are impacted upon by various sources of pollution. In addition, weak governance and the poor application of EIAs result in the unsustainable use of the natural resource base, thereby reducing availability. Various efforts are underway to improve the availability of a healthy environment. However, this is accompanied by an ongoing decline of capacity on the part of the institutions that are supposed to achieve this.

Access to a healthy environment and natural resources is and remains influenced to a large extent by one's class and race, as demonstrated by the fact that people from poorer suburbs in urban areas have reduced access to healthy environments. The poor generally have to carry the greatest burden. The lack of effective governance often results in the criminalisation of local subsistence activities, and there does not seem to be any meaningful effort to address the existing inequities of access to information and public participation. In addition, ineffective policy implementation is exacerbating or even creating further environmental equity issues.

Environmental legislation and policies tend to be technically well developed and appropriate to the task. However, policies are underdeveloped in respect of critical issues such as mining, energy use and carbon emissions. As an illustration, rapid urbanisation has overtaken policy development in some provinces creating a need for overarching, strategic planning frameworks. Furthermore, the lack of monitoring and evaluation systems means that the effectiveness of legislation and policies that are implemented is not assessed.

Environmental policies are generally acceptable, using non-discriminatory language, encouraging participation and often aimed explicitly at addressing inequalities. Where this is not explicitly the case, policies are implemented within a wider policy framework in which these values are entrenched. The quality of actual policy implementation and the results achieved, however, varies substantially between different spheres of government and different municipalities.

#### 4.6. Recommendations

- (a) The amendment of relevant legislation is required to ensure that the responsibility for environmental sector obligations is a concurrent competence of all three spheres of government instead of just national and provincial government. This will assist with monitoring and evaluation and with the implementation of policies that are appropriate at a local level. Municipalities will, however, require additional funds, capacity and expertise to carry out these duties.
- (b) Improved reporting is needed in all sectors, particularly in the conservation and the energy sectors.<sup>118</sup> This will assist in assessing the actual state of the environment and with highlighting gaps that need further attention and greater focus.
- (c) An amendment of the EIA regulations, public participation guidelines and the PAIA is needed, to ensure greater engagement and more meaningful dialogue between Impact and Assessment Practitioners and the public and private sectors. The process of gaining access to relevant information should be simplified and legal requirements compelling an acknowledgement of receipt of applications should be implemented. Consultation and public participation guidelines are needed particularly in the mining sector. While the DoM has indicated that they will initiate this process in the foreseeable future, the Commission urges the rapid initiation of the process. Furthermore, improved communication with and participation of local people in conservation and natural resource management is needed, as is a prioritised effort to deal with the protection of marine resources and the rights of subsistence fishermen.
- (d) A reassessment of the role of EAPs and consideration of their autonomy is required.<sup>119</sup> A system is required, where EAPs are independently allocated to EIAs, possibly by the state, or funded by the state. The policy framework should further be modified to include specific and quantifiable boundary values so as to reduce the pressure on regulatory agencies.<sup>120</sup>

118 SAHRC (note 2 above).

119 groundWork (note 74 above).

120 Prof. Fugle, pers comm, South African Human Rights Commission (note 2 above).



- (e) An inter-governmental initiative, involving all three tiers of government, should develop guidelines for the streamlining of operational procedures and for improved co-ordination between different government departments and different spheres of government. These should be propagated throughout government by way of an ongoing information and capacity building programme.
- (f) A programme involving all three tiers of government should be launched, to deal with the unfolding capacity crisis at especially, but not only, provincial and local government levels as a matter of great urgency. The programme should identify and address qualitative, non-financial factors (such as insufficient training, inappropriate implementation of affirmative action policies and corruption) that contribute to declining capacity at critical government departments. Emphasis should be placed on the independent functioning of departments, skills development and the development of information systems, monitoring and enforcement capacity.
- (g) Increased focus is needed on the expansion of marine protected areas and better representation of all biomes in terrestrial protected areas. The improvement of South Africa's ability to report on the quality of the resources preserved is essential to the survival of these areas.<sup>121</sup> A greater indication of the state of the environment with regards to the following is needed:
- Species and ecosystem biodiversity.
  - Size of open spaces.
  - Plans for future developments.
  - The protection of marine protected areas.
  - Buffer zones and their inclusion in town-planning processes.
- (h) A multi-stakeholder task team should be urgently set in place, with the participation of the government, the private sector and the international donor community to develop a well-resourced programme to deal with the existing and threatening mining impacts, particularly impacts on watersheds and air quality.
- (i) As a matter of urgency, current efforts to invest in and develop low-carbon and renewable energy sources should be scaled up significantly. Develop funding mechanisms to achieve this and partner with civil society to implement these schemes. Implement practical steps aimed at improving the sustainability of resource use and adaptation to climate change, and conduct more detailed assessments of the vulnerability of key threatened areas and the likely timelines of climate change impacts.<sup>122</sup>

121 SAHRC (note 2 above).

122 Ibid.

# Chapter 5



*The right to water and sanitation*



## CHAPTER 5: THE RIGHT TO WATER AND SANITATION

### 5.1. The Meaning and Content of the Right

Section 27 (1) (b) of the Constitution provides that “everyone has the right to have access to sufficient food and water”. This obligation is extended in section 27 (2), according to which the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights. The right to sufficient water intersects with environmental rights and is an enabling right for the enjoyment of other rights such as health and education.

The right to water is a shared competency of national, provincial and local government. The national government, through the DWEA, is responsible for setting national policy frameworks and standards for the delivery of water services, while provincial government must monitor and support local government, which is responsible for the actual delivery of water and sanitation services. Other key role-players are the Water Research Commission, the Water Institute of South Africa and NGOs like the Mvula Trust. Several municipalities have also involved the private sector in service delivery. The Development Bank of South Africa is an important financier of infrastructure development for water and sanitation service delivery.

#### 5.1.1. National and International Legislation and Agreements

The right to water is specifically entrenched in two international human rights treaties. Article 14 (2) of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) 1979, obliges states to eliminate discrimination against women in rural areas and ensure to such women the “right to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communication”.<sup>123</sup>

Under Article 24 (2) of the Convention on the Rights of the Child (CRC), 1989, states are obliged to take steps to ensure the realisation of a child’s right to health and in particular to take appropriate measures: “c) to combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution”.<sup>124</sup>

Furthermore, state parties to the International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966, recognise in article 11 “the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing and to the continuous improvement of living conditions”. The fact that the provision uses the word “including” indicates that this list was not intended to be exhaustive. This right has long been interpreted as including water, an interpretation recently confirmed by the UN body responsible for monitoring compliance with this treaty, the Committee on Economic, Social and Cultural Rights.<sup>125</sup>

Important sets of water national legislation and policy governing water protection, provision and access include:

- National Water Act 36 of 1998;
- Water Services Act 108 of 1997;
- Water Research Act 34 of 1971;
- White Paper on Water Supply and Sanitation (1994);
- White Paper on Water Policy (1997);
- White Paper on Basic Household Sanitation (2001);
- National Water Resource Strategy (2004);
- Draft White Paper on Water Services (2002);
- Draft Position Paper for Water Allocation Reform (2005); and
- Draft Position Paper for Water Allocation Reform in South Africa (2005).

<sup>123</sup> Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). 1980.

<sup>124</sup> Convention on the Rights of the Child (CRC). 1989.

<sup>125</sup> Water Aid and Rights and Humanity. *The Right to Water: A Legal Obligation*, <[http://www.righttowater.info/code/overview\\_4.asp](http://www.righttowater.info/code/overview_4.asp)>.



### Legal and Policy Developments between 2006 and 2009

Developments after 2006 include the development of the Consolidated Environmental Implementation and Management Plan (2008), the Drinking Water Quality Regulation Programme (2004) and an enforcement protocol, which is used to ensure service delivery from municipalities.<sup>126</sup>

The implementation of water policy at a local level is supported by the Municipal Infrastructure Grant (MIG), administered by the Department of Cooperative Governance and Traditional Affairs (DCGTA)<sup>127</sup> and a capacity building grant. The MIG aims at providing funds for municipalities to provide all South Africans with a basic level of service by the year 2014, through the provision of grant finance to cover the capital cost of basic infrastructure.

Water management has significant crosscutting implications as access to water relates directly to sanitation and health,<sup>128</sup> which collectively relates to poverty.<sup>129</sup> Further, cutting off access to water for domestic use or agriculture could also be interpreted as an eviction in terms of the Labour Tenants Act 3 of 1996 and the Extension of Security of Tenure Act 62 of 1997. Similarly, failure to provide access to water could be interpreted as denying the right to housing,<sup>130</sup> or discrimination on the basis of race, class or gender.<sup>131</sup>

During a municipal election campaign in 2000, the ANC promised free basic water. By the middle of 2001 a revised tariff structure was suggested which included six kilolitres of free water per month (40 litres per person per day for a family of five or 25 litres per person per day for a family of eight).<sup>132</sup> The White Paper on Basic Sanitation further set a target of universal access to basic sanitation by March 2010. These policies were to be implemented progressively within the means of individual municipalities.<sup>133</sup> This deadline has since been extended, however, to 2014.<sup>134</sup> In 2009, the DWEA stated that attention was being given to greater re-use of effluent, desalination and other processes to stretch the water supply<sup>135</sup> and estimated that backlogs in water service delivery will only be eliminated in 2011 and in sanitation by 2031.<sup>136</sup>

### 5.2. The Relevant MDG, Targets and Indicators

The target and indicators for MDG 7 related to water are presented in the table below.

**Table 5: Targets and Indicators of Millennium Development Goal 7**

<b>Goal 7: Ensure Environmental Sustainability</b>	
<b>Target</b>	<b>Indicators</b>
<i>Target 10: Reduce by half the proportion of people without sustainable access to safe drinking water</i>	<ul style="list-style-type: none"><li>▪ Proportion of the population with sustainable access to an improved water source, urban and rural</li><li>▪ Proportion of the population with access to improved sanitation</li></ul>

126 Swart, M. *Water Quality Regulation: In-Depth Discussions of DWAF's Blue and Green Drop Certification*, Water Services Regulation, <<http://www.aii.co.za/cv/Mariette%20Swart.pdf>>.

127 The former Department of Provincial and Local Government.

128 Draft White Paper on Basic Household Sanitation, (2001).

129 Draft White Paper on Water Services, (2002).

130 Government of the Republic of South Africa (note 17 above).

131 White Paper on National Water Policy, (1997).

132 Department of Water Affairs and Forestry. *Free Basic Water Provision: Key Issues for Local Authorities*, (2001), <[http://www.dwaf.gov.za/dir\\_ws/webdocs/share/ViewwebDoc.asp?Docid=38](http://www.dwaf.gov.za/dir_ws/webdocs/share/ViewwebDoc.asp?Docid=38)>.

133 *Draft White Paper on Water Services*, (2002).

134 DWEA, submission to SAHRC, (2009).

135 Ibid.

136 Tissington *et al*, (note 3 above).



### 5.3. Main Themes Arising

In this section the main themes which arise out of the assessment of South Africa's progress towards meeting the MDG and fulfilling the right to water and sanitation are presented.

- Access to water and sanitation: although much attention has been given to addressing the backlog in the provision of water and sanitation in South Africa since 1994, there are varying accounts of the level of service delivery that has been achieved to date. Some organisations have reported discrepancies in government statistics.<sup>137</sup>
- A human rights perspective: because the MDG are framed from a political perspective as opposed to a human rights perspective, there are some discriminatory issues that are not addressed in the MDG, such as unequal access for men and women and for people with disabilities. It also does not deal with financial access or the lack thereof.
- Distribution: the MDG and goals framed by the DWEA do not address issues of distribution. This means that the worst performing municipalities in terms of service delivery might not improve access at all by 2014, but South Africa could still reach its target of halving the proportion of the population without access to water. These poor-performing municipalities usually serve the poorest of the poor.
- Indigent policy: the current model of targeting indigent households in South Africa is fundamentally flawed as the onus is on households to prove that they are indigent. To access free basic water (FBW) and free basic sanitation (FBSan), one has to be listed on the indigent register. The process of doing this is lengthy and people who apply to be listed on the indigent register are often stigmatised. In addition, not all municipalities are currently implementing the FBW and FBSan policies.
- Municipalities: while national government acts as a regulatory body, municipalities are finding it difficult to roll out services because of a lack of capacity, funds and resources. While a wealthy municipality can provide services through cross-subsidisation, poor municipalities are unable to do so. This results in a large number of disconnections in areas that are served by very poor municipalities, as households cannot afford to pay for basic services.
- Water quality: while national government has begun a process of quality control and monitoring, there is a concern that municipalities do not have the capacity, expertise or resources to carry out water quality tests. Furthermore, submissions to the Commission highlighted the urgent need for action on water quality surrounding mines or former mines.
- Water conservation: there is a need to consider the fact that South Africa is a water-poor country and therefore to ensure that all service delivery schemes are sustainable and water-conserving. Furthermore, infrastructure management is urgently required. This will limit water losses due to poor infrastructure maintenance.

#### 5.3.1. Planning Systems

##### **Information gathering and monitoring**

While still part of DWAF, the water and sanitation directorates developed an integrated monitoring and assessment information system to provide information on water and sanitation service delivery.<sup>138</sup> Part of this is a well-developed drinking water quality regulation, which is implemented through the regular municipal audits for compliance monitoring.<sup>139</sup> DWEA is also conducting a long term study to reconcile water supply and demand, which the department aims to complete by 2012. Nonetheless, it is important to note that disputes about water quality have occurred.

##### **Budgetary planning and oversight**

Budget data used in this section was obtained from DWEA's annual reports.<sup>140</sup> Annual financial statements are recorded for a financial year (beginning 01 April and ending 31 March). This report illustrates both changes in the allocated budget for each financial year beginning in 2005/2006, as well as the annual percentage change in allocation.

137 For example, the oral submission from the Centre for Applied Legal Studies submitted to the Commission for the ESR public hearings in 2008.

138 Department of Water Affairs and Forestry. *Inception Report: Monitoring and Assessment Information Services*, (2001), <<http://www.dwaf.gov.za/IWQS/wrmais/MAIS-project-inception.pdf>>.

139 Department of Water Affairs and Forestry. *Drinking Water Quality Regulation Strategy*, (2005), <[http://www.dwaf.gov.za/dir\\_ws/waterpolicy/default.asp?nStn=policy\\_detail&Policy=432](http://www.dwaf.gov.za/dir_ws/waterpolicy/default.asp?nStn=policy_detail&Policy=432)>.

140 Budget analysis from former Department of Water Affairs and Forestry (DWAF), now DWEA.

**Table 6: Growth and Variance for the Former National Department of Water Affairs and Forestry (2005/06 to 2008/09)**

Financial Year	Inflation	Allocation	Spending	Variance %	Nominal Growth	Real Growth
		R'000				
2005 / 2006	3.4	3 935 636	3 717 088	94.4	-	-
2006 / 2007	4.7	4 660 303	4 305 650	92.4	18.4	15.0
2007 / 2008	7.1	5 862 396	5 385 396	91.9	25.8	21.1
2008 / 2009	6.8	3 786 241	3 747 709	99.0	-35.4	-42.5

Budget expenditure for DWEA indicates that there has been a continuous increase in the budget allocation from the National Treasury between 2005/06 and 2007/08, but a sharp reduction in allocation and spending in 2008/09. Prior to 2008, the department spent only 92% of its allocated budget.

While budget allocation and spending increased between 2005/06 and 2007/08, allocation by 2008/09 had decreased by almost 50% from 2007/08. This means that the impact of inflation was greater on expenditure than the budget allocated to the department.

Planning frameworks for the development of water services and sanitation seem well developed, though largely limited to the water sector, and the system as a whole has worked well to promote human rights in this sector, at least at a policy level. DWEA's (while still DWAF) water-related budget allocation has increased steadily over the last three budget years.

**Table 7: Budget Allocation for Water and Sanitation between 2006 and 2009**

Financial Year	Budget R
2006	4.4 billion
2007	5.3 billion
2008	6.6 billion
2009	7.8 billion

Municipal sanitation expenditure more than doubled between 2003/04 and 2006/07, most of which was spent on infrastructure development.<sup>141</sup> In 2007, R1.9 billion, to be spent over three years, was allocated for water and sanitation services infrastructure and substantial resources allocated to municipalities through the MIG. In 2007, DWEA was expected to establish a special programme for Bulk Water Services Infrastructure, which included wastewater treatment plants. In 2008, an additional R1.4 billion was allocated to the Regional Bulk Infrastructure Fund for Water Services. Based on the demands for funding (up to R60 billion), it is clear that the existing fund is far from sufficient and that additional funding is urgently required.

#### 5.4. Progress Made in Terms of the Relevant MDG

<b>TARGET 9</b>	<b>Integrate the principles of sustainable development into country policies and programs and reverse the loss of environmental resources</b>
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The right to sufficient water is well entrenched in South African and international legislation, policy, strategies, action plans and jurisprudence. In April 2008, the South African High Court gave further meaning to the right of access to water when it declared prepaid meters installed in Phiri, Soweto unconstitutional, and ordered the City of Johannesburg and others (CoJ) to increase the quantity of FBW to 50 litres per person per day, with the option of having a regular water meter installed. CoJ, however, appealed against this ruling and the Constitutional Court

<sup>141</sup> 72% for metros (R996 million), 91% for local municipalities (R1.6 billion) and 95% for district municipalities (R322 million) for 2006/07.



subsequently found in favour of CoJ, concluding that neither the FBW policy nor the installation of pre-paid water metres in Soweto constituted a breach of section 27 of the Constitution.<sup>142</sup> Despite the fact that the court ruled against the residents of Soweto, the Phiri Water case demonstrates that the poor and marginalised are able to use legal means to defend their right of access to water. However, having to go this route is obviously far from ideal.

According to DWEA's statistics, almost all of South Africa's provinces score in excess of 90% compliance with water quality standards.<sup>143</sup> However, in recent years there have been persistent media reports about widespread problems with municipal sewage systems, unsafe tailings dams and waste spills that are leading to a "water contamination crisis."<sup>144</sup>

The debate achieved party political overtones with the then Minister of Water Affairs and Forestry denying that there was a water crisis,<sup>145</sup> while the opposition criticised her for being "in denial".<sup>146</sup> The controversy intensified later in the year with the suspension of a researcher from the Centre for Scientific and Industrial Research (CSIR) as a result of a paper in which he raised critical issues regarding water quality and sustainability of water supplies in South Africa.<sup>147</sup> Just dealing with the decanting of water from old mines between Gauteng and the Highveld escarpment, for instance, will require about R2.5 billion per annum.<sup>148</sup>

In its submission to the Commission, the Water and Sanitation directorate of DWEA stated that there are 2.1 million people in South Africa without access to water, excluding those 2.5 households without access to housing or infrastructure. This means that approximately 96% of all South Africans have access to potable water. These figures indicate a great improvement in water service delivery since 1994, when only half the population had access to potable water. These statistics, however, are not disaggregated by type of service (i.e. standpipe, tap in the house). Progressive realisation would imply that services for people in South Africa are constantly improving and additional information on this is required.

The Development Indicators Mid-Term Review released by the Presidency on 21 June 2007 indicated an increase of RDP-standard water provision from 61.7% in 1994 to 84.7% in 2006.<sup>149</sup> The figures presented in the MDG Mid-term Review match those provided by DWEA.<sup>150</sup> According to a report from the WHO/UNICEF Joint Monitoring Program for Water Supply and Sanitation, access to water increased from 83% in 1990 to 88% in 2004, slightly contradicting the government's figures.<sup>151</sup> These figures resonate with the statistics on the official UN MDG Indicator website.<sup>152</sup>

Progress on providing FBW to the poorest sectors of society has been slower and is implemented on an *ad hoc* manner by municipalities, with varying compliance with national standards.<sup>153</sup> Nevertheless, according to DWEA, by 30 November 2009, 86% of all poor households in the country had received access to FBW.<sup>154</sup> Figures presented by the Centre for Applied Legal Studies (CALS), however, showed that only 74% of registered indigent households have access to FBW. This excludes those households that have not registered or that do have adequate infrastructure to allow for service delivery.

142 Lindiwe Muzibuko (note 29 above).

143 Department of Water Affairs. *Compliance Status*. <[http://www.dwaf.gov.za/dir\\_ws/DWQR/default.asp?PageID=0&PageHeading=Compliance%20Status](http://www.dwaf.gov.za/dir_ws/DWQR/default.asp?PageID=0&PageHeading=Compliance%20Status)>.

144 "SA may face water contamination crisis" *Mail and Guardian*, (3 February 2008), <<http://www.mg.co.za/article/2008-02-03-sa-may-face-watercontamination-crisis>>.

145 "There is no water crisis, says government" *Mail and Guardian*, (4 February 2008), <<http://www.mg.co.za/article/2008-02-04-there-is-no-water-crisis-says-govt>>.

146 "DA: Minister in denial over 'looming' water crisis" *Mail and Guardian*, (6 March 2008), <<http://www.mg.co.za/article/2008-03-06-da-minister-in-denial-over-looming-water-crisis>>.

147 The paper was originally drafted as a keynote address at a CSIR conference "Science Real and Relevant", Turton, A. (unpublished paper) Three Strategic Water Quality Challenges that Decision-Makers Need to Know About and How the CSIR Should Respond. (2008). <[http://researchspace.csir.co.za/dspace/bitstream/10204/2620/1/Turton\\_2008.pdf](http://researchspace.csir.co.za/dspace/bitstream/10204/2620/1/Turton_2008.pdf)>.

148 Legal Resources Centre (note 107 above).

149 The report provides Census statistics and "internal processes" in the Department of Water Affairs as sources, and resonates with figures available from related sources. <<http://www.info.gov.za/otherdocs/2007/developmentindicator/household.pdf>>.

150 Department of Water Affairs, Water Services Information Systems. <[http://www.dwaf.gov.za/dir\\_ws/wsni/default.asp?nStn=wsnisindex](http://www.dwaf.gov.za/dir_ws/wsni/default.asp?nStn=wsnisindex)>.

151 United Nations Children's Fund & World Health Organisation Joint Monitoring Programme for Water Supply and Sanitation, <[http://www.wssinfo.org/pdf/country/ZAF\\_wat.pdf](http://www.wssinfo.org/pdf/country/ZAF_wat.pdf)>.

152 United Nations Statistics Division (note 85 above).

153 Tissington, K. et al (note 3 above).

154 Department of Water Affairs. *Water Services: Free Basic Water Project*, <[http://www.dwaf.gov.za/dir\\_ws/fbw/Default.asp?Pageid=11&PageHeading=IMPLEMENTATION%20STATUS%20%20Provincial%20Summaries](http://www.dwaf.gov.za/dir_ws/fbw/Default.asp?Pageid=11&PageHeading=IMPLEMENTATION%20STATUS%20%20Provincial%20Summaries)>.



In respect of the proportion of the population with access to improved sanitation, DWEA indicated in its submission to the Commission that there are 13.2 million people in South Africa without access to basic sanitation. This number does not include those people without access to housing or households without appropriate infrastructure. Figures from 2009 show that rapid progress was being made with service delivery, as approximately 434 000 households were being serviced per annum with sanitation as opposed to the planned 300 000 per annum. Furthermore, bucket systems have been reduced from 23 000 to 9 000 (3% of the population) over the same period. Nonetheless, the target for universal access has been moved to 2014.<sup>155</sup>

The South African Development Indicators Mid-Term Review released by the Presidency in June 2007 stated that households with access to RDP acceptable sanitation<sup>156</sup> increased from 50% in 1994 to 71% in 2006, and progress was being made to eliminate the bucket system in established settlements by the end of 2007. In addition, there is a backlog of access to sanitation of some 3.7 million households which will require an acceleration of the delivery rate to meet the target of universal access to sanitation by 2014. The MDG Mid-Term Review of 2006 stated that major progress had been made with regards to the provision of sanitation services and that access to basic services had increased from 59% of the population in 1994 to 94% of the population in March 2007.<sup>157</sup>

However, the UN MDG statistics showed little progress in respect of the provision of sanitation between 1990 and 2006, with only two thirds of the country's urban population and just half of the country's rural population with access to acceptable sanitation.<sup>158</sup> According to DWEA, there is a policy on FBSan available for implementation, but currently, there is a lack of awareness of the policy, municipalities are not implementing the policy and DWEA information systems do not provide any information or statistics relating to FBSan.

## 5.5. Findings on the Progress Made by the State on the Realisation of the Right

### 5.5.1. Access to Water and Sanitation

At present, there are conflicting statistics on the level of water and sanitation provision in South Africa.<sup>159</sup> While the former DWAF developed a comprehensive Water Services National Information System, civil society organisations still question the validity of the statistics presented. This discrepancy makes it difficult to assess the progressive realisation of the rights concerned.<sup>160</sup>

There is also no indication of continuous improvement in service delivery to households, as would be expected if you are to progressively realise a right. For example, if a household is provided with a standpipe that is within 200 metres from the household, one would expect that service delivery would be improved so that the household will eventually have a standpipe on their stand and eventually a tap within the house. If DWEA's target is simply to meet the RDP requirement, this would mean that some households will never have access to water within their dwelling. The state has a constitutional obligation to meet both the needs of people that have no access to water and sanitation, while continually improving the level of service to other households.

Finally, in terms of basic service delivery, the state is providing ventilated pit latrines (VIPs) to communities, mainly in very impoverished areas. These VIPs are not necessarily suited to humid climates and become full very quickly. As a former Johannesburg water regulator, Kathy Eales stated, "*many VIPs are now full and unusable. In many areas, VIPs are now called 'full-ups'. Some pits were too small, or were fully sealed*".<sup>161</sup>

155 DWEA, submission to SAHRC (2009).

156 A RDP accepted level of sanitation is a ventilated improved pit latrine or flush toilet connected to a septic tank or sewerage system.

157 These percentages do not differentiate between access to water and sanitation and the source is not referenced.

158 United Nations Statistics Division (note 85 above); SAHRC (note 2 above).

159 Centre for Applied Legal Studies (CALS), submission to the SAHRC, (2009). For example, a speaker questioned the validity of the statistics presented by DWEA on the percentage of households with access to water and sanitation that is of a RDP-acceptable level.

160 SAHRC (note 2 above).

161 Nojiyeza, S., Bond, P., Amisi, B. & Khumalo, D. *South Africa: The Neoliberal Loo*, Greenleft, (2008), <<http://www.greenleft.org.au/2008/742/38369>>.



### 5.5.2. Human Rights Perspective

Using the above example of the household standpipe, if the targets are not framed from a human rights perspective, they run the risk of discriminatory practices that may impede service delivery. For example, CALS explained that, “*the Millennium Development Goal as it is framed ... doesn't deal with physically disabled people and with marginal communities including tenants and non-property owners and also farm dwellers. Those are some of the discriminatory aspects that are not addressed*”.<sup>162</sup> CALS further stated that “*access within a human rights framework includes financial and physical access. It's no good bringing water closer and closer to the community if they can't pay the tariffs*”.<sup>163</sup>

#### **Tariffs and Distribution**

A difficult problem to deal with at a national level is the distribution of wealth and resources equally amongst all citizens. Currently, water service providers, which are entities tasked with providing water to households, are mandated to set water tariffs, while the national government acts as a regulator. As such, each municipality or local governing entity is entitled to charge users according to their level of usage, in which case, the more one uses, the more one pays. Currently, some municipalities do implement this system, albeit on an *ad hoc* basis, and the same block tariffs are applied to high-end users such as business, industry, government departments and wealthier residential consumers as to poorer households.<sup>164</sup>

Implementing such a system will not only encourage the conservation of water resources, but allow municipalities to cross-subsidise service delivery between high-end users and poorer users. In addition, richer municipalities can fund service delivery in poorer municipalities. However, unless a sliding scale of costs is implemented, poorer municipalities will never have sufficient funds or resources to deliver on their mandated services.

#### **Indigent Policy**

Free Basic Services (FBS) are provided only to those households that are registered as indigent. This policy is seriously flawed as the onus is on a household to identify itself as indigent. Many vulnerable households are unaware of the indigent policy or do not register for fear of being stigmatised.<sup>165</sup> As such, the poor are woefully under represented on the register. It has therefore been argued that the indigent policy serves as a barrier to the proper access to FBS. Furthermore, the FBS policy is inconsistently administered by different municipalities and the poorest municipalities serving the most number of indigent households do not have the resources and capacity to apply the FBS policy. Furthermore, CALS explained that “*the formulation of the allocation of FBW as 'per household per month is problematic because it does not reflect the reality, particularly in the poor urban setting, of multi-dwelling households that must all share the same FBW allocation*”.

#### **Disconnections / Credit Control**

There is a trend to impose harsh credit control measures, such as water restriction devices, on low income residents, while higher income residents, businesses and government departments are treated more leniently. Simultaneously, there is a trend of non-payment for water services by parties that can afford to do so, such as government, which is a major defaulter.<sup>166</sup> To add to what can only be described as a form of discrimination, it was found that the tariff structures of municipalities with similar resource bases and population profiles vary greatly.<sup>167</sup>

Given that services are provided at a municipal level, policy implementation can be adapted to local conditions and can theoretically respond well to dealing with inequities and discrimination. However, decentralising implementation to this level also makes service provision subject to local capacity and resource constraints (see section on municipalities below). These tend to impact negatively on the progressive realisation of rights, and current forums of public participation such as ward councils and the Integrated Development Plan and Water Service Development Plan processes fail to adequately incorporate input from communities, particularly from vulnerable, marginalised and poor communities.<sup>168</sup>

<sup>162</sup> CALS (note 160 above).

<sup>163</sup> Ibid.

<sup>164</sup> Tissington, K. (note 3 above).

<sup>165</sup> Ibid.

<sup>166</sup> Ibid.

<sup>167</sup> Ibid.

<sup>168</sup> The recommendations derived mainly, but not exclusively, from Tissington, K. *et al* (note 3 above).



## **Municipalities**

While the national government acts as a regulatory body, municipalities are tasked with service delivery at a local level. Unfortunately, different municipalities have different levels of capacity and funding. As such, some municipalities find it difficult to roll out services because of a lack of capacity, funds and resources. While wealthy municipalities can provide services through cross-subsidisation, poor municipalities are unable to do so.

It is also evident that there are severe capacity problems at municipal level which is plagued by gross under spending despite the urgent need for service delivery.<sup>169</sup> Having said that, for those capacitated municipalities the MIG and Equitable Share funding allocations were found insufficient to ensure universal access to adequate water and sanitation. This is particularly the case in poorer municipalities and has often resulted in poor infrastructure maintenance and poor service. Furthermore, municipalities implement policies on an *ad hoc* basis. While local knowledge is essential for the appropriate implementation of policies, greater regulation is needed to ensure that municipalities meet at least the basic requirements for service delivery.

## **Water Quality**

There are strong indications that water quality is declining due to water contamination from illegal dumping, decanting mines and sewage plants. Submissions from the Federation for a Sustainable Environment (FSE) and the Legal Resources Centre (LRC) clearly articulated the consequences that are imminent if action is not taken on mine-water pollution. This trend is likely to continue given the country's current energy-generation strategy and emphasis on coal mining.<sup>170</sup> In addition, because EIAs are reactive instead of proactive, they are ineffective in sustainable development planning, and there is very limited or no monitoring of the environmental and social impacts of mining or enforcement of relevant legislation.

While the DoM does have a new policy for the identification and rehabilitation of derelict and ownerless mines, action will have to be taken with some level of urgency to ensure the protection of valuable water resources, particularly in this water-poor region. Further, the current and potential impact of decanting mines and dysfunctional sewage systems on the water supply, and thereby on the living standards, health and rights of millions of South Africans, is very concerning and will impede the progressive realisation of the right to water and sanitation.<sup>171</sup>

Dr Anthony Turton, in the LRC submission, summed up the state of water resources in South Africa by stating that, “*aquatic ecosystems are in stress and some, like Middleburg dam, are simply at the very limit of our current scientific capacity to ‘manage’. Our coal-based energy has resulted in externalised costs in the form of acid rock drainage and acid rain. Our mining-based economy has resulted in externalised costs in the form of acid mine drainage and decanting water containing potentially toxic loads of heavy metals and radio-nuclides. Our industry is globally uncompetitive due to the protectionist policies used by a pariah state to bolster the national economy, now producing effluent streams that are so costly to clean up, that in many cases the economic viability of the industry is at stake, if we expect a significant reduction in discharge. We have lost our dilution capacity in rivers and I have predicted that we are moving away from an Integrated Water Resource Management (IWRM) paradigm into a new Integrated Salts Management phase instead. Then there is the issue of global climate change, introducing another level of uncertainty*”.

## **Water Conservation**

Recent research has indicated that water needs in South Africa could soon exceed supply in places due to population and economic growth, restricted rainfall and climate change. The sustainability of water resources does not feature strongly enough in development planning decisions. As such, previous recommendations of sliding-scale tariffs might assist in encouraging more responsible water use. Additional methods of curbing excess water use and cleaning and preserving mine-water are also needed.

### **5.5.3. Implications: Availability, Accessibility, Appropriateness and Acceptability**

Given that DWEA and civil society organisations are in disagreement over the actual level of service delivery, it is difficult to ascertain the level of access that South Africans have to water and sanitation. Nevertheless, there has been an improvement in the delivery of water services, but delivery in respect of sanitation is still lagging.

169 Tissington, K. *et al* (note 3 above).

170 Ibid.

171 CALS (note 160 above).



Access to FBW is limited to households that registered as indigents and it was found that the provision of this service by municipalities is conducted in a rather *ad hoc* manner. For example, despite the FBSan policy, there appears to be very little awareness around its existence and few municipalities are implementing it. Statistics on service delivery in this area are difficult to locate. Accessibility is also undermined by a lack of financial means to pay for water and sanitation, particularly for poor households.

The acceptability of the use of VIPs is questionable as research has shown that VIPs do not function well in humid areas and become full very fast. The impact of dumping, mining and other pollutants on water also undermines the acceptability of the service being provided.

For some communities in the poorest municipalities in the country, availability is of concern. Research by CALS showed that South Africa could achieve its MDG targets with regards to water and sanitation provision without any progress being made in the country's worst performing municipality.

The appropriateness of the Indigent Policy used in South Africa is questionable as it places the onus on poor households to prove that they are poor and to voluntarily register as an indigent household. Some households might not be aware of the policy and if they are aware, there is often a stigma attached to indigent households and for that reason people may be reluctant to voluntarily register.

Given that services are provided at a municipal level, policy implementation can be adapted to local conditions and can theoretically respond well to local conditions of inequity and discrimination. However, decentralising implementation also makes service provision subject to local capacity and resource availability and this tends to impact negatively on the progressive realisation of rights.

## 5.6. Recommendations

1. For relevance in South Africa, the MDG indicator for water provision should be expanded to include issues of sustainability, discrimination and quality.<sup>172</sup>
2. As a matter of urgency, the development of an accord between DWEA and DoM is needed on the harmonisation of mining development policies with water resource protection. Serious consideration is needed on issues of sustainability in mining applications and the enforcement of environmental regulations with the operation and rehabilitation of mines.<sup>173</sup>
3. The gap between economic dimensions of service delivery and finance should be addressed on the one hand, and policy targets, policy implementation standards and policy efficiency at different levels of government on the other. The development of a new, overarching funding mechanism, such as the proposed American Infrastructure Investment Bank, should be considered as part of the solution.
4. A strategy to ensure that the poor and vulnerable retain access to water while simultaneously resolving issues around non-payment for services is required. Among others, the Indigent Policy and register for the allocation of Free Basic Services should be replaced with a universal allocation approach or geographic targeting. The implementation of an appropriate FBSan policy and a FBW national minimum should be standardised across all municipalities.<sup>174</sup>
5. The national regulation of water tariffs and credit control practices to promote social and environmental justice is needed to ensure uniformly low tariffs for low consumption and equitable rates across rich and poor municipalities. Fair, equitable and pro-poor policies on enforcement and disconnections should be implemented, including the prohibition of prepayment and other water restriction devices in poor communities.<sup>175</sup>
6. As a matter of great urgency, the assessment and resolution of capacity problems at a municipal level is required. This should include greater financial and technical support and the allocation of skilled personnel to under-capacitated and poor municipalities.

172 SAHRC (note 2 above).

173 Ibid.

174 Tissington, K. *et al* (note 3 above).

175 Ibid; SAHRC (note 2 above).



7. The promotion of research on service delivery is required on the following:
  - Environmental, institutional and economic dimensions of service delivery;
  - Climate change and the availability of water resources including pollution, water quality and water resource development;
  - The institutional framework of water management and service provision, organisational capacity and human resource development and training;
  - Levels of water consumption and costs and affordability of water services for low income households, including the non-payment for services; and
  - Options for cross-subsidisation and elasticity of demand at different levels of consumption across different bands of user groups.<sup>176</sup>

<sup>176</sup> Ibid; Provincial Government of the Western Cape (note 3 above).

# Chapter 6



*The right to food*



## CHAPTER 6: THE RIGHT TO FOOD

### 6.1. The Meaning and Content of the Right

Section 27 (1) (b) of the Constitution states that “everyone has the right to have access to sufficient food and water”. This obligation is extended in section 27 (2), according to which the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights. In section 28 (1) (c) the right to food is expanded as a right to basic nutrition for children and in section 35 (2) (e) as a right for detainees and sentenced prisoners.

Section 25 (4) (a) further speaks of a commitment to land reform and reforms to bring about equitable access to all South Africa’s natural resources, while determining that fair compensation must be paid in the event of land being expropriated for a public purpose. Where the state takes land from people that they use to produce food for themselves, the constitutional right to food will be relevant in determining what fair compensation would be.

The right to food is entrenched also in international human rights law, conventions and international strategies:

The Convention on the Rights of the Child (1989) obliges states “*to care for children and to combat disease and malnutrition through, among others, the provision of adequate nutritious foods and nutritional support programmes*”.<sup>177</sup>

The World Food Summit Plan of Action (1996) specifies actions that states must take to limit hunger and malnutrition and says that steps must be taken to clarify the content of the right to food and freedom from hunger. Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) obliges states “*to recognise the right of everyone to adequate food and requires active interventions on the part of states to counteract hunger*”. General Comment No. 12 (1999) of the Committee on Economic, Social and Cultural Rights (CESCR) interprets the meaning of this right and links food rights and health care rights.

South Africa has highly developed food standards that are entrenched in the legislation,<sup>178</sup> the foundations of which were laid during the apartheid era. However, these failed to adequately address issues of food security and nutrition that are of particular relevance in a context characterised with inequitable access to natural resources and variable rainfall patterns. South Africa has no major assistance from the Food and Agriculture Organisation (FAO) or World Food Programme (WFP) as it is considered a “rich” developing country.<sup>179</sup>

Important legislation and policies since 1994 include the following:

- The ANC manifesto, which mentions food security as an important policy issue.<sup>180</sup>
- The Reconstruction and Development Programme (RDP), which identified food security as a basic human need and mainstreamed food security as a priority policy objective.
- The Integrated Food Security Strategy (2002) (IFSS). The IFSS coordinates the inputs of the “Social Sector Cluster”<sup>181</sup> into a comprehensive programme affecting virtually all spheres of government. Its vision is to eradicate hunger, malnutrition and food insecurity by 2015.<sup>182</sup>

The main outcome of these policy developments was the Integrated Food Security and Nutrition Programme (IFSNP), which was developed by departments in the social cluster and distributes responsibilities between

177 CRC (note 125 above).

178 For example, the Agricultural Products Standards Act (act 119 of 1990), the Agricultural Products Standards Act (Act 119 1990), the foodstuffs, Cosmetics and Disinfectants Act (Act 54 of 1972), The Marketing Act (Act 59 of 1968), and the Code of Practice for Food Hygiene Management SABS 049 and a range of government notices.

179 See <<http://www.wfp.org/countries>>; <<http://www.fao.org>>.

180 African National Congress. Election Manifesto: Working Together, We Can Do More, (2009), <<http://www.anc.org.za/elections/2009/manifesto/manifesto.html>>.

181 The Social Sector Cluster includes, amongst others, the Departments of Health; Social Development; Public Works; Water and Environmental Affairs; Transport; Basic Education; Higher Education; Human Settlements; Cooperative Governance and Traditional Affairs; Rural Development and Land Reform; Tourism; Arts and Culture; Science and Technology.

182 Department of Agriculture, Forestry and Fisheries. *The Integrated Food Security Strategy for South Africa*, (2002), <<http://www.info.gov.za/view/DownloadFileAction?id=70243>>.



them.<sup>183</sup> Its main objective is to reduce the number of hungry and malnourished households by half by 2015. A wide range of programmes and projects were implemented at a national, provincial and municipal level under this umbrella between 2002 and 2009. Examples include the Special Programme for Food Security Projects (SPFS) and the National Food Emergency Scheme (NFES).

A wide range of related programmes and projects were also rolled out at a provincial level between 2006 and 2008. State programmes that provide food or money to buy food directly to people include the following:

- Department of Health's food supplements: for those with debilitating diseases, such as HIV/AIDS and TB.<sup>184</sup>
- The Department of Basic Education (DoE) primary school feeding scheme: which operates at about 80% of primary schools.<sup>185</sup>
- The Protein-Energy-Malnutrition (PEM) Programme: for malnourished children treated at public health facilities.
- The CSG: for children aged 14 years and below.<sup>186</sup>
- The older persons grant: for men and women aged 60 and older.
- The disability grant: for males living with a disability between the age of 18 and 62 and females between the age of 18 and 59 years.
- Social relief: provides direct food assistance.<sup>187</sup>

These efforts were intensified in response to the sharp increase in food prices since 2001. Among other deals, the government made agreements with food retailers to provide food to the poor at special low prices. The government is a major sponsor of an important new initiative, namely "Food Bank South Africa" and has publicly backed and financially supported the programme in partnership with the private sector. The initiative was started in the urban and peri-urban centres and will most likely expand to rural areas as well.<sup>188</sup> The state has also taken a number of steps to assist people at becoming self-sufficient food producers or to gain the income needed to buy food. The following programmes should be noted as significant:

- The DAFF Food Security and Rural Development Programme: the provision of agricultural starter packs and food production information packs to food insecure rural households.<sup>189</sup>
- The DAFF Land Redistribution and Development Programme: the provision of financial assistance for small farmers (National DAFF Strategic Plan 2008).<sup>190</sup>
- The Department of Public Works Expanded Public Works Programme (2004): the creation of jobs aimed at the poorest communities enabling people to buy food. The programme had created one million "full time equivalent" jobs by 2008. Phase II of the programme aims to create 2 million jobs by 2014.<sup>191</sup>
- Department of Social Development Poverty Relief Programme: the provision of support for rural community food gardens and income generating projects.

The government's food strategies and programmes link directly with the rural development and land reform policy. Issues of rural agricultural development, access to agricultural land, and food security were addressed in important sets of agricultural legislation since 1994, and include the Agriculture White Paper (1995), the Agricultural Policy Discussion Document (1999) and the Integrated Rural Development Programme (1999).

Laws were promulgated to prevent land dispossession and forced evictions, notably the Land Reform Act 3 of 1996, the Extension of Security of Tenure Act 62 of 1997 (ESTA) and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE). These laws direct courts to assess all relevant circumstances before deciding whether or not to grant an eviction order, such as whether the land was used to produce food.

183 Department of Social Service and Population Gauteng. *Statement by Gauteng Social Services And Population Development Mec, Angie Motshekga, On The Provincial Government's Rollout Plan For The National Food Emergency Scheme And The Distribution Of School Uniforms To Needy Families*, (11 March 2003).

184 Department of Health Programmes, <<http://www.doh.gov.za/programmes/index.html>>.

185 <http://www.education.gov.za/>.

186 <http://www.sassa.gov.za/content.asp?id=1000000511>.

187 <http://www.sassa.gov.za/content.asp?id=1000000503>.

188 <http://www.foodbank.org.za/>.

189 <http://www.search.gov.za/info/>.

190 GDACE, submission to the SAHRC, (2009); The Department of Agriculture, Forestry and Fisheries, <<http://www.nda.agric.za/>>.

191 <http://www.epwp.gov.za/>.



It also sets in place legislation that makes possible the restitution of land rights lost as a result of apartheid era dispossession (e.g. the Restitution of Land Rights Act 22 of 1994).

A range of related initiatives are underway at a provincial level. An example of this is the Gauteng Province's Agricultural Development Strategy (2006), its agricultural potential atlas and the identification of seven agricultural hubs. The province supports emerging farmers and the development of homestead food gardens, community food gardens and school gardens support projects similar to those of the national government. However, the funding for these projects is limited.

The quantity of land transferred under the land reform programme increased sharply between 2005 and 2007, but levelled off in the following year. To date, the government has delivered about 4 million hectares of agricultural land to historically disadvantaged groups but the land reform target is to redistribute 21 million hectares of land by 2014.

The Department of Agriculture has increased targeted training, research and extension support programmes through the distribution of R170 million to provincial governments as part of a comprehensive rural development strategy and the development of a skills and human resource base. During 2008 –11, the Department will roll out a R500 million programme to address the problems with a lack of capacity and will improve extension services at a provincial level.

Civil society organisations such as NGOs and faith-based organisations (FBOs) play a major role in South Africa, though most of these organisations are active mainly in urban areas.<sup>192</sup> Furthermore, there are large gaps between the well funded civil society organisations and struggling community-based organisations (CBOs). CBOs tend to be very informally structured and poorly financed. Examples include soup kitchens, feeding schemes and organisations providing home-based care services.<sup>193</sup> There are few well developed social movements or organisations that deal with one's right to sufficient food in South Africa. As such, no significant litigation to promote the right to food has taken place.

## 6.2. The Relevant MDG, Targets and Indicators

Table 8: Targets and Indicators for Millennium Development Goal 1

Goal 1: Eradicate Extreme Poverty and Hunger	
Goals and Targets	Indicators
Target 2: Halve between 1990 and 2015, the proportion of people who suffer from hunger	<ul style="list-style-type: none"><li>▪ Prevalence of underweight children</li><li>▪ Proportion of the population below minimum of dietary consumption</li></ul>

## 6.3. Main Themes Arising

The main theme arising from the written submissions, the Commission's research and the public hearings related mainly to the subsidisation of farming projects and food gardens.

- Small scale farming: The biggest challenge currently facing farmers is the lack of production assets such as water, land and credit. Credit is considered the biggest problem as farmers do not have any collateral and without financial assistance from banks, there is little progress that a farmer can make. Furthermore, grants that are provided by provincial agriculture departments are too low for farmers to survive off and there are more requests for funding than the department is able to provide.
- Food gardens: The success of food gardens is limited by the lack of access to adequate conditional grants. In addition, the sustainability of food gardens is undermined by a high turnover of membership in the programme. Theft has also been a problem in the past with large containers of food being stolen. A study on the impact of community food gardens done two years ago illustrated the need for tailor-made projects for different groups of people, which the department is now considering.

<sup>192</sup> Important civil society actors involved in food delivery and security in SA: Food Bank South Africa (<http://www.foodbank.org.za/>); Food and Trees for Africa (<http://www.trees.co.za/>), Food Gardens Foundation (<http://www.foodgardensfoundation.org.za>), JAM (<https://www.jamint.com>), World Vision (<http://www.worldvision.org>), Robin Good Initiative (<http://www.robingood.ws>), Operation Hunger (<http://www.operationhunger.co.za>).

<sup>193</sup> Habib, A.M., Swilling, M., & Russell, B. *The size and scope of the non-profit sector in South Africa*. (2002).



- Assessment of programmes: Impact studies are needed to assess the success and gaps in programmes that provincial departments are implementing, particularly the training programme for farmers and the backyard gardens project.

### 6.3.1. Planning Systems

#### *Information gathering and monitoring*

The government has implemented the following monitoring and information systems in the food sector:

- The Food Insecurity and Vulnerability Information and Mapping Systems (FIVIMS) was implemented after 2006 in collaboration with the World Food Programme. It is a decision-making support tool that helps to systematically assemble, analyse and disseminate basic information on chronic and transitory food insecurity in the country.<sup>194</sup>
- The National Food Pricing Monitoring Committee of DAFF, which was appointed for a period of one year to investigate and advise government on food prices in South Africa.
- A monitoring system for tracking the impact of the food fortification programme implemented by the Department of Health with financial support from the Global Alliance for Improving Nutrition (GAIN), the United Nations Children's Fund (UNICEF) and the Micronutrient Initiative (2005/06).

#### *Budgetary planning and oversight: Department of Agriculture*

Budget data was obtained from the annual reports of DAFF.<sup>195</sup> Annual financial statements are recorded for a financial year (01 April to 31 March). This report illustrates both changes in the allocated budget for each financial year beginning in 2005/2006, as well as the annual percentage change in allocation.

**Table 9: Variance for the Former National Department of Agriculture (2005/06 to 2008/09)**

Financial Year	Inflation	Allocation	Spending	Variance	Nominal Growth	Real Growth
		R'000	R'000			
2005 / 2006	3.4	1 967 768	1 878 008	95.4%	-	-
2006 / 2007	4.7	2 367 630	2 218 894	93.7%	20.3	16.9
2007 / 2008	7.1	3 469 603	3 328 417	95.9%	46.5	41.8
2008 / 2009	6.8	2 937 748	2 847 871	96.9%	-15.3	-22.4

Budget expenditure for DAFF indicates that there has been a continuous increase in the budget allocation from the National Treasury between 2005/06 and 2007/08, but a sharp reduction in allocation and spending in 2008/09. For all the financial years studied, spending by DAFF was at least 3% less than the amount that was allocated to the department, with only 93.7% spent in 2006/07. While budget and allocation and spending increased between 2005/06 and 2007/08, allocation by 2008/09 decreased by 22.4% from 2007/08. This means that the impact of inflation was greater on expenditure than the budget allocated to the department.

<sup>194</sup>

Food and Insecurity and Vulnerability Information Mapping Systems <<http://www.fivims.org/>>.

<sup>195</sup>

Formerly known as Department of Agriculture.



The provincial expenditure by DAFF for the years 2005/06 to 2008/09 is provided in Table 10 below.

**Table 10: Expenditure for the Provincial Departments of Agriculture between 2005/06 and 2008/09**

Province	2005/06	2006/07	2007/08	2008/09 <sup>197</sup>
	R'000 000			
Eastern Cape	787	872	1 071	1 252
Free State	299	227	292	362
Gauteng	103	128	188	226
KwaZulu-Natal	790	842	722	1 158
Limpopo	981	1 024	1 004	1 099
Mpumalanga	443	398	547	672
Northern Cape	132	148	220	245
North West	322	440	419	553
Western Cape	259	266	326	358
<b>TOTAL</b>	<b>4 116</b>	<b>4 345</b>	<b>4 789</b>	<b>5 925</b>

The Limpopo province recorded the highest expenditure followed by the Eastern Cape and KZN. The lowest expenditure rates were recorded in Gauteng and the Northern Cape. In 2006/07, provincial expenditure was increased in each province except two, namely, the Free State in which expenditure decreased by 24% and in Mpumalanga which decreased by 10.2%.

Overall, the provincial budgets indicate an increase in provincial spending for DAFF. Nonetheless, the allocations remain insufficient relative to the number of applications for financial assistance and the programmes that the department has to implement.

#### 6.4. Progress Made in Terms of the Relevant MDG

The health and condition of children in a country is a reliable indicator of the wellbeing of the general population. In 1999, 60% to 73% of the South African population was food insecure, with 10% of children between six and 15 years not eating breakfast and 50% of children between one and nine years consuming less than half of the recommended daily allowance for key vitamins and minerals.<sup>197</sup> At least 21.6% of children between the ages of one and nine years are stunted, indicating chronic past under-nutrition.<sup>198</sup> Younger children (one to three years) and children living on commercial farms, tribal lands and rural areas are severely affected. The impact of being underweight affects 10.3% of children aged one to three, 18% of which live on commercial farms. Conversely, 6% of children in the one to nine year age group are overweight, with similar or poorer figures for adolescents and adults.<sup>199</sup>

The South African MDG Mid-Term Report, quoting the development indicators mid-term review released by the Presidency in June 2007, paints a picture of improvement in malnutrition figures. The report stated that severe malnutrition among children below five years old and the incidence of underweight children has decreased substantially.<sup>200</sup> It refers approvingly to the distribution of vitamin supplements to children and mothers seen at health facilities, and the progress made with regulations for the mandatory fortification of staple foods.<sup>201</sup> It nonetheless concedes that malnutrition remains “one of the contributors to child morbidity and mortality in South

196 Pre-audit outcomes.

197 Department of Health Integrated Nutrition Programme. *Provincial and National Demographic Socio-Economic and Health Indicators*, (2001), <<http://www.doh.gov.za/programmes/inp/docs/statistics.pdf>>.

198 Labadarios, D. National Food Consumption Survey (NFCS): Children Aged 1-9 Years, (1999).

199 Department of Health. *South Africa Demographic and Health Survey*, (1998).

200 From 88 971 cases in 2001 to 30 082 in 2005. South Africa Millennium Development Goals, Mid-term Country Report. September 2007.

201 Department of Health. The Integrated Nutrition Programme, Nutrition Directorate, <<http://www.doh.gov.za/programmes/inp/status.htm>>.



*Africa*". There are few clinics in rural areas and informal settlements, and very few of these clinics have access to medication. Those that do have medication on the premises have to deal with cases of theft. However, according to NGO sources, by July 2005, 3.9 million children (22% of the total number of children in the country) often or always went hungry because there was not enough food.<sup>202</sup> In addition, UNICEF stated that the proportion of moderately or severely underweight children under five years old has actually increased from 11.5% to 12% between 1995 and 2007. Nevertheless, the number of children under five years old that were extremely underweight decreased from 2.9% to 2%, during the same time period.<sup>203</sup> According to Operation Hunger, the incidents of kwashiorkor and marasmus have probably decreased, though the incidence of general malnutrition has increased substantially.

### **6.5. Findings on the Progress Made by the State on the Realisation of the Right**

Statistics about hunger and under-nutrition vary substantially and there is some controversy about the sources of data used to inform official statistics.<sup>204</sup> For example, civil society organisations consider information that is sourced through clinics, hospitals and local authorities to be unreliable and on occasion manipulated. NGOs that work in the field state that they are seldom consulted with requests for data or to verify statistics.<sup>205</sup>

Most of the state's food security programmes facilitate access to food through capacity-building and income generation. Though the intention of these programmes is laudable, they tend in effect to be temporary in nature and fail to address the long term food needs of South Africans. They also seem to have not had much impact on the ability of beneficiaries to get good jobs.<sup>206</sup> Other issues are the lack of attention given to the impact of climate change on food security;<sup>207</sup> the substantial gap between the scope and scale of food related support and relief programmes and the actual food needs on the ground.<sup>208</sup>

Such shortcomings are often related to a lack of institutional capacity and co-ordination, particularly at a provincial level. For example, Mr. Jacobs of the Belhar Community Forum states that "*to be quite honest, our South African government has some of the best policies in the world, but the very sad reality is that it lacks the political will and capacity to deliver*".<sup>209</sup> This is demonstrated by the variance between allocation and spending in some government departments, unfilled posts, under-skilled staff and the general inefficiency of service delivery. For instance, the national DAFF's ability to spend funding is very poor and the same can be said about some provinces, most notably KZN. Critically, the state does not ensure that the financial and human resources needed for implementation and service delivery are available. The programme is substantially underfunded, so much so that only a fraction of the total need is addressed and the programme, in principle, is not capable of facilitating the realisation of the right.

Adequate co-ordination between government departments and between government and civil society is lacking.<sup>210</sup> The government often funds NGOs to assist with its mandate but the actual financial support of NGOs and CBOs is generally insufficient and irregular. The better-resourced and popular NGOs tend to be privately financed due to inconsistent support from government. To a large extent the government insists that it can "do it all by itself" and therefore little co-ordination with civil society takes place.<sup>211</sup> In addition, government (local and provincial) departments do not adequately involve communities in decision-making and problem solving tasks but generally use the top-down approach.

202 Children Count. *Statistics on Children in South Africa*, <<http://www.childrencount.ci.org.za/>> . The source of these statistics is Statistics SA (2005) *General Household Survey 2004*. Pretoria, Cape Town: Statistics SA; Statistics SA (2006) *General Household Survey 2005*.

203 United Nations Statistics Division (note 85 above). However, it is possible that as the new WHO reference population is introduced, differences in the calculation of the estimates (using the old NCHS/WHO reference population or the new WHO reference population) could lead to discrepancies.

204 For example, the General Household Survey (2004 and 2005), the results of which were used in government estimations, substantially over- and under-estimated the number of children in various categories. There are also contradictions between the statistics put forward by the government and those put forward by NGOs and UNICEF.

205 Operation Hunger, pers comm, (2009).

206 Community Agency for Social Enquiry (CASE), submission to the SAHRC, (2009).

207 Agri SA, submission to the SAHRC, (2009).

208 More than 14 million people in the country are food insecure of which 11 million receive no social assistance grants from the state.

209 Belhar Community Forum, submission to the SAHRC, (2009).

210 Operation Hunger (note 206 above).

211 Oxfam, pers comm, (2009).



The duties of DAFF are co-ordinated by an integrated strategy and responsibilities and tasks are allocated to the different spheres of government. There is, however, much fragmentation and inefficiency in implementation. Programmes are not monitored effectively and there appears to be no clear allocation of authority and no outlined penalties for poor or non-performance and illegal activities.<sup>212</sup> Particularly at a provincial level, programmes are not always based on clear, measurable targets and indicators, and programmes that are said to focus on food insecurity sometimes do not have indicators designed to give effect to that focus.<sup>213</sup> *“There are no or very limited mechanisms in place to ensure meaningful monitoring, evaluations and corrective action of community development projects, programmes and processes.”*<sup>214</sup>

The real commitment of the government to food security has also been questioned in light of alleged corruption in food programs and the use of food aid as a political tool during the 2009 elections.<sup>215</sup> According to the Belhar Community Forum, *“during election campaigns a lot of food parcels are floating around, but once the elections are over then it is back to begging, doing odd jobs and scratching in dirt bins and dumping sites in order to make a living”*.<sup>216</sup> In addition, programs have also been criticised for a lack of outcomes. For instance, DAFF’s food garden initiative was criticised for its high failure rate. People are given tools and seeds and expected to farm with little or no training. The DoE has also been criticised for the low quality and inadequacy of meals offered to schools.<sup>217</sup>

Given these shortcomings, the state is not moving as expeditiously and effectively as possible to give effect to the right to food.

## 6.6. Recommendations

1. Conduct a policy review process with substantial stakeholder participation for greater policy efficiency and effectiveness.
2. Implement a more rigorous integrated planning process involving all relevant national, provincial and local government departments including NGOs and FBOs to ensure that targets and measures are measurable and meaningful.
3. Develop a cross-sectoral programme management approach for greater coherence and co-ordination between government departments and different spheres of government, making better use of civil society organisations to assist in service delivery.
4. Improve service delivery efficiency and effectiveness by focusing on the development of service delivery skills and capacities, particularly at a provincial and local government level.
5. By expanding the scope of programmes, aim at including food-stressed people outside the categories of vulnerable people so that they have access to food.
6. Pragmatically assess the negative impacts of the land tenure and land reform policies on one another and on food security with a view to balancing out these contradictory imperatives.<sup>218</sup>
7. Design and implement more comprehensive and meaningful support programmes for agriculture in support of adaptation to climate risks.

212 Operation Hunger (note 206 above).

213 For example, DAFF’s Livelihoods, Economics and Business Development Programme supports emerging farmers and aims at ensuring household food security. However, the measures are high level bureaucratic ones that do not relate directly to the achievement of actual outcomes in respect of food security. Eg the number of farmers that gain access to financial services.

214 Belhar Community Forum (note 210 above).

215 “Cope Calls for Zuma Security Probe” *Mail and Guardian*, (17 March 2009), <<http://elections.mg.co.za/story/2009-03-17-cope-calls-for-zuma-security-probe>>.

216 Belhar Community Forum (note 210 above).

217 Operation Hunger (note 206 above).

218 Agri SA (note 208 above).

# Chapter 7



*The right to social security*



## CHAPTER 7: THE RIGHT TO SOCIAL SECURITY

### 7. INTRODUCTION

This chapter addresses the progressive realisation of the right to social security over the period 2006 to 2009. The South African government's commitment to achieving the progressive realisation of this right is reviewed against its international obligations and the Constitution. In addition, South Africa's progress towards meeting the relevant MDG is assessed (Goal 1: Target 1: Halve between 1990 and 2015 the proportion of people whose income is less than US\$1 per day).

While this chapter examines the expansion of South Africa's system of social grants within the broader context of social security, this analysis is prefaced by the understanding that social grants in and of themselves do not necessarily equate with the reduction of poverty. It must be understood, therefore, that the provision of social grants alone are unlikely to fulfil either the obligation concerning the progressive realisation of the right to social security or MDG 1. The chapter goes on to examine the main themes arising from the analysis and sets out in detail the specific findings concerning the progress made by the state in the progressive realisation of the right to social security. The findings are organised under four headings, namely, access, availability, appropriateness and acceptability. Thereafter, the conclusions are summarised in respect of the principal themes and finally, a series of recommendations are made.

In the analysis, it is argued that the South African government has not truly fulfilled its mandate with respect to MDG 1 or, in particular, with respect to the progressive realisation of the right to social security. Notwithstanding the significant expansion of the social grant system, it is argued that the government has fallen short in giving true meaning to the progressive realisation of social security by not providing the considerable interventions required to ensure that the poor have the maximum possible opportunities to enter or prepare for labour market participation.

#### 7.1. The Meaning and Content of the Right

*"What is the primary aim of society? It is to maintain the inalienable rights of man. What is the foremost of these rights? The right to exist. Therefore, the first social law is that which guarantees all members of society the means of existence."<sup>219</sup>*

As the above quote demonstrates, the right to basic material sustenance has been firmly established in the human rights discourse as at least as important as other basic rights for many years. The notion of the right to social security has been intrinsically linked to other key components of human liberation. As it has so often characterised the push for fundamental socio-economic and political change in history, the right to the basic means for a decent existence has also underpinned the South African transition.

A human rights-based approach to social security must necessarily 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 socio-economic rights. It must integrate national, regional and international standards and commitments on social security issues into public policy. The UN High Commissioner for Human Rights<sup>220</sup> emphasises that economic and social rights 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, particularly critical in a middle-income developing country,<sup>221</sup> include:

- 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

<sup>219</sup> Quoted in Labica, G. *Robespierre - une politique de la philosophie*. (1990), 53-54.

<sup>220</sup> United Nations Development Fund. *Applying a Human Rights-Based Approach to Development Cooperation and Programming*, (2006).

<sup>221</sup> 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.

The *White Paper on Social Welfare* published in 1997 provides a clear definition of Social Security for the South African context:<sup>222</sup>

*Social Security covers a wide variety of public and private measures that provide cash or in-kind benefits, firstly, in the event of an individual's earning power permanently ceasing, being interrupted, never developing or being exercised only at an unacceptable social cost and such person being unable to avoid poverty and secondly, in order to maintain children. The domains of social security are poverty prevention, poverty alleviation, social compensation and income distribution.*

The White Paper then goes on to define major factors in the South African social security system:

- (a) Private saving.
- (b) Social insurance (joint contributions by employer and employees to pension-typed funds).
- (c) Social assistance (non-contributory and income tested benefits – i.e. social grants), and
- (d) Social relief (short term measures designed to tide people over a particular crisis).

Perhaps because the poor, and those employed in the informal sector are largely excluded from social security measures under a) and b), the vast majority of verbal and written testimony concerning social security at the hearings was relevant to c) and d), social assistance and social relief respectively.

In programmatic terms the definition of social security (as utilised by the National Treasury and other government departments) includes such things as unemployment insurance, compensation funds and the Road Accident Fund. More broadly defined in the South African context, social security may also include other programmatic efforts by the National and Provincial Departments of Social Development (DoSD) to alleviate poverty. Such efforts include the National Food Relief Programme which aims to distribute food to poor individuals and families experiencing hunger. The Department funds and provides a policy framework for the delivery of more general social welfare services and functions, which are delivered via the provincial government and NGO structures. Such services and functions include:

- The development of policy, legislation and strategies which promote the rights of vulnerable groups.
- The creation and strengthening of programmes catering for the support and development of vulnerable persons and groups.

It must be noted that the overwhelming proportion of concerns expressed through the submissions and testimony at the Commission's hearings concerned programmes of social assistance and social relief, particularly the social grant programmes now administered by the South African Social Security Agency (SASSA). Social assistance and social relief are the most direct means (but not the only means) to address and fulfil MDG 1, namely, the elimination of extreme poverty and hunger.

#### **7.1.1. National legislation and international agreements**

##### ***The Constitution of the Republic of South Africa***

The basis of the human right to social security under law in South Africa is set out in section 27 (1) of the Bill of Rights in the Constitution which states that everyone has the right to have access to:

- (a) health care services, including reproductive health care;
- (b) sufficient food and water; and
- (c) social security, including if they are unable to support themselves, appropriate social assistance.

Critically, section 27 (2) provides that the state must take reasonable legislative and other measures, within its available resources, to achieve the *progressive realisation* of this right.



### **Social Assistance Act 1992 (as amended) and regulations**

This Act is the primary piece of legislation giving effect to the constitutional obligation to provide social security. The Act and regulations set out the governing criteria for the social security system and the regulations set out the eligibility for various social grants.

### **South African Social Security Act 9 of 2004**

This Act shifted the responsibility for providing social security from the provinces to the national sphere of government and created a specialist agency, the South African Social Security Agency, to be responsible for the delivery of social grants.

### **Children's Act (2005) and Children's Amendment Act (2007)**

Sub-section (9) of this act states that a child-headed household may not be excluded from any grant or other form of social assistance merely because the household is headed by a child. Subsection 5 (a) makes provision for a child head-of-household, or the designated adult, to collect any social security payment for which the household is eligible under the Social Assistance Act (2004).

A range of national policies and strategies also create a range of obligations around the progressive realisation of social security and the elimination of extreme poverty. These include (but are not limited to):

- Department of Social Development Strategic Plan 2007–2010. The development of a Comprehensive Social Security system is one of five key programmes outlined in this document.
- Draft National Policy of Families. This policy calls for a comprehensive integrated social security system to benefit families.
- Orphaned and Vulnerable Children (OVC) Policy Framework and Action Plan.
- National HIV/AIDS and STI Strategic Plan for South Africa (2007–2011).

### **International Covenant on Economic Social and Cultural Rights (ICESCR)**

Article 9 of the Covenant includes a general clause on the right to social security. The clause simply states that “*the states parties to the present covenant recognise the right of everyone to social security, including social insurance*”.

In February 2008, the UN Committee on Economic, Social and Cultural Rights promulgated General Comment No. 19: *The Right to Social Security*. This document greatly elaborates on, and gives specific objectives to Article 9 of the ICESCR. *Inter alia*, the General Comment identifies nine principal branches which a social security system needs to cover. These are health care; illness; old age; unemployment; employment injury; family and child support; maternity; disability; survivors and orphans.

The General Comment mandates special topics of broad application and the basis for many of these resides in the Constitution and/or in South African case law. These include the principles of non-discrimination and equality; gender equality; workers inadequately protected by social security (part-time, casual, self-employed and home-workers); informal economy; indigenous peoples and minority groups; non-nationals (including migrant workers, refugees, asylum-seekers and stateless persons); internally displaced persons and internal migrants.

While this is a highly relevant document in assessing normative standards of social security, it must be noted that the government has not to date ratified the ICESCR.

### **UN Convention on the Rights of the Child**

UN member states are obliged to recognise the right of every child to social security and call on states to take the necessary measures to achieve the full realisation of this right with recourse to available resources and national law.



## 7.2. The relevant MDG, Targets and Indicators

Social security is most relevant to the first of the eight MDG.

**Table 11: Targets and Indicators for Millennium Development Goal 1**

<b>Goal 1: Eradicate Extreme Poverty and Hunger</b>	
<b>Goals and Targets</b>	<b>Indicators</b>
Target 1: Halve between 1990 and 2015 the proportion of people whose income is less than US\$1 per day.	<ul style="list-style-type: none"> <li>▪ Proportion of population below \$1 per day.</li> <li>▪ A Poverty headcount (percentage of population below national poverty line).<sup>224</sup></li> <li>▪ Poverty gap ratio (i.e. the incidence and depth of poverty).</li> <li>▪ Share of the poorest docile in national consumption.</li> </ul>

## 7.3. Main Themes Arising

### **Social Grants do not equate to reduction of poverty**

A consistent theme at the hearings was that while the government has targeted poverty relief measures reasonably well (particularly in terms of social grants), such interventions have not been successful in significantly reducing poverty overall. As outlined in the following section, there are various views on the extent to which poverty rates have slightly increased or decreased. However, there appears to be broad consensus in the literature and among stakeholders that the current direction of social development/social security policy will not be successful in substantially reducing poverty rates. Similarly, the public hearings revealed a broad belief that the government interprets its obligation around the progressive realisation of the right to social security in terms of targeting specific social grants as opposed to ensuring that the poor have the maximum possible opportunities to lift themselves out of poverty.

### **Poor governance**

The theme of poor governance of social development programmes, at both the national and provincial levels was dominant in much of the oral submissions. This included a range of difficulties from extremely poor service at social grant pay points to inadequate inter-departmental co-ordination on anti-poverty measures. In sum, it is clear that the poor service co-ordination and programme implementation at key departments is militating against the progressive realisation of the right to social security and to the achievement of MDG 1.

The lack of adequate mechanisms to ensure meaningful public participation in the development of social security policy as well as the oversight of programmes was another central theme. The marginalisation of particularly vulnerable groups through inadequate access, coverage or service was also a broad and serious concern that was raised at the hearing. Such groups included child-headed households, people in isolated communities, people with disabilities and refugees. Unsurprisingly, concerns over the inadequate assistance for people living with HIV and AIDS were articulated quite strongly and is indicative of the continued marginalisation of this vulnerable group.

The general inadequacy of social grant benefits, particularly the CSG, and the social relief of distress was an identified theme. In the course of both the hearings and in the compilation of this report, a clear picture emerged of the lack of any strong linkages between the receipt of a social grant and the provision of opportunities for recipients to prepare for the labour market.

A picture also emerged of a government trying to develop the correct “image” in terms of its social development efforts but without truly ensuring that the significant policy and administrative shifts required to make such images meaningful were implemented. For example, the change in name to the National Department of *Social Development* from the Department of *Social Welfare* has not truly been accompanied by a substantial paradigm shift from mere provision to socio-economic empowerment. Similarly, evidence suggests that the creation of a specialist *Social Security Agency* has not greatly improved efficiency or quality of service.

<sup>223</sup> South Africa has no official poverty line (a fact of significant debate at the hearings). For the purposes of addressing this indicator this report uses a figure of R365 per month in 2007 constant Rand terms.



## 7.4. Progress Made in Terms of the Relevant MDG

### **Per Capita Real Income**

Trends identified by the All Media Products Survey (AMPS) and Income & Expenditure Survey (IES) datasets for 2007,<sup>224</sup> showed an improvement in the incomes of the poorest rising from R783 per month to an income of R1 032 per month (in 2007 Rand). This is up from R924 in 2005 and R980 in 2006. Notably, the income of the richest 10% of the population increased at a faster rate.<sup>225</sup> These findings, however, must be viewed with caution. In particular, the AMPS data indicating a decline in poverty is somewhat controversial. There is also a contention among some in the field that the AMPS data, which is used primarily for private sector marketing purposes, is not as rigorous in its estimation of income changes in the lower income brackets as it is in middle and upper income brackets.<sup>226</sup>

The AMPS findings on income are also at odds with trends uncovered in other studies. Statistics compiled by the South African Institute for Race Relations in 2007,<sup>227</sup> for example, showed that between 1996 and 2005, the proportion of South Africans living on less than \$1 per day increased from 4.4 % to 8.8% of the population.

Budlender also noted the irony of statistical findings that incomes among the poorest have “increased” as a result of more widespread social grant uptake “*a finding that the income of recipients has gone up is rather trite, given that the grant consists of income*”.<sup>228</sup>

### **Percentage of Total income**

The percentage of total income for the poorest 10% remained steady at 0.6% for 2007. This figure was identical for 2005 and 2006, down slightly from the 2004 figure of 0.7%.

### **Depth of Poverty**

The percentage of people living on R365 per month, in 2007 constant rand terms, has declined slightly each year from 2004 to 2007. In 2004, 22% of South Africans lived on less than this amount and this declined to 21%, 20%, and 19% in each respective year.<sup>229</sup>

### **Testimony and Submissions**

The overwhelming consensus at the hearings, expressed through both the written and oral submissions, was that the South African government has not made substantial progress towards fulfilling its obligations concerning MDG 1. Some of the submissions were directly stated and couched in terms of this MDG itself, while in other instances it was strongly inferred.

As noted by the Community Agency for Social Enquiry (CASE),<sup>230</sup> the social security system is one of three prongs of an agenda by the government to address extreme poverty. While CASE, among many other groups, recognised the great progress made in expanding the social security system, it was argued time and time again that this did not equate with an overall reduction in poverty.

Several submissions argued, and provided evidence, that poverty levels have increased in South Africa, effectively moving the government in the opposite direction of the fulfilment of MDG 1. Drawing from a range of empirical sources, the Black Sash<sup>231</sup> maintained that “*the state can neither claim to have reduced the breadth nor depth of poverty in South Africa*”. The Black Sash illustrated their contention, *inter alia*, by utilising a study by Leibbrandt<sup>232</sup> which showed that there had been a pronounced decline for middle and lower income people, based on the 1996 and 2001 census figures. A further study by Meth<sup>233</sup> showed an increase in the number of poor people. Building

224 Eighty/20 Consulting, private presentation, (2009).

225 The Presidency: Republic of South Africa. *Poverty and Inequality Indicators*, (2008).

226 Eighty/20 Consulting (note 225 above).

227 South African Institute of Race Relations. South Africa Survey, (2006/2007).

228 Budlender, D. *Feasibility and appropriateness of attaching behavioral conditions to a social support grant for children aged 15-17 years*. (2008).

229 The Presidency (note 226 above).

230 CASE (note 207 above).

231 Black Sash, CASE, National Welfare Forum (NWF) and Studies in Poverty and Inequality Institute (SPII), submission to the SAHRC, (2009).

232 Leibbrandt, M. and Woolard, I. *Towards a Poverty Line for South Africa: A Background Note*, (2006).

233 Meth, C. Income poverty in 2004: A second engagement with the recent Van der Berg et al figures, Working paper No. 47, (2006).



on a range of studies, the Commission's ESR Unit<sup>234</sup> quoted statistics released by the South African Institute for Race Relations from 2007 indicating a general worsening of poverty.

It was either inferred or directly stated by several of those testifying (and in the written submissions) that it is the most vulnerable groups in society who are the worst affected by the failure to eradicate extreme poverty and hunger. *Epilepsy South Africa*,<sup>235</sup> for example, noted that persons with disabilities are often among the poorest of the poor, being either generally ignored or "*treated in a way that does not correspond with their aspirations of socio-economic integration*".

A conclusion drawn by the Commission's ESR Unit<sup>236</sup> encapsulates one of the main concerns expressed by many regarding the realisation on MDG 1: "Social assistance programmes have been well targeted and have had an impact but have done little to reduce poverty."<sup>237</sup> The Unit also recognised,<sup>238</sup> however, that there has been an improvement in the access to basic services and that this is an extremely positive development. However, with the increase in overall poverty and inequality, the Unit argued that merely improving access to services alone will not make a substantial qualitative improvement in the ordinary lived experience of the poor.

Such arguments underlie the critical importance of addressing *income poverty* in addition to ensuring access to services if extreme poverty is to be eradicated in South Africa per MDG 1. The link between extreme income poverty and poor nutritional outcomes (eradication of hunger being a part of MDG 1) was emphasised several times in the various submissions. The Alliance for Children's Access to Social Security (ACESS) for example, quoted a 2007 UNICEF study showing that food consumption increased when cash grants were made available.<sup>239</sup>

The exclusion of a huge segment of the population – the adult able bodied unemployed – from social grant entitlement was highlighted on numerous occasions at the public hearings. It is submitted that the continued exclusion of people who may be destitute but do not qualify for assistance is non-compliant with the MDG. Ironically, the social grant aimed at temporarily assisting those in utter destitution, Social Relief of Distress (SRoD) was identified as the most mismanaged and unevenly applied social grant of all and some provinces appear to run out of money for this critical grant. A testifier at the public hearings felt that the SRoD "*is so much of a mystery because it doesn't seem like it is communicated to the public*". Another echoed this concern noting the very small numbers of people who have been able to access this grant.

The low level of participation by national and provincial departments at the hearings made the task of probing the implementation of MDG 1 extremely difficult because there was barely an element of "self assessment" to gauge. One of the few government participants at the hearings was the Western Cape Department of Social Development which submitted that it could not provide an assessment as to the progress in meeting the MDG due in part to the lack of baseline data. A review of that department's strategic goals does indeed suggest that they are not well informed by the MDG.<sup>240</sup> The Annual Report of that department makes no reference to the MDG in its benchmarks. Similarly, in its 2007/08 Annual Report, the National Department of Social Development (DSD) also made little mention of the MDG.

234 SAHRC (note 2 above).

235 Epilepsy South Africa, submission to the SAHRC, (2009).

236 Ibid.

237 Ibid Page 5.

238 Ibid.

239 Submission by the Alliance for Children's Access to Social Security (ACESS): Grants for children infected and affected by HIV/AIDS.

240 Western Cape Department of Social Development, Annual Report 2007/08.



It is worth noting that the Limpopo Department of Health and Social Development did present the Commission with an outline of programmes aimed at fulfilling MDG 1. The need to “attain” the relevant MDG is briefly referenced in the department’s Annual Performance Report.<sup>241</sup> However, it is evident that the Limpopo provincial government must falter here because there is no national framework or support mechanism to help define and facilitate such implementation.

In summation, there was a strong sense that there is no coherent, nationally coordinated strategy in South Africa to eradicate extreme poverty and hunger, and that the existing social security system is not comprehensive enough to reach the MDG of eradicating extreme poverty.

#### 7.4.1. Planning Systems

##### **Information gathering and monitoring**

The fundamental difficulty of monitoring the extent of the achievement of the MDG, and in gathering information towards that end, was best summed at the hearings by the representative of the Western Cape Department of Social Development. She was clear that her department could not comment on the extent to which it was achieving the MDG largely because of the lack of *baseline data*. There are no official targets, for example, promulgated for the provincial government of the Western Cape based on the goals. By extension, there are no targets for individual departments of the provincial government.

While there is barely a mention of the MDG in the Annual Report of the National Department of Social Development, there is acknowledgement concerning the progressive realisation of the right to social security. The Department’s Programme 2 is termed *Comprehensive Social Security*, the stated objective of which is: “*To develop and monitor policies for a comprehensive social security system; develop norms, standards and guidelines for implementation; develop macro-finance modelling to inform policy decisions; and assess the social, economic and fiscal impact of social security programmes*”.

Yet, it is clearly the view of many in civil society that the lack of implementation of clear national benchmarks, baselines and goals is characteristic of the government’s approach to social security. The lack of these elements means, in part, that information gathering and monitoring toward the objective of assessing the progressive realisation of the right to social security is very difficult from an “empirical” perspective.

“*The progressive realisation of the right to social security*” is a stated output and is indeed an output of the DoSD’s Social Assistance sub-programme. However, when the performance measures and targets of this output are examined, it is difficult to make the case that such measures and targets are in fact contributing to “progressive realisation” as civil society and the Commission have defined it.

As alluded to by the former Commission’s CEO, Adv Tseliso Thipanyane, at the hearings, it is instructive to examine Paragraph 68 of the Committee on Economic, Social and Cultural Rights, General Comment 19. This Paragraph states in part that a national strategy and plan of action to realise the right to social security should (in part) “*... set targets or goals to be achieved and the time-frame for their achievement, together with corresponding benchmarks and indicators, against which they should be continuously monitored; and contain mechanisms for obtaining financial and human resources*”.

The absence of the National Department of Social Development at the hearings, (or indeed of any national government agency with the exception of Statistics South Africa) has made it very difficult to determine exactly what information gathering and monitoring mechanisms the national government is utilising in terms of social security. An examination of the DoSD’s Annual Report actually raised more questions than it provided answers in this regard. What was indeed striking was the lack of availability of data to properly inform policy planning and decisions. The lack of adequate data emerged from the submission of Stats SA which stated that only 54% of the required data was populated in the Millennium Development Goal Country Report in 2007. This perhaps exemplifies what Adv Thipanyane later underlined as an ongoing source of frustration, that of government departments providing statistics without the necessary context to make them indicative or meaningful.



It is also relevant to note that Paragraph 76 of General Comment 19 underlines the importance of states, once having identified appropriate national indicators for the right to social security, setting up appropriate national benchmarks. Furthermore, under Paragraph 76, the Committee proposes to engage with state parties in an exercise of “scoping” so that they (the Committee and the state party) would jointly consider indicators and national benchmarks, which will then provide the targets to be achieved during the next reporting period. The paragraph continues:

*“In the following five years, state parties will use these national benchmarks to help monitor their implementation of the right to social security. Thereafter, in the subsequent reporting process, state parties and the Committee will consider whether or not the benchmarks have been achieved, and the reasons for any difficulties that may have been encountered. When setting benchmarks and preparing their reports, state parties should utilise the extensive information and advisory services of the United Nations specialised agencies and programmes.”*

This is significant as the services of the UN are being offered to states on the very issue of social security benchmark development and the monitoring and evaluation thereof. It is therefore incumbent upon state parties to make use of these services.

In general, the striking lack of information from the Departments of Social Development across the country (in addition to other relevant organs of state) makes it extremely difficult to monitor the impact of public interventions to reduce poverty and hunger and to assess the extent of the progressive realisation of the right to social security.

Many of the frustrations expressed in oral and written submissions concerning poverty measurement as well as general information gathering and monitoring were remarkably well mirrored in the Consolidated Synthesis Report of the Dialogues for Action<sup>242</sup> (held in late 2008). Some of the gaps concerning MDG 1 (a) (income poverty) that were identified in the report were reflected in the testimony and submissions, to varying degrees. These gaps were:

1. The inadequacy of poverty lines compared with a relative measure of an “adequate standard of living”, the latter standard suggesting much greater public input into the definition process.
2. The need to complement existing poverty measurements by a measure of “deprivation” which would account for other parts of the poverty equation aside from income.
3. The need for more disaggregated information data to identify needs/issues in particular groups and categories (e.g. refugees, people with disabilities).

The Western Cape Department of Social Development’s submission that it could not provide an assessment as to the progress in meeting the MDG, due in part to the lack of baseline data, is indicative of a broader problem in government.

The Commission’s ESR Unit argued that there must be a broad agreement through societal consultation on a poverty datum line. At the hearings, Cameron Jacobs, in response to the testimony provided by Stats SA, noted that there is very little public engagement around the development of a poverty line. He questioned why there was a lack of social dialogue given that Stats SA is responsible for developing a poverty line.

### **Budgetary planning and oversight**

As noted by IDASA<sup>243</sup> the 2008/09 budget evinced an increased prioritisation in social spending.

Broadly defined, consolidated expenditure on social protection increased from R72.3 billion in 2005/06 to an estimated R118.1 billion in 2009/10. This represents an increase from 4.6% to 4.8% of GDP over this period. Proportionally, large shares of this overall budget go to the Social Development and Education Departments respectively.

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Hoffmann, F. *Consolidated Synthesis Report. Dialogues for Action: Human Rights and MDGs*, (Africa and Asia Regional Dialogues), (2008).

243

Institute for Democracy in Africa (IDASA). *An immediate Response to Budget*, (2009).



According to IDASA, approximately 13.4 million South Africans received a social grant of some type in the 2008 calendar year.<sup>244</sup> In the 2009/10 financial year, expenditure on grants rose to R80.4 billion from R71.2 billion in 2008/09. The budget projection is that spending on social grants will increase by an average annual rate of about 10.2% over the Medium Term Expenditure Framework (MTEF), although the rate of growth of beneficiaries is expected to reach 11.1% over the same period. Taking into account SASSA administration costs, the overall social grant budget will reach R85.5 billion in 2009/10. This constitutes 3.5% of GDP which represents a slight increase from the 3.3% estimate for 2008/09.<sup>245</sup> However, it is interesting to note that, as illustrated by its medium term estimates on social grant expenditure, the National Treasury aims to contain this percentage. As illustrated in Table 12 below, the National Treasury aims to contain social grant-related expenditure to 3.5% of GDP in the 2010/11 financial year and then actually decrease it to 3.4% in the 2011/12 financial year.

**Table 12: Social grants expenditure in R millions and as a percentage of GDP, 2005/06 to 2011/12<sup>246</sup>**

<b>R million</b>	<b>2005/06</b>	<b>2006/07</b>	<b>2007/08</b>	<b>2008/09</b>	<b>2009/10</b>	<b>2010/11</b>	<b>2011/12</b>
					<b>Preliminary outcome</b>	<b>Medium-term estimates</b>	
Social grants transfers	50 708	57 032	62 467	71 161	80 380	88 126	95 237
SASSA administration	3 324	3 819	4 551	4 610	5 135	5 589	6 047
<b>Total</b>	<b>54 032</b>	<b>60 851</b>	<b>67 018</b>	<b>75 771</b>	<b>85 515</b>	<b>93 715</b>	<b>101 284</b>
<i>Percentage of GDP</i>	3.4%	3.4%	3.2%	3.3%	3.5%	3.5%	3.4%

<sup>244</sup> The government's Social Pension System (SocPen) would suggest that this figure is lower (see table 2), closer to 12.75 million recipients as opposed to IDASA's calculations of 13.4 million. This may be because the Socpen figures expressed in Table 2 take a "snap shot" – in this example April 2008, of the total number of beneficiaries at one time. The IDASA figure is an estimate of the total number of people who received a grant in FY 2008.

<sup>245</sup> IDASA (note 244 above).

<sup>246</sup> National Treasury, Budget Review, 6, (2007).



Table 13 illustrates the significant growth in social grant uptake since 2004. The average annual growth rate in the numbers of social grant beneficiaries was 9.2% over the period April 2004 to April 2009.

**Table 13: Social grants beneficiary numbers by type of grant and by province, 2005 to 2009**

Type of grant	April 2005	April 2006	April 2007	April 2008	April 2009	% growth (average annual)
Old age	2 093 440	2 144 117	2 195 018	2 218 993	2 324 615	2.7%
War veterans	3 343	2 832	2 340	1 963	1 649	-16.2%
Disability	1 307 551	1 319 536	1 422 808	1 413 263	1 404 884	1.8%
Foster care	252 106	312 614	400 503	443 191	487 510	17.9%
Care dependency	88 889	94 263	98 631	101 836	105 909	4.5%
Child support	5 661 500	7 044 901	7 863 841	8 195 524	9 061 711	12.5%
<b>Total</b>	<b>9 406 829</b>	<b>10 918 263</b>	<b>11 983 141</b>	<b>12 374 770</b>	<b>13 386 278</b>	<b>9.2%</b>
<b>Province</b>						
Eastern Cape	1 743 007	2 094 642	2 244 303	2 291 898	2 507 094	9.5%
Free State	596 083	678 522	723 698	755 665	808 438	7.9%
Gauteng	1 165 679	1 318 981	1 406 445	1 451 967	1 571 129	7.7%
KwaZulu-Natal	2 149 969	2 498 888	2 931 722	3 033 463	3 275 005	11.1%
Limpopo	1 412 882	1 640 032	1 751 512	1 798 859	1 956 601	8.5%
Mpumalanga	704 070	836 451	901 386	925 171	1 006 932	9.4%
Northern Cape	188 578	213 512	232 102	307 095	259 279	8.3%
North West	777 722	888 065	1 001 629	980 018	1 118 912	9.5%
Western Cape	668 839	749 170	790 344	830 634	882 888	7.2%
<b>Total</b>	<b>9 406 829</b>	<b>10 918 263</b>	<b>11 983 141</b>	<b>12 374 770</b>	<b>13 386 278</b>	<b>9.2%</b>



Table 14 illustrates the growth in social grant beneficiary numbers since 2005. Particularly notable is the growth in claim rates for carers of children, namely the CSG and Foster Care Grant.

**Table 14: Social grant expenditure numbers by type of grant and province: 2005/06–2011/12**

R million	2005/06	2006/07	2007/08	2008/09	2009/10	2010/11	2011/12	% growth (average annual)
Old age	19 470	21 222	22 801	25 992	28 500	29 902	31 067	8.1%
War veterans	28	25	22	20	17	15	13	-12%
Disability	14 099	14 261	15 280	16 600	17 218	18 209	19 158	5.2%
Grant-in-aid	57	67	87	123	130	137	145	16.8%
Foster care	1 996	2 851	3 414	3 943	4 701	5 557	6 473	21.7%
Care dependency	916 14	1 006	1 132	1 322	1 521	1 592	1 655	10.4%
Child support	143	17 559	19 625	22 537	28 158	32 568	36 568	17.2%
Social relief of distress	-	41	106	624	135	146	158	
<b>Total</b>	<b>50 709</b>	<b>57 032</b>	<b>62 467</b>	<b>71 161</b>	<b>80 380</b>	<b>88 126</b>	<b>95 237</b>	<b>11.1%</b>
<b>Province</b>								
Eastern Cape	9 733	10 599	11 636	12 673	-	-	-	-
Free State	3 352	3 706	4 122	4 603	-	-	-	-
Gauteng	6 130	6 747	7 318	8 322	-	-	-	-
KwaZulu-Natal	11 898	13 890	15 105	17 704	-	-	-	-
Limpopo	6 815	7 636	8 439	9 731	-	-	-	-
Mpumalanga	3 476	3 928	4 322	4 989	-	-	-	-
Northern Cape	1 177	1 285	1 622	1 960	-	-	-	-
North West	4 186	4 912	5 187	5 747	-	-	-	-
Western Cape	3 942	4 329	4 716	5 432	-	-	-	-
<b>Total</b>	<b>50 709</b>	<b>57 032</b>	<b>62 467</b>	<b>71 161</b>	<b>-</b>	<b>-</b>	<b>-</b>	<b>-</b>

**Table 15: Department of Social Development: Actual Expenditure 2005/06 to 2007/08**

R'000	2005/06	2006/07	2007/08
	55 067 840	61 676 087	67 191 404

Table 15 (above) indicates the growth of actual expenditure by the National Department of Social Development (NDoSD) for the past three financial years. It is more instructive, however, to note the increased expenditure in "real" terms (i.e. inflation adjusted). Real growth in NDoSD expenditure from the financial year 2005/06 occurred at a rate of 8.6% and from 2006/07 to 2007/08 at a rate of 4.2%.

It is highly significant that in 2007/08 financial year, the DSD spent a statistical 100% of its overall budget allocation.<sup>247</sup>

## 7.5. Findings on the Progress Made by the State on the Realisation of the Right

### 7.5.1. Access and Availability

By any measure it is fair to say that access to social security and particularly to social assistance has expanded considerably in recent years. According to the South African Social Security Agency (SASSA), within all the grant types there was a growth rate of 5.2% in 2008/09 as compared to the 2007/08 growth rate of 3.4%. There was a more spectacular uptake with specific grants. From 1996/07 to 2008/09 there was high annual average growth rate experienced; within the CSG of 147.53%, Care Dependency Grant of 44.30% and Foster Care Grant of 23.90%.<sup>248</sup>

<sup>247</sup> National Department of Social Development: Annual Report 2007/08.

<sup>248</sup> Extrapolated from SASSA statistical reports published on [www.sassa.gov.za](http://www.sassa.gov.za).



The fundamental question is whether such growth, in and of itself, truly amounts to the progressive realisation to the right to social security. The sense of much of the testimony and submissions in terms of the realisation of the right to social security is well encapsulated by CASE, “*The social security system is one of the most clearly articulated anti-poverty programmes and costs the state 3.5% of its Gross Domestic Product. Currently, more than 12 million people access social assistance in the form of grants. Two thirds of these recipients receive the Child Support Grant. However, the manner in which the social security system is implemented excludes many people from accessing poverty relief!*”<sup>249</sup>

While there was widespread acknowledgement that the safety net had been expanded to reach more and more people over time, numerous arguments were presented to the effect that this expansion in and of itself could not be seen as *progressive realisation* per the constitutional obligation. It is critical to note that there are still many in need who have not accessed the social security infrastructure. Among these vulnerable groups are child-headed households.

### **Child-headed households**

Of great concern was the lack of information on social grants being received by child-headed households. As outlined in Section 4.4.1, the Children’s Act (2005) makes provision for a child head-of-household, or the designated adult, to collect any social security payment for which the household is eligible. However, there must be much greater effort to inform institutions in communities which come into contact with child-headed households of this right. Furthermore, these households need to be capacitated and assisted in securing the much needed social grant.

### **Extension of the Child Support Grant to the age of 18 years old**

The gradual extension of the eligibility of the CSG from a cap of a child of seven years to 15 years must be acknowledged as positive and in the spirit of the relevant constitutional obligations. However, at the hearings and in the recent literature,<sup>250</sup> the lack of the availability of CSG for children above 15 years old is seen as highly problematic. Two of the most alarming concerns of the many that were expressed in respect of the CSG were: 1) The loss of the CSG at 15 years seems to be linked to a higher school drop-out rate, and 2) For girls in particular, the loss of the benefit may encourage dependency on older males the result of which may lead to sexual exploitation. Therefore, the consensus was that the children’s right to social security could only be progressively realised if the CSG is extended to 18 years old.

ACESS<sup>251</sup> contended that the difficulties around birth registrations constitute one of the main barriers to eligible children receiving a CSG. Based on their recent research on the issue, ACESS has calculated that there are approximately 1.7 million eligible children who are not receiving a CSG. As one measure to address this, ACESS suggested a system of data matching across the computerised data bases of key departments in order to identify children without birth registrations. Many such children who are not registered at the Department Home Affairs, for example, may be registered on the data bases of the Departments of Health or Education.

### **Employment generation /access**

The great difficulty for many communities and groups of people in accessing employment opportunities and in obtaining the skills demanded by the economy was emphasised throughout the hearings. To sum up a few main points:

- It was emphasised that a receipt of a social grant in a household helps facilitate female members of that household in particular to undertake broader job search efforts.
- Research has clearly shown that the national government’s Expanded Public Works Programme (EPWP), a central tier of its anti-poverty strategy, has not made any significant impact on poverty rates or the depth of poverty.
- The need for a cash social grant linked to a specific skills training programme for the unemployed youth was proposed.
- The need to link social grants to income generating activities was emphasised.

249 CASE (note 207 above).

250 An array of reports and policy documents including several by ACESS and the Children’s Institute.

251 ACESS. *Memorandum of Obligation*, (2009).



One particularly poignant argument was made in the context of the government's plan to create 500 000 new jobs. It was noted that, particularly in the light of the recent international economic crisis, this goal may simply not be achievable. What *is achievable* however, is the development of a comprehensive social security system.

### ***Unemployment Insurance***

The narrow reach of the Unemployment Insurance Fund in South Africa was also highlighted at the public hearings. The sense is best summed up by the following statement from the Centre for Human Rights (University of Minnesota):

*"Conventional programs that are based on the needs of urbanised wage-earning workers cannot be easily adopted to meet the needs of the large poor rural populations in developing countries. Similarly, conventional programs are often not suited for meeting the needs of large numbers of people who are working in the informal sector".<sup>252</sup>*

Therefore, basic social security provision needs to be extended to the unemployed who do not qualify for UIF payments but who are actively seeking work or who are in a vocational training programme.

### ***Birth registration and Refugees***

This issue of limited interdepartmental co-ordination was highlighted in several submissions. One such concern was the poor co-ordination between the Department of Home Affairs (DoHA) and the DoSD. The Consortium for Refugees and Migrants in South Africa emphasised the need for cross departmental regulations to coordinate the practices of both the DoHA and the DoSD. Legal refugees have the right to receive a social grant if the normal eligibility criteria are met.<sup>253</sup> Yet, the Consortium for Refugees and Migrants testified that they did not know of a single case of a refugee being assisted by the DoSD without being represented by a legal services organisation. This would suggest that the Department is ill equipped to deal with refugees. It was further argued that staff is not adequately trained in this area and there are also no promulgated internal guidelines. At worst, the situation would suggest a culture of disregard for the rights of refugees despite the eligibility of those with legal standing. This strongly suggests that a rights-based approach has not been incorporated into departmental practice in relation to refugees. However, the Consortium also recognised and commended the DoSD for the recent promulgation of regulations that extended access to social security for legally recognised refugees. This is clearly an extremely positive development. However, the test for the effectiveness of the regulations will be in the day to day implementation by the Department of Social Development.

The submission of the Consortium for Refugees and Migrants touched on a number of issues raised by others including the dignity of applicants, correct assessment of claims and the danger of "discretionary" exclusion. These issues were taken further by the Black Sash which stated that *"for those able to access social security infrastructure, the intensive administrative demands and means testing reduces the social security process to an undignified, cumbersome and discretionary experience leading to unintended or incorrect conclusions or exclusions and sometimes non-transparent behaviour by officials".*

### ***Rural access to social grants***

It is clear from many sources that the take up rate of social grants has increased progressively since 2004 on an overall national basis. A comprehensive 2009 study conducted by ACES and CASE<sup>254</sup> however, suggested that take up rates of the CSG, in particular in several marginalised rural areas, is well below the national average.

<sup>252</sup> University of Minnesota Human Rights Resource Centre. Social Security as a Human Right (Module 11), undated.

<sup>253</sup> In December, 2003 the Constitutional Court made a clear decision on this right. In *Khosa and Others v Minister of Social Development* the court ruled that permanent residents of South Africa are bearers of the right to social security as outlined in the Constitution.

<sup>254</sup> CASE. *Barriers to accessing comprehensive social security in vulnerable rural areas in South Africa*, (2009).



### 7.5.2. Appropriateness

#### ***Exclusion of able-bodied unemployed***

A theme raised by several groups concerned the rights of the able-bodied unemployed. As summed up by Adv Thipanyane at the hearings: “*I am talking about people who are above 18, may be above 15 and below 60 who are not disabled. This is a huge size of our population. They are also entitled to the right to social security*”.

Unemployed, able-bodied persons of prime age continue to be excluded from the social security system and many must rely on money provided through a family member’s social grant in order to survive. In addressing this particular theme, CASE<sup>255</sup> argued that the failure to extend social assistance to those in need, that is, those between the ages of 16 and 60 years is a direct contravention of section 27 (2) of the Constitution which obligates the state to progressively realise the right to social security.

#### ***Expanded Public Works Programme (EPWP)***

While technically not a “social security” programme, it is highly relevant to address the EPWP because it is one of the only few large scale anti-poverty measures enacted by government. A 2008 evaluation, conducted by the Human Sciences Research Council (HSRC)<sup>256</sup> found that while the target of one million work opportunities had been reached, the programme falls short in that:

- Minimum standards for length of a job were not reached;
- Only 19% of the training target had been met;
- Only 59% of the funds allocated over three years had been spent;
- Overheads and other costs were rising but wages did not increase; and
- Earnings per job have declined over time.

While these shortcomings must be addressed, programmatic efforts of facilitating access for the poor and the unemployed to the job market must be more multi-faceted than the EPWP.

#### ***People with HIV and AIDS***

The Lesbian and Gay Equity Project highlighted the contradiction that exists between a person living with HIV and AIDS and collecting a disability grant, and receiving anti-retroviral (ARV) treatment. To qualify for a disability grant, an applicant must have a CD4 count of less than 200. Yet, when that person commences ARV treatment which may have the effect of increasing the CD4 count to over 200, he or she automatically becomes ineligible to continue receiving the grant.

#### ***Bank charges***

The appropriateness of delivering a social grant through a person’s bank account, rather than through a service pay point was noted by Isobel Frye of the Studies in Poverty and Inequality Institute.<sup>257</sup> She produced figures which showed that the cost of a social grant through a pay point is approximately R26 while delivering to a bank account costs the DoSD 23 cents. However, bank charges attached to the withdrawal of the social grant are very high and this cost the beneficiary has to bear. Some at the public hearings felt strongly that the banks must be held accountable for this.

#### ***Inequality***

Several submissions addressed the issue of the pervasive and extreme income inequality in South Africa. Isobel Frye went a step further and put this issue firmly in the context of poverty alleviation “*... if you are serious about addressing the alleviation of poverty, we can't actually do this until we address inequality, and social security with (its) redistributive aspect is one of the best ways of doing that*”.

<sup>255</sup> Ibid.

<sup>256</sup> Expanded Public Works Programme. *Hope for the unemployed? HSRC Review*, (2008),6 (3).

<sup>257</sup> Black Sash *et al*, (note 232 above).



### 7.5.3. Acceptability

#### **South African Social Security Agency (SASSA)**

The poor quality of service delivery agencies, in particular, the ineffectiveness of SASSA was noted by several groups and individuals. One person who provided an oral submission reflected that the idea of establishing SASSA as a stand-alone agency with a very specific mandate was essentially a good one. However, the testifier submitted that initially the agency's relative independence and tight focus seemed to enable it to function well *until* staff from the Department of Social Development were transferred there in significant numbers. The implication was that the problems of inefficiency, incompetence and poor service which had plagued the Department of Social Development's delivery of social grants were merely transferred to SASSA.

One telling piece of evidence from the Belhar Community Health Forum is as follows:<sup>258</sup>

*“Our Social Security Agency boasts of a world class service but our community people have to sleep overnight at their doorsteps to be attended to the next day and in most cases actually wasted their time going to these agencies. There are no visible notices to indicate which services are rendered on which days to inform our communities.”*

This situation was corroborated by one of the few government department submissions, that is, the Limpopo Department of Social Development.<sup>259</sup>

However, as noted by Black Sash<sup>260</sup> many of those who are able to access SASSA are often faced with intense administrative demands and means-testing which reduces the social security process to an undignified, cumbersome and discretionary experience. The Black Sash further contended that this often leads to “*unintended or incorrect conclusions or exclusions and sometimes non-transparent behaviour by officials*”.

It is appropriate at this juncture to emphasise the point that the progressive realisation of the right to social security is highly contingent on good governance. The international literature backed up by a wide range of testimony, intimate time and time again that the transparency, competency and inclusiveness of the relevant government agencies determine their level of success in providing access to social security.

The Human Rights Resource Centre (University of Minnesota)<sup>261</sup> asserts that an effective and equitable social security system cannot fulfil its mandate in a context in which government agencies function undemocratically and where avenues of public protest and participation in the policy making process are piecemeal. This, *inter alia*, suggests that mechanisms to ensure meaningful public input into social security policy and practice are a critical component of good governance.

#### **Social Development Advisory Board**

There are currently few avenues by which social security beneficiaries can make their voice heard either in terms of policy or in terms of improving programme delivery. The need for the establishment of a Social Development Advisory Board which would have meaningful and structured input into departmental policy and programmes was consistently noted, albeit, in slightly different ways. The Anti-Privatisation Forum argued, for example, for the establishment of a forum in which social movements could provide input into decision making.

#### **Policy changes driven by litigation**

ACESS and the Children's Institute made the startling point that it simply has not been possible for the National Department of Social Development to create a comprehensive national strategy to reduce poverty due to its preoccupation of having to respond to litigation initiated by civil society. A picture was painted of a Department whose legal, policy and programmatic roll-out of resources were largely driven reactively by law suits, the effort to settle such suits, and, wherever, possible, avoiding judgment.

258 Belhar Community Forum (note 210 above).

259 Limpopo Provincial Government, submission to the SAHRC, (2009).

260 Black Sash, presentation at the SAHRC ESR public hearings, (2009).

261 University of Minnesota (note 253 above).



One of the most poignant and telling questions of the hearings relating to the progress made by government towards the progressive realisation of the right to social security was posed by Adv Thipanyane:

“... to what extent does your department, the policy makers, actually factor into the plans, the constitutional context to issues of social security?”

Adv Thipanyane further stated that for ten years the Commission had battled to get government departments to provide it with not just raw figures but the *context* for those figures. The strong impression created at the hearings was one in which the Department of Social Development presents seemingly relevant statistics but its policy making is not truly informed by the constitutional imperative of the progressive realisation of the right to social security.

The evidence brought before the Commission during the public hearings demonstrated, from a range of perspectives, that the South African social security system is not substantially reducing poverty. This is perhaps best summed up the Commission’s ESR Unit which found that there was “... *startling evidence that that there has hardly been any progress in reducing poverty and inequality in South Africa and this has a direct impact on the progressive realisation of economic & social rights enshrined in the Constitution*”. Others suggested that the development of a comprehensive social security system is a matter largely of political will concerning the use of public funds by key powerful persons and institutions. Isobel Frye noted that “... *it’s not just the question of the rate of the pace of progressive realisation, the value, the coverage, but also the question of available resources and who determines the sufficiency of the resources that are made available to the state to realise socio-economic rights*”.

The lack of reliable data and solid information bases undermines any public effort towards the progressive realisation of the right to social security. One panellist made the argument that part of the obligation of government in the realisation of economic and social rights is to ensure that adequate data is collected.

### ***Need for a Social Security Road Map***

A strong and consistent theme throughout the hearings was that of the need for the national government to develop a Social Security Road Map. This is best summed up by the submission from Black Sash *et al* arguing for “*the state to provide a clear road map underpinned by the principles agreed to that demonstrates how the right to social security within a genuinely reasonable framework will be realised as guaranteed in our Constitution*”.<sup>262</sup>

But what would a *Social Security Road Map* look like? The Black Sash and other stakeholders, while referencing the term, provided few details of the underlying purpose or goals of such an initiative. In considering this critical question, it is highly apt to note General Comment 19 of the Committee on Economic, Social and Cultural Rights which reads in part:

“*The duty to take steps clearly imposes on states parties an obligation to adopt a national strategy and plan of action to realise the right to social security, unless the state party can clearly show that it has a comprehensive social security system in place and that it reviews it regularly to ensure that it is consistent with the right to social security.*”

In essence, a Social Security Road Map would be tantamount to a long term public plan of how the right to access to social security will truly be progressively realised. However, it would be critical to ensure that an initiative is not simply an implementation plan for the rollout or expansion of current income support programmes. A plan of this nature must comprehensively address the challenge of equipping social security recipients with the opportunities they require to achieve social economic independence.

In this sense a social security road map must be closely aligned and interdependent with other national initiatives such as the development of sustainable human settlements, transportation, and, most importantly *job creation* (incorporating, *inter alia*, adult education, vocational training and local economic development).

Currently, however, it would be extremely difficult for the Department of Social Development to meet the challenge of developing a national comprehensive strategy (road map) to achieve progressive realisation. While lack of capacity is one limiting factor, it is fair to say that the Department’s change agenda has, in recent years, largely

<sup>262</sup> Black Sash (note 232 above).



been driven in reaction to litigation.<sup>263</sup> Rather than risk what may be an adverse judgment, it appears that the Department has, in several cases, effectively conceded that the litigants were correct, but not before a significant amount of time had passed and effort expended. Therefore, the Department's actions may suggest that the concept of *progressive realisation* is neither an overarching policy concern nor even part of a philosophical underpinning which guides it. Nonetheless, it must be concluded that the Department is not currently well structured, geared or orientated to develop and implement a comprehensive social security system.

However, it must be noted that the national government has instigated significant policy changes over the last two years which, it could be argued, move solidly in the direction of implementing the progressive realisation of the right to social security. As highlighted in a report by ACESS<sup>264</sup> several important and extremely positive changes were implemented in relation to grants for children in 2008 and 2009. These include:

- The implementation of a standard qualifying amount for CSG;
- The removal of the distinction of whether the beneficiary resides in a shack or a house, or whether she/he lives in a rural or urban area;
- The removal of the means test for the Foster Care Grant;
- The automatic increase in the grant amount pegged with the annual Consumer Price Index increase.

The most important recent change, however, has been a substantial increase in the income threshold to qualify for social grants. In a comprehensive 2008 study, ACESS<sup>265</sup> noted that before the threshold increase (implemented later that year pursuant to the passage on the new regulations of the Social Assistance Act) a CSG caregiver would have had to be 50% poorer than they were 10 years previously to qualify for the benefit. The threshold had indeed barely been adjusted in a decade.

## 7.6. Conclusions Regarding the Principal Themes

### ***The government's understanding of the progressive realisation of the right to social security***

The South African government appears to have interpreted its responsibility to ensure the realisation of the right to social security in terms of expanding eligibility for specific social grants, rather than undertaking a broader programmatic effort to ensure that the poor have the maximum possible opportunities to enter or prepare for labour market participation. Even in terms of social grants, improving access and availability has largely been facilitated and motivated through legal action rather than proactive efforts by the government to ensure the progressive realisation of the right. On balance, it is reasonable to assert that a rights-based approach has not truly informed policy or practice in the social security arena.

### ***Public participation***

The evidence is clear that there are few, if any, effective processes to ensure meaningful public participation in the development and evaluation of social security policy or oversight of social security programmes. Access to information, while improved on some levels, is still inadequate particularly with regard to the provincial departments of social development.

### ***Social exclusion***

Poor rural populations are still disadvantaged in many areas in terms of access. Many child-headed households are still not enjoying their constitutional right to social security. Similarly, problems continue to exist in terms of access for eligible refugees. More broadly, the able bodied prime aged unemployed are not eligible for social grants in their own right but are also not afforded any other options to enjoy an adequate standard of living.

263 Ironically, very few if any of these cases have proceeded to judgment, having been settled in the litigant organisation's favour.

264 ACESS. *Applying for a grant for children living in poverty*. (2009).

265 ACESS. *Child Poverty Paper*. (2007).



### ***From strategic planning to implementation***

The development of the SASSA was a positive move and it has presided over an expansion of the social grant system. Significant service problems persist at the agency as they do in several provincial departments of social development. The full realisation of the right to social security will require much broader multi-departmental and multi-sphere efforts to integrate anti-poverty strategies. Such strategies need to focus on facilitating access to employment opportunities through multiple means.

#### **7.7. Recommendations**

1. It is clear that ineffective governance by key government agencies is a major factor militating against both the realisation of the right to social security and the MDG 1. The National Department of Social Development should be provided with external assistance to address the problems identified herein including the development of a specific action plan. This should be tabled at the Social Cluster and included in the government's Programme of Action.
2. Strongly related to the above is the need for a reorientation of the organisational mindset towards embracing a human rights-based approach to social security. This would signify a move away from a reactive and often disengaged means of policy making and operations. A human rights-based approach must be the touchstone for the Department on which everything from its long term planning to its day to day operations and interactions are based. The notion must inform everything from basic procedures to ongoing staff training. One component of a human rights approach would be to ensure the development of mechanisms to facilitate maximum input of social security beneficiaries into policy making and operations. A further recommendation is to ensure that, as much as possible, social security goals are firmly linked to solid opportunities for economic advancement.
3. There needs to be a firm recognition in government that the provision of expanded social security benefits does not obviate the need to realise other socio-economic rights. Greater access to social security cannot be seen, for example, as compensation for poor community health services or under-resourced schools, or somehow compensate for poor services of the latter. It must be recognised that socio-economic rights are highly interdependent. Similarly, the MDG 1 cannot be fully achieved by income support and relief measures alone.
4. The National Department of Social Development needs to undertake the process of developing a comprehensive Road map for social security. *Inter alia*, the Road map should clearly articulate how the government intends to meet specific MDG and how the constitutional right to social security will be progressively realised. Absolutely essential to the development of a road map is the inclusion and participation of civil society stakeholders.
5. The Road map, and indeed social development policy, must include solid programmatic strategies to link prime age, able bodied social grant recipients with labour market preparation measures and opportunities. This should include (but not be limited to) basic literacy and numeracy instruction, a wide range of vocational training for higher demand positions, direct job placement and targeted local economic development interventions. The Expanded Public Works Programme should be a key component in such a strategy but cannot suffice for the strategy itself.
6. A broadly representative Social Development Advisory Board should be established and should be a statutory body. The Board's membership should include at least two recognised social security experts and two people representing social grant recipients. Structures must ensure that the Board has direct input into social security policy, programme development, community education efforts, roll out, monitoring and evaluation. The SASSA Annual report must note exactly how the Advisory Board input contributed to change. The Board should also play a role in helping build the capacity of SASSA.



7. In its Annual Report, the Department of Social Development should be required to clearly map out the measures it has taken, and is planning to take, towards achieving the progressive realisation of the right to social security and the relevant MDG. These must be linked with solid plans or achievements in terms of programmatic roll-out.
8. Social Relief of Distress (SRoD) eligibility criteria, assessment and award must be nationally consistent. Regulations must be promulgated in every SASSA office and eligibility/assessment and processing issues must be included in staff training. It must be made clear that every legal South African resident, including refugees, is eligible for the SRoD if that person or household faces destitution and has no recourse to any other resources. The Department must monitor and evaluate the roll-out of the SRoD and act swiftly on any failures in assessment or delivery.
9. Per Paragraph 76 of General Comment 19 (Committee on Economic, Social and Cultural Rights) the national government and the Department of Social Development in particular, should consider seeking the assistance of specialised UN agencies in helping to develop appropriate social security benchmarks as well as appropriate monitoring and evaluation mechanisms for those benchmarks.
10. A public committee chaired by Statistics South Africa should be tasked with the objective of developing an official poverty line. In doing so, the committee should be mandated to undertake broad public consultation.
11. A concerted effort must be made to ensure a greater take-up rate of the CSG for those children not registered at the Department of Home Affairs. In addition, the national government should also ensure that there is better co-ordination between the data bases of various departments (particularly Health and Education) to ensure that children not registered at the Department of Home Affairs might be "captured" elsewhere. It should be made possible for hospitals to register births on their systems for transmission to the Department of Home Affairs.
12. Greater effort must be made to target marginalised rural communities to increase the take up rate of social grants, in particular the CSG.
13. The government must ratify the International Covenant on Economic, Social and Cultural Rights.
14. Either the Banking Charter must be amended, or a separate law introduced, to ensure that whoever receives a social grant from the national government paid directly into a bank account is exempt from being charged fees on that account for so long as they are in receipt of the grant.

# *Chapter 8*



*The right to health*



## CHAPTER 8: THE RIGHT TO HEALTH

### 8. INTRODUCTION

In this chapter the progressive realisation of the right to access health care services for the period 2006 to 2009 is reviewed against the MDG and the Constitution. The health related MDG (1, 4, 5, 6 and 8) and their indicators provide an initial quantitative yardstick as to whether the health care situation has worsened or improved. However, the caveat with the MDG is that they do not challenge the qualitative extent of the progressive realisation of the right to access health care services within a rights-based framework. The analysis in this chapter uses the international accepted criteria: accessibility, availability, acceptability and appropriateness. The chapter further analyses the government planning, monitoring and evaluation systems as well as the budget on health. Recommendations for further action are provided at the end.

It is argued that the Department of Health is not maximising the effective use of its resources in order to achieve the targets associated with progressive realisation. Overall, the Department of Health has developed a good policy and legislative framework for people to gain access to health care services. However, there are gaps in the implementation of the policies and legislation at local, provincial and national level. It is further argued that there is insufficient capacity of well-qualified people to offer the health care services. Health care services are limited for poor people and people living in rural areas. The limitations are extended to other vulnerable groups which include people with disabilities (physical and mental), older people, sex workers, refugees, pregnant women and people living with and affected by HIV or AIDS. These gaps amount to social exclusion and are contravening a rights-based approach.

Another major challenge is the inconsistency in data gathering on health issues and the resultant unreliable statistics. This certainly has implications in respect of appropriate planning, monitoring and reporting.

#### 8.1. The Meaning and Content of the Right

Article 13 in the International Covenant on Economic, Social and Cultural Rights (ICESCR) stipulates the right of all people to access the highest attainable standard of physical and mental health. The Convention on the Elimination of All Forms of Discrimination against Women<sup>266</sup> and the Convention on the Rights of the Child<sup>267</sup> furthermore highlight the importance of the rights of women and children respectively to have adequate access to health care services. Article 25 in the Convention on the Rights of Persons with Disabilities (UNCRPD) recognises that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability. It further provides that all appropriate measures must be taken to ensure access for persons with disabilities to health services that are gender-sensitive, including health-related rehabilitation. General Comment 14 of the Committee on Economic, Social and Cultural Rights explains the definitive elements of the ICESCR as the availability, accessibility, appropriateness and acceptability of these rights.<sup>268</sup>

In line with this international human rights law framework, the Constitution under section 27 specifies that all South Africans have the right to access health care services (including reproductive health care) and emergency medical treatment. It furthermore entrenches that:

- Everyone has the right to bodily and psychological integrity through informed decision making and consent (section 12.2);
- Everyone has the right to an environment that is conducive to health and wellbeing (section 24 (a));
- Every child is entitled, through section 28, to basic health care services; and
- Detainees have the right to access adequate medical treatment (section 35).

The realisation of these rights is enhanced by the National Health Act (61 of 2003) which, apart from those rights entrenched in the Constitution, emphasises the right to free health care for specific groups<sup>269</sup> and the right to report

<sup>266</sup> CEDAW (note 124 above).

<sup>267</sup> CRC (note 125 above).

<sup>268</sup> General comment number 14: The right to the highest attainable standard of health (2000). United Nations Human Rights website: <[http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/E.C.12.2000.4.en](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/E.C.12.2000.4.en)>.

<sup>269</sup> All except those on medical aid schemes and those receiving compensation for occupational diseases are entitled to these services. Pregnant and lactating women and children under the age of 6 are particularly accounted for. Furthermore all those seeking termination of pregnancy services are entitled to these free services.



health care services that have inadequately satisfied a person's needs. The White Paper on the Transformation of the Health System (1997) outlines the aims of the health policy to address health issues faced by South Africans. The accessibility of these rights have here been further defined as physical accessibility (easy reach of health care services), economic accessibility (affordable health care and free primary health care for certain groups), non-discrimination (available and accessible health care service for all, including marginalised groups such as disabled, prisoners, women, children, etc.) and information accessibility (information that is presented in the most accessible way to the target audience).

### **8.1.1. National and International Legislation and Agreements**

Some of the key policies and legislation supporting the progressive realisation of these health rights are:<sup>270</sup>

- Amendments to the Medicine and Related Substances of Medicine Act 101 of 1965;
- Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972 – Provides for the regulation of foodstuffs, cosmetics and disinfectants, in particular their importation and exportation as well as the quality standards that must be complied with by manufacturers;
- Hazardous Substances Act 15 of 1973 – Provides for the control of hazardous substances, in particular those emitting radiation;
- Occupational Diseases in Mines and Works Act 78 of 1973 – Provides for medical examinations on persons suspected of having contracted occupational diseases especially in mines and for compensation in respect of those diseases;
- International Health Regulations Act 28 of 1974;
- Pharmacy Act 53 of 1974 – Provides for the regulation of the pharmacy profession, including community service by pharmacists;
- Health Professions Act 56 of 1974 – Provides for the regulation of health professions, in particular, medical practitioners, dentists, psychologists and other related health professions, including community service by these professionals;
- Dental Technicians Act 19 of 1979 – Provides for the regulation of dental technicians and for the establishment of a council to regulate the profession;
- Allied Health Professions Act 63 of 1982 – Provides for the regulation of health practitioners such as homeopaths, chiropractors, etc. and for the establishment of a council to regulate these professions;
- Human Tissue Act 65 of 1983 – Provides for the administration of matters pertaining to human tissue;
- National Policy for Health Act 116 of 1990 – Provides for the determination of national health policy to guide the legislative and operational programmes of the health portfolio;
- South African Medical Research Council Act 58 of 1991 – Provides for the establishment of the South African Medical Research Council and its role in relation to health research;
- Academic Health Centres Act 86 of 1993 – Provides for the establishment, management and operation of academic health centres;
- The Medicines and Related Substance Control Amendment Act 90 of 1997 – Provides for the registration of medicines and other medicinal products to ensure their safety, quality and efficacy. The Act also provides for transparency in the pricing of medicines;
- The Medical Aid Schemes Act 131 of 1998 – Provides for the regulation of the medical schemes industry to ensure consonance with national health objectives;
- The Tobacco Product Control Amendment Act 12 of 1999 - Provides for the control of tobacco products, prohibition of smoking in public places and advertisements of tobacco products as well as the sponsoring of events by the tobacco industry;
- National Health Laboratories Service Act 37 of 2000 – Provides a statutory body that provides laboratory services to the public health sector;
- Council of Medical Schemes Levy Act 58 of 2000 – Provides a legal framework for the council to charge medical schemes certain fees;
- National Health Act 61 of 2003 – Provides for a transformed national health system for South Africa;
- Nursing Act 33 of 2005 – Provides for the regulation of the nursing profession;
- The Traditional Health Practitioners Act 22 of 2007.



### ***Legislation particularly focussed on women***

- The Choice of Termination of Pregnancy Act 92 of 1996 – Provides a legal framework for termination of pregnancies based on choice under certain circumstances;
- The Sterilization Act 44 of 1998 – Provides a legal framework for sterilizations, also for persons with mental health challenges.

### ***Legislation particularly focussed on children***

- Child Care Act 74 of 1983 – Provides for the protection of the rights and wellbeing of children.

### ***Legislation focussed on other vulnerable groups***

- The Older Persons Act 61 of 2006;
- The Correctional Services Act 111 of 1998;
- The Mental Health Care Act 17 of 2002 – This is the overall legal framework for mental health in South Africa, with specific focus on admission and discharge of mental health patients in institutions and human rights for mentally ill patients.

A number of health related policies and legislation have been revised between 2006 and 2009. Some of the major policies related to the relevant MDG in this section include the Policy Guidelines on Child and Adolescent Mental Health (2008), Infant and Young Child Feeding Policy (2008), South Africa's National Policy Framework for Women's Empowerment and Gender Equality (2008), Policy and Guidelines for the implementation of PMTCT programme, HIV and AIDS and STI Strategic Plan for South Africa 2007–2011 (2007), Draft Tuberculosis Strategic Plan for South Africa (2007) and The National Infection Prevention and Control Policy for TB, MDRTB and XCRTB (2007). Legislation amended in this period includes the Tobacco Products Control Amendment Act 23 of 2007, the Choice of Termination of Pregnancy Act 1 of 2008, the Medicines and Related Substances Amendment Bill Act 44 of 2008, and the Foodstuffs, Cosmetics and Disinfectants Amendment Act 39 of 2007.

## **8.2. Relevant MDG, Targets and Indicators**

As outlined in the table below, the health sector's areas of responsibility specifically relate to MDG 1, 4, 5, 6 and 8. MDG 1 is related to poverty and hunger alleviation with a specific target of halving the proportion of people who suffer from hunger. The key indicators here are the prevalence of underweight children (under five years of age) and the proportion of the population living under the minimum level of dietary consumption.

MDG 4 is concerned with reducing child mortality and the target is to reduce child (under five years) mortality by two thirds, with its key indicators being the under five mortality rate, infant (under one year) mortality rate and proportion of children immunised against measles.

MDG 5 is specifically concerned with health care for women and in particular improving maternal health care through reducing the maternal mortality rate. The key indicators of success are the maternal mortality ratio and the proportion of births attended by skilled health personnel.

HIV, AIDS, malaria and other diseases are the key foci of MDG 6. The first target deals with halting and beginning to reverse the spread of HIV, and considers the key indicators of success being the HIV prevalence rate among 15–24 year old pregnant women, the contraceptive prevalence rate and the number of children orphaned by HIV and AIDS. The second component of this goal has a target of halting and beginning to reverse the incidence of malaria and other major diseases. Prevalence and death rates associated with malaria; proportion of population in malaria risk areas using effective malaria prevention and treatment measures; prevalence and death rates associated with tuberculosis; and the proportion of tuberculosis cases detected and cured under directly observed treatment short course (DOTS) are considered the key indicators of success.

MDG 8 is concerned with developing global partnerships for development, and is specifically concerned with providing access to affordable drugs in developing countries, in co-operation with pharmaceutical companies. The key indicator for success is the proportion of the population with access to affordable essential drugs.



### Critique of the MDG

The MDG are useful in providing key indicators for measuring human development. However, the indicators are limited in terms of adequately representing what the MDG aim to achieve, being properly defined and having proper targets assigned to them. When assessing health related MDG, a number of limitations are evident. Firstly, the proportion of one year old children immunised against measles is a key indicator of reducing child mortality. However, the accuracy of this as a representative indicator is limited as other childhood illnesses, such as TB, polio, whooping cough, hepatitis B, diphtheria and haemophilus influenza also pose life threatening risks or threaten the quality of life for children. Furthermore, no target for the immunisation of children against measles has been set, making progress difficult to measure. The second limitation in terms of combating HIV is the indicator on the contraceptive prevalence rate. The lack of definition for "contraceptive" makes it challenging to measure, and even in the case where definitions exist, such as consistent condom use or condom use on last sexual encounter,<sup>271</sup> the measurement on these indicators often depends on the reported and not actual behaviour, making this indicator somewhat unrealistic to measure. Lastly there is a lack of indicators for non-communicable diseases (such as cancer and mental illness), injuries and trauma. The impact of the burden of disease which this represents, and which is consequently not measured, is substantial.

In general, the arbitrary or unavailability of baselines and targets for indicators in the MDG<sup>272</sup> makes them difficult to measure. These limitations show that the indicators for the MDG are in some instances inadequate to sufficiently measure the goal, are limited in terms of being clearly defined, and in a South African context, are limited in providing baselines and targets to measure progress and consequently impact on goal directed planning.

### 8.3. Main Themes Arising

In this section the main health themes that emerged from the hearings, submissions and other relevant source documents and reports are discussed.

#### 8.3.1. Government's understanding of the progressive realisation of the right of access to health care services

In the course of their presentations and in their responses to questions (for example, in relation to maternal morbidity; the Free State budgetary crisis and roll-out of a HPV vaccine); both the National and Western Cape DoH employed the notion of progressive realisation as a "get-out clause" that condones non-fulfilment of the right to have access to health care services where resources are scarce. They appeared not to appreciate that the standard of progressive realisation requires maximising the effectiveness of current resources in order to achieve targets associated with progressive realisation and that measures which lead to diminished access fall foul of the progressive realisation standard (in that they likely amount to retrogressive measures). An exception was however the Western Cape DoH's decision to continue to put new patients on ARV treatment (despite a shortfall in the budget of R28.5 million), as they regarded the national policy as giving people entitlement to treatment.

#### 8.3.2. Access to information

Vulnerable groups often have limited access to health care information and are not targeted specifically with health awareness campaigns. This is applicable to persons with disabilities as well as older persons with regard to HIV prevention and older persons as caregivers for family members living with and affected by HIV/AIDS.

#### 8.3.3. Social exclusion

Health care services in South Africa are limited for poor people and people living in rural areas. The limitations are extended to other vulnerable groups which include people with disabilities, older people, sex workers, refugees, pregnant women and people living with and affected by HIV/AIDS.

<sup>271</sup> Used in: Shisana O, Simbayi L.C, Rehle T, Zungu NP, Zuma K, Ngogo N, Jooste S, Pillay-Van Wyk V, Parker W, Pezi S, Davids A, Nwanyanwu O, Dinh TH and SABSSM III Implementation Team. *South African National HIV Prevalence, Incidence, Behaviour and Communication Survey, 2008: The health of our children*, (2010).

<sup>272</sup> Department of Health, submission to the SAHRC, (2009).



The majority of South Africa's poor people rely on the public health care sector for their health care needs, but expenditure in the private sector far outweighs that in the public sector. This scenario, exacerbated by the financial crisis, has resulted in an over-serviced private sector and under-serviced public sector.<sup>273</sup> A National Health Insurance is being investigated to close the gap between the private and public divide, the details of which were not available at the time of writing.

People living in rural areas also struggle to access health care and drugs sufficiently. This is particularly in respect of accessing immunisation and mental health care.

Both the standard of health care services and the slow reduction rate of child mortality illustrate that health care services are not of a standard which would ensure adequate health care that prevents child and infant mortality. The quality of the health care services for women is a particular and key challenge as the maternal mortality rate is increasing. A recent study showed that 38.4% of the deaths could have been prevented.<sup>274</sup> This is further reflective of prevailing gender inequalities as women in a vulnerable situation are excluded from accessing quality health care, and their vulnerabilities are then further exacerbated.

In a recent prevalence survey on the interface of rape and HIV, it was found that rape of a woman or girl had been perpetrated by 27.6% of the men interviewed, while 2.9% of the interviewees said they had raped a man or a boy.<sup>275</sup> Rape victims (of which almost nine out of ten are women) are sometimes unable to access PEP service timeously if the health facility approached is not designated. This is unfortunate proof that women are not accessing health care services to the extent necessitated and the pace of the progressive realisation of their rights is slow.

Persons with mental disabilities are excluded from accessing the health care system properly. For example, a study in the Western Cape revealed that 16.5% of that population suffer from common mental disorders and 75% do not receive any kind of treatment for their mental illness.<sup>276</sup>

Sex workers' access to health care services is limited due to the social stigma attached to sex work, the criminalisation of sex work and the negative attitude of health workers. This can have a detrimental effect on the HIV prevalence rate.

People living with HIV in the Free State province (and Edendale district) are excluded from accessing ART. Likewise, it has been reported that some refugees and asylum seekers are unable to access ART due to the lack of a South African identity document. Furthermore, it is uncertain whether the barriers for prisoners to access ART have been removed.

#### **8.3.4. From strategic planning to implementation**

##### ***Data collection***

A major challenge is the inconsistency in data gathering on health issues and consequent unreliable statistics. The unavailability of a baseline makes it difficult to measure the progress in reaching the MDG. This is particularly the case with statistics on child mortality and maternal mortality. Furthermore, there is a lack of disaggregation of indicators on child and maternal mortality in terms of specific disabilities. This impairs the utility of the information with regard to appropriate planning.

<sup>273</sup> South African Human Rights Commission. *Public Inquiry: Access to Health Care Services*, (2007), 57.

<sup>274</sup> National Committee on Confidential Enquiries into Maternal Deaths (NCCEMD). (2009); Saving Mothers: Fourth Report on Confidential Enquiries into Maternal deaths in South Africa, (2005-2007), 20.

<sup>275</sup> Medical Research Council, Gender & Health Research Unit. *Understanding Men's Health and Use of Violence: Interface of rape and HIV in South Africa*, (2009).

<sup>276</sup> Mental Health and Poverty Project, submission to the SAHRC, (2009).



### ***Inter-governmental relations and communication***

Because AIDS orphans, detainees, refugees, and persons with disabilities are cross-cutting groups that need to be targeted by various departments, these groups are often not prioritised in any one department, and integrated services are lacking. AIDS orphans need to be specifically prioritised by the Department of Health, particularly in terms of providing VCT and ART. Furthermore, health care for detainees, persons with mental and physical disabilities, refugees and sex workers need to become particular focal areas for the Department of Health.

### ***Service delivery***

Overall, the Department of Health has developed a good policy and legislative framework for people to gain access to health care services. However, there are gaps in the implementation of the policies and legislation at local, provincial and national level. This prompted the assertion by the former Commissioner Zonke Majodina of the Commission that there is insufficient capacity of well-qualified people to offer the health care services.

Since the transformation to the primary health care model there have been difficulties with internalising roles at each level of government. The concerns include whether community care workers have been sufficiently trained. Without sufficient numbers of adequately trained and motivated health workers, no health care system can fulfil its human rights obligation. Service delivery needs to be strengthened at a district level, thereby effectively operationalising the primary health care approach.<sup>277</sup> To fulfil the requirement of progressive realisation, the Department of Health must make sure that health workers at community clinics are appropriately trained to implement the policies and legislation and that they are properly managed. More specifically, it has been reported that they need to be trained on how to diagnose disabilities, disability education and management, how to collect pap smears and how to train women in the use of female condoms.

With a growing older population there is a need to increase the number of health professionals with special training in Geriatrics, that is, not only medical practitioners but also physiotherapists, occupational therapists, nurses and social workers.<sup>278</sup>

The Department of Health has at times been unable to secure the supplies of drugs in a consistent manner. This has been the case with ARV drugs in the Free State, insulin (and milk formula) for children of HIV positive mothers, as well as epilepsy drugs. Although the government (in response to pressure from civil society) has made efforts to bring drug prices down, the majority of the South African population does not have access to affordable drugs. Finally, it should be noted that with the increasing incidence of TB and the advent of the MDR and XDR-TB, the national TB Control Programme does not seem to be addressing the disease adequately.

### **8.4. Planning Systems**

#### ***Information gathering and monitoring***

*"We don't have a definition of essential health services. This means we don't have a baseline for the right to health and it is impossible to cost the health service and thereby determine objectively what can be afforded."*<sup>279</sup>

In order to gather data on the status of economic and social rights and to be able to compare it over time, it is crucial to have reliable data. However, it is markedly clear that the Department of Health has been relying on unreliable data and has applied inconsistent use across data sources, particularly in respect of the maternal and child mortality rates. The collection of data around child mortality is a key challenge for health related goals. Some of these challenges include the variation between different sources of statistics for child and infant mortality rates, the lack of funding and research resources to collect proper statistics related to the causes of still births, and the inability to track unregistered child deaths that occur outside of health care facilities, particularly in rural areas.<sup>280</sup>

To respond to the concerns about reliable statistics the Department of Health has made two key recommendations in their submission; that consensus is needed around methodologies and assumptions used in demographic models by various research institutions; and that periodic scientific reviews should be conducted on all health statistics. The Department of Health is working together with Statistics South Africa and the health matrix network

<sup>277</sup> SAHRC (note 274 above) 59.

<sup>278</sup> Ibid, 61.

<sup>279</sup> AIDS Law Project (ALP), submission to the Public Inquiry into Access to Health Care Services, (2007).

<sup>280</sup> Shisana (note 272 above).



to improve this. However, even though these recommendations have been made, the Annual Report 2007/08 of the National Department of Health does not point to any periodic reviews in relation to the above mentioned recommendations.

The inability to identify causes of stillbirth is a consequence of the lack of funding and research resources allocated to the monitoring of this particular type of death. This has serious consequences, particularly because these deaths may be prevented if more information is available on the causes of death. A limitation with regard to the child mortality rate is that the National Department of Health has not set it as an indicator, but only as an objective.<sup>281</sup> The child and infant mortality rates are therefore not tracked and reported against by the Department of Health in annual reports.

There are also limitations with regard to information gathering and monitoring of mental health. There is only one indicator for mental health in the District Health Management Information System,<sup>282</sup> and this is not disaggregated at all by diagnosis or sex. Furthermore, the only indicators related to mental health in the Western Cape are suicide, drug abuse and alcohol abuse. However, the Mental Health and Poverty Project at the University of Cape Town has introduced a set of mental health indicators in some districts, which could be applicable and of use to the Department of Health. Finally, mental health is inadequately integrated into the planning and implementation process and should be given high priority.

There is also no disaggregation of the indicator on maternal or child mortality in terms of disability. There is therefore limited information available on the rate of mortality for children and women with disabilities.

The National Cancer Registry has not been updated since 1999, leading to an absence of available data on cancer incidence.<sup>283</sup>

The Department of Health<sup>284</sup> has taken some steps to improve monitoring practices. A National Complaints Management System is being developed to assist with the tracking of the quality of service delivery. A situational analysis has also been conducted. This information will now be used to strengthen this system. It is important that this system is designed in a way that allows for feedback from marginalised groups, particularly persons with disabilities, detainees, and refugees. Secondly, a monitoring and evaluation framework has been developed for the National Strategic Plan for HIV and AIDS and STIs (2007–2011). Data is also constantly been collected in accordance with the Comprehensive Plan for HIV and AIDS Care, Management and Treatment (CCMT). A mid-term review of the CCMT was also conducted and draft reports were circulated to the national and provincial governments. The report is not yet however available on the Department of Health website.

Some of the progress made up until 2008<sup>285</sup> includes:<sup>286</sup>

- 250 laboratories are certified to support the programme;
- 3 pharmacovigilance centres are established to monitor and investigate adverse reaction to treatment;
- 93% of public health facilities are offering VCT;
- ART stock is available in all health care facilities;
- 436 facilities are accredited to provide CCMT services including ART;
- 84% of municipalities had at least one accredited facility for CCMT.

Two major reports were produced, the Summary Report on the Ante-Natal (ANC) HIV and Syphilis Prevalence Survey 2007,<sup>287</sup> and the Progress Report on Declaration of Commitment on HIV and AIDS (written for the UN General Assembly Special Session on HIV and AIDS- UNGASS). The key findings for the UNGASS report were:<sup>288</sup>

281 Department of Health (note 271 above).

282 Number of mental health visits.

283 Cancer Association, comment made at the SAHRC ESR public hearings, (2009).

284 Department of Health (note 271 above).

285 South African Government Information. Q & A: World AIDS Day (2008), <[http://www.info.gov.za/issues/hiv/wad\\_qa.htm#progress\\_plan](http://www.info.gov.za/issues/hiv/wad_qa.htm#progress_plan)>.

286 Some of these and other findings are covered in the section on HIV and AIDS below.

287 These findings are discussed under the relevant sections in this report.

288 Department of Health. *Progress Report on the Declaration of Commitment on HIV and AIDS*, (2006-2007), <<http://www.doh.gov.za/docs/reports/2008/progress/part1.pdf>>.



- The increase in the budget for HIV/AIDS from R 4 270 716 447 in 2006 to R 4 530 175 220 in 2007;
- 100% screening of blood units for HIV by the South African National Blood Transfusion Service;
- The increase from 46% to 55% in 2006 and 2007 respectively of people living with advanced HIV infection receiving ART;
- The challenge of availability of data on HIV;
- The availability of skilled of human resources in the health sector; a weak monitoring and evaluation system, and the lack of affordability of ARVs.

In terms of research, a National Burden of Disease Survey was commissioned in 2008/09 but at the time of writing the report was not available.

Currently the National Health Information System and District Health Information System is used to collate data from provinces and districts respectively. A bid was awarded in 2007/08 for the strengthening of a health information system through an electronic data base for health research. The status of development and effectiveness of this system in terms of strengthening the health information system is, however, not yet known.

#### **Budgetary planning and oversight**

The budgetary process is led by the National Treasury each year. Inadequate financial resources and spending continue to be a challenge in the health sector; often having detrimental effects such as halting the roll out of ARVs. The expenditure of the Department of Health accounted for more than 20% of the government's expenditure for the 2009/2010 financial year.<sup>289</sup> The budget speech and allocations suggest that health is a key priority area for the government, with improvements to the health care system such as expanding the hospital revitalisation programme and improving remuneration for health officials being particular key priority areas.

The National budget and expenditure for the Department of Health<sup>290</sup> was as follows:

**Table 16: National budget and expenditure for the DOH**

2005–2006		% of spending (Variance)	2006–2007		% of spending (Variance)	2007–2008		% of spending (Variance)
Final Appropriations R	Actual Expenditure R		Final Appropriations R	Actual Expenditure R		Final Appropriations R	Actual Expenditure R	
9 952 861	9 850 055	98.9	11 453 993	11 338 047	98.9	13 091 136	12 762 734	97.5

The increase in actual expenditure was 15.1% but when taking the rate of inflation into account, the real percentage of growth was 11.7% between 2005/06 to 2006/07. For 2006/07 to 2007/08, the actual growth in expenditure was 12.6% and, again, when one takes inflation into account; this is reduced to 7.9%. This reflects a reduction in actual expenditure when comparing 2005/06 to 2006/07.

South Africa currently has a population of 49.32 million.<sup>291</sup> Population statistics suggest that the rate of population growth has declined from 1.12% in 2005/06 to 1.07 in 2008/09. In terms of population per province, the expenditure is proportionate to population figures, with Gauteng and KZN receiving most of the health budget.

<sup>289</sup> IDASA (note 246 above).

<sup>290</sup> <http://www.treasury.gov.za>.

<sup>291</sup> Statistics South Africa. *Midyear population estimates*, (2009), <http://www.statssa.gov.za/>.



The table below provides the provincial budgets and expenditure for 2005/06 to 2008/09.

**Table 17: Provincial expenditure from 2005/06 to 2008/09**

R million	2005/06	2006/07	2007/08	2008/09 Pre audited outcomes
Eastern Cape	6 137	7 257	8 013	10 013
Free State	3 121	3 461	3 834	4 460
Gauteng	9 974	11 115	13 085	15 679
KwaZulu-Natal	10 582	11 664	14 959	17 103
Limpopo	4 796	5 832	6 132	7 960
Mpumalanga	2 627	3 013	3 657	4 453
Northern Cape	1 101	1 407	1 557	1 742
North West	2 968	3 479	3 847	4 485
Western Cape	5 719	6 420	7 498	8 656
<b>TOTAL</b>	<b>47 071</b>	<b>53 649</b>	<b>62 582</b>	<b>75 030</b>

Under-expenditure for specific programmes<sup>292</sup> was as follows: R14 million for Administration (6.3% of total budget for Admin), R223 million for Strategic Health Programmes (6.5% of total budget for Programme), R77 million for Health Service Delivery (less than 1% of overall Programme budget) and R14 million for Human Resources (19.8% of HR budget). These prove the concern about the Department of Health's ability to absorb funding effectively, apply the funding and then implement appropriate measures accordingly. This has particularly been the case in the Free State where the provincial Department of Health ran out of money for certain drugs. As a result, the Department of Health is busy setting up a monitoring and evaluation system for ARVs and a new system for management of drug supplies. In the Western Cape there is a challenge with the inward migration of a significant number of people, particularly from the Eastern Cape, and the equitable share of government funding which has not kept pace. Rigid budgeting processes and insufficient cooperation between provinces is a barrier.

Therefore the reduced actual expenditure after inflation which is clearly evident in 2007/08 financial year is a challenge in terms of expenditure. This will have an impact on the accessibility of health care for all South Africans, as the reduction in expenditure suggests that funds allocated for health are not increasing at a rate sufficient to result in improved quality of, and access to, health care services.

## 8.5. Progress Made in Terms of the Relevant MDG

Goal 1: Eradicate extreme poverty and hunger	
Target 2	Between 1990 and 2015, halve the proportion of people who suffer from hunger. <sup>293</sup>

### 8.5.1. Indicator: Prevalence of underweight children under five years old

The District Health Information System showed that the number of children under five years of age with severe malnutrition<sup>294</sup> decreased significantly, from 88,971 cases in 2001 to 29,165 in 2007 in South Africa.<sup>295</sup> The national average of children under the age of five years who were weighed in 2007/08 and did not gain weight is 1.3%, which is similar to 2006/07.<sup>296</sup> The Free State province had the highest rate of children under five years of age who did not gain weight, followed by the Northern Cape Province.<sup>297</sup> Some children with poorly performing weight measurement may not be recorded within the health facility due to lack of access to health services.

292 Figures for financial year 2007/08.

293 For a discussion on indicator 2, see the section on the Right to food.

294 Severe malnutrition is defined as the number of children with a weight less than 60% of their estimated 'normal' weight for their age.

295 The Presidency. *Development Indicators*. (2008).

296 According to the District Health Barometer, Year 2007/08 the indicator of the rate of children under 5 years not gaining weight measures the proportion of children that are not gaining weight relative to the number of children weighed for the first time in a month in a health facility.

297 Health Systems Trust. *District Health Barometer 2007/08*, (2009), 110.



The health sector has made a significant contribution over the years to the decline in malnutrition amongst children under five. Health sector interventions have included the provision of Vitamin A supplementation to children and mothers, which exceeded set targets. By the end of March 2007, 96.4% of children aged six to 11 months (who were seen at health facilities) had received these supplements, which exceeded the 2006/07 target of 90%. Furthermore, 53.7% of post-partum mothers were also provided with the supplements, which reflected progress towards the set target of 75% for 2006/07. While 24.3% of infants aged 12–59 months also received Vitamin A supplementation, this was lower than the target of 40%. It is clear therefore that additional effort needs to be made to increase Vitamin A coverage for infants aged 12–59 months in particular. Other interventions included the provision of food parcels and the establishment of food gardens at health facilities, schools and communities. It is acknowledged that while the provision of micro and macro nutrition supplementation is important, it was more important to ensure food security for poor households in particular.

By end of March 2006, almost 100% of Environmental Health Officers had been trained to monitor compliance with the regulation for food fortification. In September 2007, 60 out of 300 millers were complying with food fortification which can be seen as good progress when compared to the 30% target set for 2007/08.<sup>298</sup>

In conclusion, South Africa is on its way to reducing the prevalence of underweight children.

#### Goal 4: Reduce Child Mortality

Target 5 Between 1990 and 2015, reduce the under-five mortality rate by two-thirds

##### 8.5.2. Indicator: Under-five Child Mortality Rate (CMR) and Infant Mortality Rate

Mortality is one of the most commonly used indicators of social and economic development and is therefore important in establishing the developmental and health status of a country.<sup>299</sup> Child mortality<sup>300</sup> is a particular priority area in the MDG and the target is to reduce the under-five mortality rate by three-quarters (75%),<sup>301</sup> between 1990 (rate of 64/1000 births)<sup>302</sup> and 2015, (that is to 16/1000<sup>303</sup> births). The indicators related to child mortality have been further disaggregated according to infant (up to one year) mortality rate (baseline of 49/1000<sup>304</sup> births), and neo-natal<sup>305</sup> mortality rate (baseline of 17/1000 births).<sup>306</sup>

Data from Stats SA and the South African Demographic and Health Survey (SADHS)<sup>307</sup> are the two most often used statistics by the Department of Health. Both these data sources showed a decline in child and infant mortality. However, Stats SA showed a more drastic decline of 4/1000 (for IMR) between 2001 and 2003, and the SADHS showed a gradual decline of 2/1000 deaths for both IMR and CMR between 1998 and 2003. Stats SA therefore showed double the decline in IMR in half the time. International data provided by the World Health Organisation and UNICEF showed consistently that, prior to 2007, there has been an increase in IMR and CMR since 1990. However, there has been a drastic decline of 10/1000 deaths between 2006 and 2007. Figures provided by the Medical Research Council are most concerning as they show a substantial increase in CMR and IMR over the years.

298 Department of Health (note 273 above); UNESCO (note 90 above).

299 Infant Health and Mortality Indicators.

300 Defined as death of children under the age of five years.

301 The targets are specified according to the MDG.

302 United Nations Statistics Division (note 85 above).

303 In some cases the target is reflected as a CMR of 15/1000, such as in the case of the Health Systems Trust.

304 United Nations Statistics Division (note 85 above).

305 Definitions for Neo-natal mortality varies. UNICEF defines neonatal deaths as those which occur between late pregnancy and up to seven days of birth. The Department of Health (or the South African Demographic and Health Survey 2003) defines neo-natal mortality as within the first month of life.

306 UNICEF Statistics, baseline data from 2004, <[www.unicef.org/infobycountry/southafrica\\_statistics.html#61](http://www.unicef.org/infobycountry/southafrica_statistics.html#61)>.

307 According to UNESCO (note 90 above), the SADHS is used for planning and implementing appropriate interventions.



While the actual numbers provided for child and infant mortality rate are debatable, where data is available trends for all except one data source show a decline in CMR and IMR from 2006 to 2009. In some data sources, this decline is more drastic (in the case of UNICEF and WHO) than other sources (ASSA 2003 showed a decline of 5/1000 CMR and IMR, and Stats SA showed a decline of 4/1000 for IMR). While the consistent decrease in IMR and CMR may seem somewhat positive, UNICEF indicated that according to their statistics, which is the best case scenario for 2007, South Africa needs a 13.8% rate of reduction per year to meet the MDG target within the six years leading up to 2015.

The progress on achieving these objectives is somewhat contentious as different data sources provide different statistics on child mortality, making the reliability of available statistics questionable. A further limitation regarding the reliability of statistics is the unreported deaths, particularly of children in rural areas.

The table below illustrates disparities in data provided by the various data sources.

**Table 18: Data for Child Mortality Rate (CMR) and Infant Mortality Rate (IMR)**

Data Source <sup>3</sup>	Type of Mortality	Year								
		2001	2002	2003	2004	2005	2006	2007	2008	2009
UNICEF: Countdown to 2015 <sup>4</sup>	CMR <sup>5</sup>	-	-	-	-	-	69 <sup>6</sup>	59	-	-
	IMR <sup>7</sup>	-	-	-	-	-	-	46	-	-
WHO <sup>8</sup>	CMR	-	-	-	-	-	69	59	-	-
	IMR	-	-	-	-	-	56	46	-	-
Medical Research Council <sup>9</sup>	CMR	58	59	59	59	-	-	-	-	-
	IMR	96	100	104	106	-	-	-	-	-
The Lancet (Murray, Laakso, Shibuya and Lopez) <sup>10</sup>	CMR	-	-	-	-	69	-	-	-	-
ASSA <sup>11</sup> 2003	CMR	90	89	87	82	77	73	71	69	68
	IMR	60	58	56	52	49	48	46	45	43
Statistics SA <sup>12</sup>	CMR	-	-	-	-	-	-	-	-	-
	IMR <sup>13</sup>	63	61	59	56	53	50	48	46	46
SADHS	CMR	-	-	58	-	-	-	-	-	-
	IMR	-	-	43	-	-	-	-	-	-



### 8.5.3. Indicator: Proportion of one-year-old children immunized against measles

The MDG consider the immunisation of children, particularly against measles, as an important indicator for the prevention of child mortality. Statistics (Department of Health Annual Report 2007/08 [data for 2007], Children's Institute: UCT [data from 2001–2004], and UNICEF [data for 2007]<sup>308</sup>) show that there has been a steady increase of children under one year old being immunized against measles, with the most recent figure for 2007 being 83%. The table below shows the increase in coverage since 2001.

**Table 19: Measles Immunisation Coverage: 2001–2004, 2007**

Year	2001	2002	2003	2004	2007
Measles immunization coverage <sup>14</sup>	79.5%	80.9%	81%	82.1%	83%

Even though there has been a steady increase in measles immunisation coverage of approximately 1% per year, it is challenging to make conclusions about the level to which South Africa is progressing towards the MDG, as agreed targets for measles immunisation have not been prescribed by the MDG. Statistics for measles cases have, however, dropped from 616 cases to 28 cases reported in 2007/08 (overachieving on the target of reduction by 50% set by the Department of Health).<sup>309</sup> However, as indicated in the critique of the MDG, looking to immunisation against measles as the only key immunisation indicator for reducing child mortality is not comprehensive. However, South Africa does not fall short in terms of their achievements related to overall immunisation coverage.

This immunization coverage is defined as the proportion of children under one year who received all their primary vaccines for tuberculosis (TB), diphtheria, whooping cough, tetanus, polio, measles, hepatitis B and haemophilus influenza. The Presidency Report (2007)<sup>310</sup> showed that the target of 90%<sup>311</sup> overall immunization coverage had already been met in 2005. The statistics on coverage for these specific vaccines are provided in the table below.<sup>312</sup>

**Table 20: Overall Immunisation Coverage: 2005–2007**

Type of Immunisation	2005	2006	2007
TB (Corresponding vaccines: BCG)	99%	99%	99%
DTP 1	99%	99%	99%
DTP 3	97%	99%	97%
TT2+ (PAB)	58%	73%	72%
Polio (Corresponding vaccines: Polio 3)	97%	99%	97%
Hib3	97%	99%	97%
Hepatitis B3	97%	99%	97%
Measles (MCV)	84%	85%	83%

In conclusion, the data available for 2007 consistently showed that the IMR is between 46 and 48/1000. CMR has been shown to be between 59 and 71/1000 cases. Even in the best case scenario (which is the data presented by UNICEF), South Africa has a long way to go to meet the target of a CMR of 16/1000. It is concerning that South Africa is not even close to halfway meeting the target for CMR, after nine years of commitment to the MDG, and with only six more years to go. Furthermore the inconsistency between different data sources poses another challenge to the reliability of current data collection methods undertaken. In terms of immunisation, it seems that South Africa is doing well, steadily progressing in providing immunisation against measles and overall immunisation for children.

<sup>308</sup> SAHRC (note 2 above).

<sup>309</sup> National Department of Health (note 271 above).

<sup>310</sup> Presidency of South Africa (note 296 above). The Working Paper points out that there is a variation in data for measles coverage within government, where the National DoH identifies coverage of 83% and the Presidency's 2007 Development Indicators Report which identifies a 90% immunization coverage. It is important to note that this data is not contradictory, as suggested by the Working Paper, as the Presidency report refers to overall immunization coverage as defined above whereas the data referred to in Working Document only covers immunization for measles.

<sup>311</sup> Data sources cited in Presidency Report: District Health Information System and Statistics South Africa.

<sup>312</sup> Data source: South African Human Rights Commission. *Public Inquiry: Access to Health Care Services*, (2007).61.



## Goal 5: Improve maternal health

Target 6 Between 1990 and 2015, reduce the maternal mortality by three-quarters

### 8.5.4. Indicator: Maternal mortality ratio (MMR)<sup>313</sup>

Maternal deaths are largely preventable, and this is one reason why a reduction in maternal mortality has been identified as one of the MDG. In South Africa, 92% of women are able to access ante-natal and delivery care. This success came about, in part, because health care is free for all pregnant women.

The MMR seems to be difficult to determine and estimate as various sources present different results. As reflected in the South African Millennium Development Goal Country Report for 2005 and 2007, the 1998 South Africa Demographic and Health Surveys found that the MMR was 150/100 000. In 2002, Stats SA reviewed all registered deaths and estimated the MMR to be at 124/100 000. This figure suggested that the country was on track towards decreasing MMR over time. However, an MMR of 124/100 000 is considered high for a middle income country such as South Africa. This is acknowledged in the MDG Country Report for 2005 and for 2007.<sup>314</sup> However, the MMR from Stats SA for 2003 was 165.50 as opposed to 84.25 in 1998 showing a drastic increase, with a small decrease in 2004 to 147. The World Health Organisation estimated in 2000 that the maternal mortality ratio in South Africa was 230, while five years (2005) later they estimated it to be 400. It should be noted that there are no recent statistics or estimates.

In July 2009, the National Committee on Confidential Enquiries into Maternal Deaths (NCCEMD) released its fourth report covering the period 2005/07. In this period 4,077 maternal deaths were reported which is an increase of 20% from the 3,406 deaths reported during 2002/04. The increase in deaths reported is due to a combination of better reporting and an actual increase of deaths. The report is based on maternal deaths in all health institutions from 2005 to 2007 that were reported to NCCEMD. As many maternal deaths occur outside the health institutions, the report cannot be used as accurate when it comes to the MMR for the country or the provinces. However, the report does give accurate information on the causes of deaths and quality of care within the institutions. The report furthermore stated that 38.4% of the maternal deaths could have been avoided.<sup>315</sup> Hypertension, obstetric haemorrhage, pregnancy related sepsis and non-pregnancy related infections (of which AIDS accounted for 45%) were responsible for four out of five avoidable deaths. AIDS was the most common cause of maternal deaths. Only 60% of the women who died were tested for HIV.

Non-attendance and delayed attendance at the health institutions were the most common patient orientated problems. The most frequent health worker related avoidable factor was substandard care, namely the lack of adherence to standard protocol, poor problem recognition and initial assessment. Poor transport facilities, lack of health care facilities and lack of appropriately trained staff were major administrative problems. The ways to prevent these deaths are known. The third NCCEMD report developed ten recommendations with implementation strategies for how to prevent avoidable maternal deaths. *“By the end of March 2007, 85% of health institutions were implementing the recommendations from the third NCCEMD report, which exceeded the 2006/07 target of 80%.”*<sup>316</sup> However, despite following these recommendations, the prevalence of maternal deaths reported increased for this triennium.

Assessing this indicator on the MMR, it can be concluded that South Africa is a far way from reaching the target of reducing the MMR by three quarters. In fact the trend is suggesting that the MMR is increasing.

### 8.5.5. Indicator: Proportion of births attended by skilled health personnel

The second indicator is the *proportion of births attended by skilled health personnel*. Assistance at delivery by a skilled health professional is one of the key indicators for improving maternal health. The SADHS 1998 and 2003 showed an increase in the percentage of women who were attended to by skilled health professionals during delivery, especially by a nurse or midwife. Assistance at delivery by a nurse, midwife or a doctor increased from

<sup>313</sup> Maternal death is defined as ‘deaths of women while pregnant or within 42 days of termination of pregnancy from any cause related to or aggravated by the pregnancy or its management, but not from accidental or incidental causes see NCCEMD (note 275).

<sup>314</sup> UNESCO (note 90 above).

<sup>315</sup> NCCEMD (note 275 above).

<sup>316</sup> Department of Health (note 273 above).



84.4% in 1998 to 92.0% in 2003.<sup>317</sup> The District Health Barometer, 2007/08 measures an indicator on the delivery rate in facility, namely the proportion of the estimate of all expected births that take place in the public health facilities. It is an expression of access to the public sector facilities as well as utilisation of these by pregnant women as opposed to giving birth at home. During the 2007/08 year the average delivery rate in a facility was 80.6%, with very little change from the national delivery rate in the facility in 2006/07 and 2005/06. Over the 8-year period since 2000/01 there is a clear increasing trend in delivery coverage in all provinces, although with quite different starting and ending rates, and a very small increase in KZN. The average delivery rate in 2007/08 in the rural nodes was 74.5% and below the national average. *“The four districts in the Eastern Cape were all well below the national average and it is a concern that access to this vital service remains low in the rural districts of this province.”*<sup>318</sup> In conclusion, there is an increase in the proportion of births assisted by skilled health staff, with a lower proportion in rural areas. However, the MMR indicators remain high, pointing to probable low quality of care during pregnancy and child birth<sup>319</sup> including insufficient HIV testing.

Goal 6: Combat HIV/AIDS, malaria and other diseases

Target 7 By 2015, have halted and begun to reverse the spread of HIV and AIDS

Sub-Saharan Africa has historically been the region with the highest number of people living with HIV, carrying 67%<sup>320</sup> of the world's burden of HIV. South Africa has therefore committed itself to the MDG target of halting, and beginning to reverse the spread of HIV and AIDS by 2015. The key indicators for combating HIV according to the MDG is the HIV prevalence among 15–24 year old pregnant women, the contraceptive prevalence rate and the number of children orphaned by AIDS.

#### 8.5.6. Indicator: HIV Prevalence among 15 to 24-year-old pregnant women

When looking at trends for combating HIV and AIDS, a key indicator is specifically looking at the HIV prevalence among 15-24 year old pregnant women, and it decreased from 30.2% to 28% in 2007. All the provinces, except the Free State, showed a decline in HIV prevalence among antenatal clinic attendees. The Western Cape declined from 15.7% to 12.6% and Limpopo declined from 21.5% to 18.5% in HIV prevalence among antenatal clinic attendees. The other provinces showed a decline of between 2% to 2.5%. The Free State Province showed an increase of about 3% in HIV prevalence of the same group.

Again it is challenging to make an assessment of the achievement of this indicator as a target has not been set. For this reason it is necessary to look at HIV statistics in more detail, so as to make an assessment of the achievement of the MDG.

#### HIV prevalence generally

HIV prevalence on the whole is showing signs of stabilisation with an overall prevalence rate of 10.9%<sup>321</sup> in 2009 of the South African population, compared to 11.4% in 2002 and 10.8% in 2005. The table below shows the prevalence across different age groups.

Table 21: HIV prevalence across age groups

Population Group	HIV prevalence rate per year		
	2002	2005	2008
2-14 years	5.6%	3.3%	2.5%
15-24 years	9.3%	10.3%	8.7%
Pregnant females between 15–24 years	-	30.2% <sup>15</sup>	28% (2007)
25+ years	15.5%	15.6%	16.8%
All	11.4%	10.8%	10.9%

<sup>317</sup> Ibid.

<sup>318</sup> Health Systems Trust. District Health Barometer 2007/08, 2009,116. The four districts are Ukhahlamba, Alfred Nzo, O.R. Tambo and Chris Hani.

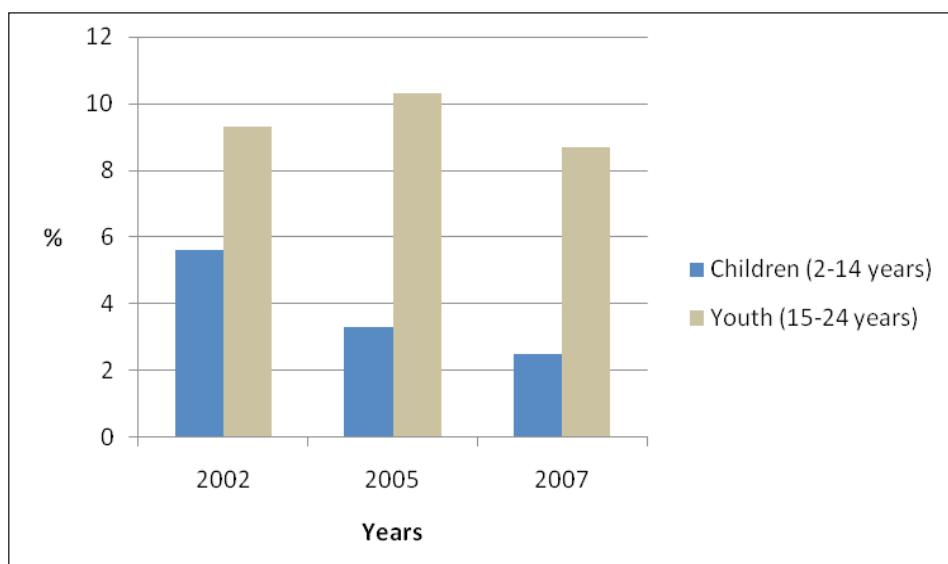
<sup>319</sup> Health System Trust (note 298 above).

<sup>320</sup> All data taken from Shishana (note 272 above), unless otherwise indicated.

<sup>321</sup> This figure excludes children under the age of two years. When including children under the age of two years, the prevalence changes to 10.6%.

The most significant positive finding is that HIV prevalence among the age group 2–14 years has halved between 2002 (5.6%) and 2008 (2.5%), and that HIV prevalence for the age group 15–24 years decreased from 10.3% in 2005 to 8.7% in 2008. This is the lowest it has ever been since the Prevalence Survey has been conducted. These positive results are shown in the graph below.

**Figure 2: HIV Prevalence for children and youth**



A cause for concern however is the growth in HIV prevalence among the 25+ age group, which showed an increase of 1.3% from 15.5% to 16.8% since 2002. The HIV prevalence among older persons is high with 10.4% of males and 10.2% of females between the ages of 50–54 years, and 6.2% of males and 7.7% of females between the ages of 55–59 years being infected with HIV.

Gender differences in the younger age groups are significantly notable with female prevalence being consistently higher (at least double) compared to males between the ages 15–29 years. Intergenerational sex<sup>322</sup> has also increased quite drastically, from 18.5% in 2005 to 27.6% in 2008 among females between 15–19 years of age, while there was a decline from 2% in 2005 to 0.7% in 2008 among males. This is even more cause for concern among females in this age group as age mixing increases one's risk of infection.<sup>323</sup>

Even though the HIV prevalence on the whole seems to show signs of stabilising, data for the provinces is still disconcerting as the disparities between HIV prevalence are vast in some instances. The table below shows that the Western Cape (3.8%) and the Northern Cape (5.9%) have the lowest HIV prevalence rates, while KZN (15.8%), Mpumalanga (15.4%) and Free State (12.6%) have the highest HIV prevalence rates.

Overall, five of the provinces show a decline in HIV since 2002, with the Western Cape and Gauteng showing the most successful decline in HIV prevalence. KwaZulu-Natal (increase by 4.1%) and the Eastern Cape (increase of 2.4%) show the largest incline in HIV prevalence since 2002. This is displayed in the table below.

<sup>322</sup> This is where a person's sexual partner is five years or older.

<sup>323</sup> Shisana (note 272 above).



**Table 22: HIV Prevalence according to Province**

Province	HIV prevalence rate per year		
	2002	2005	2008
Western Cape	10.7%	1.9%	3.8%
Northern Cape	8.4%	5.4%	5.9%
Limpopo	9.8%	8.0%	8.8%
Eastern Cape	6.6%	8.9%	9.0%
Gauteng	14.7%	10.8%	10.3%
North West	10.3%	10.9%	11.3%
Free State	14.9%	12.6%	12.6%
Mpumalanga	14.1%	15.2%	15.4%
KwaZulu-Natal	11.7%	16.5%	15.8%

The National Prevalence Survey showed that 14.1% of persons with disabilities are HIV positive.

#### **8.5.7. Indicator: Contraceptive prevalence rate**

As indicated in the critique of the MDG, contraceptive prevalence is vague as an indicator. “*Consistent and correct condom use is one of the most effective means for preventing HIV transmission,*”<sup>324</sup> and therefore it would be a more precise indicator. However, information is not available regarding this and so last condom use as well as condom use with multiple partners will be used as an indication of the prevalence of contraceptives/condom use.

#### **Last condom use**

According to the HIV Prevalence Survey (2008), there has been a statistically significant increase in reported condom use at last sexual encounter for all age groups between 2002 (27.3%)<sup>325</sup>, 2005 (35.4%) and 2008 (62.4%). The data per province for condom use is interesting when comparing it to the HIV statistics. The Western Cape, which has the lowest HIV prevalence, showed the lowest condom use (49%), whereas Mpumalanga and the Eastern Cape showed the highest level of condom use (70.2% and 70% respectively) even though these two provinces are among the provinces with the highest HIV prevalence.

This contradictory evidence suggests that the indicator condom use on last sexual encounter may be limited in terms of pointing out consistent condom use.

#### **Condom use with multiple partners**

Exposure to multiple sexual relationships increases one's risk of contracting HIV, due to social networks. Overall, condom use among those in multiple sexual relationships is higher than general condom use (i.e. reported condom use in any sexual encounter, whether within or outside of a relationship), with 75.2% reported condom use at last sexual encounter. This is an increase from 70.8% in 2002.

#### **8.5.8. Indicator: Number of children orphaned by HIV and AIDS**

UNICEF estimated the number of children (aged 0–17 years of age) orphaned by AIDS to be at about 1 400 000 by 2007. The specific health care for AIDS orphans is the responsibility of various departments such as the Departments of Education, Social Development, Home Affairs and Health.

<sup>324</sup> Shisana (note 272 above).

<sup>325</sup> Data un-weighted.



Even though this is a key area of priority in the National Strategic Plan for HIV/AIDS (2007/11), Orphans and Vulnerable Children were not mentioned in the Department of Health's submission to the Commission, nor were they reported on in the Department's Annual Report for 2007/08. It is therefore not clear how the Department of Health is progressing in terms of providing VCT and ART for these children.

#### **Conclusion on HIV related indicators**

Results for HIV prevalence among pregnant women between the ages of 15–24 years old are positive as this has been reduced from 30.2% to 28% in 2007. The majority of provinces (that is, all except the Free State) also show a decrease in HIV prevalence for this group. In terms of halting the spread of HIV, South Africa seems to be showing positive signs of stabilisation with a 10.9% prevalence rate. While the decrease in HIV prevalence for the age groups 2–14 and 15–24 years has been the highlight of the HIV prevalence survey for 2009, the HIV prevalence in some provinces, as well as the disproportionate prevalence between females and males, is still problematic.

Positive results are evident for reported condom use at last sexual encounter for all age groups. Data on condom use at last sexual encounter in the provinces, however, contradicts the statistics on HIV prevalence, which may be an indication of the unreliability of the indicator measuring consistent condom use.

Unfortunately, orphans and vulnerable children do not feature as a priority area for the Department of Health and neither does it seem like it is a subject for inter-governmental cooperation.

**Target 8** By 2015, to have halted and begun to reverse the incidence of malaria and other major diseases

#### **8.5.9. Indicator: Prevalence and death rates associated with malaria**

The total number of malaria cases has decreased from 51 444 in 1999 to 6764 in 2008, with a slight increase in 2006 and 2008 compared to the preceding year. Since 2003 the Limpopo province has been the province with most malaria cases in the country.<sup>326</sup>

**Table 23: Malaria cases in South Africa**

PROVINCE	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
Limpopo	11 228	9 487	7 197	4 836	7 010	4 899	3 458	6 369	2 742	4 392
Mpumalanga	11 741	12 390	9 061	7 965	4 335	4 064	3 077	4 558	2 052	1 655
KwaZulu-Natal	27 238	41 786	9 473	2 345	2 042	4 417	1 220	1 236	557	582
Rest of South Africa	1 237	959	775	503	72	19	0	0	27	135
<b>TOTAL</b>	<b>51 444</b>	<b>64 622</b>	<b>26 506</b>	<b>15 649</b>	<b>13 459</b>	<b>13 399</b>	<b>7 755</b>	<b>12 163</b>	<b>5 351</b>	<b>6 764</b>

The malaria fatality rate has fluctuated during 1999 to 2008, with a peak of one in 2003, 0.82 in 2005 and 0.9 in 2007. The lowest level was 0.4 in 2001. In 2008 it was 0.64.

**Table 24: Malaria case fatality rates in South Africa**

PROVINCE	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
Limpopo	1.1	0.7	0.8	0.9	1.5	0.8	0.89	0.89	0.92	0.71
Mpumalanga	0.6	0.4	0.1	0.4	0.7	0.3	0.52	0.46	0.82	0.48
KwaZulu-Natal	0.8	0.8	0.5	0.7	0.1	0.6	1.39	0.90	0.97	0.52
<b>TOTAL</b>	<b>0.8</b>	<b>0.7</b>	<b>0.4</b>	<b>0.6</b>	<b>1</b>	<b>0.6</b>	<b>0.82</b>	<b>0.73</b>	<b>0.9</b>	<b>0.64</b>

<sup>326</sup> Department of Health (note 273 above).



#### **8.5.10. Indicator: Proportion of the population in malaria-risk areas using effective malaria prevention and treatment measures**

Although there are no statistics about this indicator, the mere fact that the prevalence of malaria cases decreased indicates that South Africa is on the way to achieving this indicator and therefore the target as well. According to the Department of Health's submission:

*"Factors behind the successes in malaria control include: (i) An increase in indoor residual spraying with an overall coverage of more than 80% and the completion of spraying before the peak in malaria transmission; (ii) The use of artemisinin-based combination therapy by the malaria affected provinces, which reduces parasite carriage; (iii) Intensified surveillance leading to early detection of any increases in malaria cases in high risk areas; (iv) Epidemic preparedness teams capacitated to respond to seasonal outbreaks; (v) Advocacy with mass community mobilisation and training of healthcare workers in the malaria affected areas; (vi) Collaboration amongst African countries in improving the effectiveness of malaria control programme since malaria vectors (mosquitoes) have no regard for national borders."<sup>327</sup>*

In conclusion, although the death rate associated with malaria is fluctuating, South Africa has reached its target of having halted and begun to reverse the incidence of malaria.

#### **8.5.11. Indicator 3: Prevalence and death rates associated with tuberculosis**

Tuberculosis (TB) remains a major public health issue in South Africa. Fuelled by the HIV epidemic, the TB epidemic continues to grow unabated. TB is the leading cause of death in HIV-infected persons in South Africa. The annual incidence of TB in persons who live with HIV infection is about ten times that in persons who are not infected with HIV.<sup>328</sup> Over the last decade, the incidence of TB has more than doubled, from 305 per 100 000 in 1997 to 722.4 per 100 000 in 2006 to 739.6 per 100 000 in 2007.<sup>329</sup> There were no available statistics covering 2008 at the time of writing. The increasing incidence of TB has resulted in South Africa being ranked fourth in the list of 22 high burden TB countries in 2008.

The death rate associated with tuberculosis has increased in percentage terms from 5.6% in 1996 to 7.2% in 2005. However, it should be noted that the death rate in 1999 was 8.9%.<sup>330</sup> There are no statistics for the death rate for 2006/09. The national Department of Health has enhanced its interventions to address the TB and HIV co-morbidity and as a result 80% of TB patients were tested for HIV in 2007/08 which exceeded the target of 35%.<sup>331</sup>

Within the last year the national Department of Health has carried out a number of activities aimed at improving the management of TB. These include the revision of the national TB guidelines to include recent recommendations on the management of children with TB, and the diagnosis of smear-negative and extrapulmonary TB; revising the TB registers to include information on collaborative TB/HIV activities; and the training of health-care workers on infection control. The advent of extreme-drug resistant TB in 2006 poses challenges. During the planning cycle for 2007/08-2009/10, the areas of focus included improving smear conversion rates in the four worst performing districts, strengthening of laboratory services, revision of the MDR-TB Treatment Guidelines, and a range of activities designed to better understand and treat extremely drug resistant TB.<sup>332</sup> Additional activities which address drug-resistant TB, such as the introduction of a Multi-Drug Resistant (MDR)-TB register and training on MDR-TB for medical officers and nurses, have also taken place.<sup>333</sup>

However, it is acknowledged that to decrease MDR and XDR-TB, the national TB Control Programme must be strengthened.

<sup>327</sup> Ibid.

<sup>328</sup> Health System Trust (note 298 above).

<sup>329</sup> Health System Trust, <<http://www.hst.org.za/healthstats/16/data>>.

<sup>330</sup> Department of Health. *Tuberculosis Strategic Plan for South Africa, 2007-2011*, (2007), 12.

<sup>331</sup> Department of Health (note 271 above).

<sup>332</sup> Department of Health (note 273 above).

<sup>333</sup> Ibid.



#### **8.5.12. Indicator: Proportion of tuberculosis cases detected and cured under directly observed treatment, short-course (DOTS)**

Although the drug-resistant TB burden is increasing, the principal aim of the National TB Control Programme (NTCP) remains the successful treatment of new smear positive TB clients. The early detection and effective treatment of these infectious clients will reduce the number of people infected with TB in the country. The smear conversion rate (SCR) and cure rate are the two indicators used to measure progress towards achieving this aim. In order to achieve the MDG, WHO set targets for both indicators at 85%. These are the same targets which have been set to be reached by 2011 in the five year strategic plan for 2007–2011.<sup>334</sup> In 2007 the average SCR<sup>335</sup> for South Africa was 60.5% as compared with 55.8% in 2006. The slow but steady increase in SCR from 46.6% in 2004 is very encouraging. As long as this improvement continues, the national target should be attainable within a few years. However, the North West province showed no improvement in the SCR over the last four years and is the only province with a SCR lower than 50%.<sup>336</sup> The interim South African cure rate<sup>337</sup> target showed an increase of 10% each year.<sup>338</sup> The most recent data on the cure rate showed that there has been a steady improvement in the cure rate from 50.8% in 2004 to 57.6% in 2005, to 65.2% in 2006. This improvement is a road to success and all staff working in the TB control programme need to be encouraged to continue these improvements. However, of concern is that three of the twelve rural districts had cure rates of less than 50%.<sup>339</sup>

The improvement in TB cure rates from 2003 to 2006 is not as encouraging as the improvement in SCRs. Cure rates have improved in KZN and the Eastern Cape but in many provinces they have remained static or increased marginally and remain well below the targets of the National TB control programme.<sup>340</sup>

In keeping with the World Health Organisation (WHO) AFRO resolution of 2005, South Africa in 2006 implemented a national tuberculosis (TB) crisis management plan in three provinces, namely, Eastern Cape, Gauteng and KwaZulu-Natal. Four of the worst performing districts in these provinces were identified namely, Amathole District and Nelson Mandela Metro (Eastern Cape), City of Johannesburg (Gauteng) and EThekweni Metro (KwaZulu-Natal). They were provided with systematic and targeted support in accordance with their locally developed plans. The aim of the interventions was, in the short term to increase the number of TB patients testing negative for TB within three months of treatment, and in the medium term to increase the cure rates.<sup>341</sup>

The TB cure rate improved in the TB crisis management districts during 2006. In the Nelson Mandela Metro, the cure rate improved from a baseline of 42% to 53.3%. In Amathole District, the cure rate increased from 31% to 52.5%, while in the City of EThekweni the cure rate increased from 42% to 45.5%. Finally, in the City of Johannesburg the cure rate increased from 61% to 74.4%. All TB crisis management districts met their interim target except the City of EThekweni, which had a target of 50%.<sup>342</sup>

The Tuberculosis Strategic Plan for South Africa 2007–2011 was finalised during 2007 and implementation of the plan has started. The Plan is based on an adaptation of WHO's Stop TB Programme and includes aspects that focus on prevention, early and reliable diagnosis as well as treatment.

In conclusion, both the prevalence and the death rate for TB have increased over the decade (with no data on the death rate in 2006–2009). Fortunately, the SCR has increased in 2007. While there is no data for the cure rate in this reporting period, the cure rate for the crisis areas have improved during 2006.

334 Department of Health. *Tuberculosis Strategic Plan for South Africa, 2007-2011*, (2007), 20.

335 Clients diagnosed as having "smear positive" TB have TB in the lungs and the organism that causes TB, the *Mycobacterium tuberculosis* bacillus, is seen in their sputum at diagnosis. The smear conversion rate (SCR) is the proportion of smear positive clients who no longer have the TB bacillus in their sputum after two months of treatment and are referred to as "smear negative". As TB treatment is at least six months in duration, this is an important process indicator of the effectiveness of TB treatment. It is the first indicator which will alert health workers to the failure of clients to respond to treatment and the possibility of drug-resistant TB. SCR is also a measure of the effectiveness of the health service.

336 Department of Health (note 274 above).

337 The TB cure rate is the proportion of TB cases that have taken TB treatment for a full six months, and as a result no longer have TB bacilli in their sputum. A more technical definition of cure rate is the proportion of smear positive TB cases that are shown to be smear negative at the end of six months treatment and who have also had a negative smear on one previous occasion during the TB treatment.

338 Department of Health (note 271 above).

339 Health System Trust (note 298 above).

340 Ibid.

341 UNESCO (note 90 above).

342 Department of Health (note 271 above).



It is imperative though, that TB is not viewed as an exclusive health sector challenge. Lessons from other countries generated across decades reflect that the provision of adequate housing, jobs and reduction of poverty and unemployment are central to turning the tide against TB. These are as important as adequate clinical skills, good case management, and effective monitoring of treatment outcomes amongst health workers, as well as compliance with TB treatment amongst TB patients.<sup>343</sup>

Goal 8: Develop a global partnership for development	
Target 17	In cooperation with pharmaceutical companies, provide access to affordable drugs in developing countries

#### 8.5.13. Indicator: Proportion of the population with access to affordable essential drugs

There are large gaps in the availability of medicines in both the public and private sectors in developing countries, as well as wide variations *vis-à-vis* the international reference prices for medicines. Both factors make many essential medicines inaccessible, especially to the poor. This is not only a substantial obstacle to accelerating progress in the achievement of MDG 8 but also a barrier to the achievement of MDG 4, 5 and 6.<sup>344</sup>

There are no statistics in South Africa on this indicator. South Africa has a population of about 48 million people<sup>345</sup> and only 7 million of those have health insurance and have access to affordable essential medicines by making use of services in the private sector. About 40 million people access essential medicines through public sector facilities. However, the Department of Health has, through pressure by NGOs, engaged with the pharmaceutical industry and managed to reduce the price of medicines by 20% during 2007/08. The National Drug Policy provides a roadmap for the management of medicines in the country. The Pharmacy Act 53 of 1974, as amended in 2000, enables lay ownership of pharmacies. This creates a method to improve access to Essential Medicines specifically in rural and under-serviced areas. The amendment in 2000 furthermore requires newly qualified pharmacists to perform a year of community service. In keeping with the National Drug Policy (NDP) relating to pricing of medicine, the Medicines and Related Substances Act 101 of 1965 as amended, includes provision for the parallel importation of medicines, the establishment of a medicine price committee and the introduction of a transparent, non-discriminatory pricing system for medicines.

Civil society organisations have also played a role in influencing access to affordable drugs. The TAC and ALP pressured Merck & Co and its local subsidiary MSD (Pty) Ltd to grant multiple licenses for generic efavirenz (EFV) products (which are part of most ARV treatments) and thereby reducing the price.<sup>346</sup>

The Department of Health also gazetted a draft International Benchmarking Methodology in December 2006, which compared medicine pricing policies and practices with five other countries.

Although the government has made efforts to bring the drug prices down, the majority of the South African population does not have access to affordable drugs. In the current context of the global economic crisis, the MDG Gap Task Force recommends the following to improve the accessibility and affordability of essential medicines:<sup>347</sup>

- Governments should provide additional protection to low-income families to cope with the rising costs of medicines as a consequence of the global economic crisis.
- In addition to national efforts, further international actions should be taken to improve the availability and affordability of essential medicines, such as the establishment of international patent pools.
- The public sector, in collaboration with the private sector, should strive to make essential medicines available at affordable prices and step up efforts to improve health insurance coverage.
- Governments, in collaboration with the private sector, should give greater priority to treating chronic diseases and improving the accessibility of medicines to treat them.

343 Department of Health (note 273 above).

344 MDG Gap Task Force. *Strengthening the Global Partnership for Development in a Time of Crises*, (2009), 62.

345 However, refugees and asylum seekers are not included in the population register. Coupled with an unquantifiable number of undocumented immigrants, the actual number of inhabitants is obviously higher than the reported 48 million.

346 AIDS Law Project. *18-month Review 2007-2008*, (2008), 40-41.

347 MDG Gap Task Force (note 360 above).



## 8.6. Findings on the Progress Made by the State on the Realisation of the Right

### 8.6.1. Accessibility

Health facilities, goods and services have to be accessible to everyone without unfair discrimination. This includes physical accessibility, economic accessibility and information accessibility.<sup>348</sup>

One of the principles for progressive realisation refers to a programme that accounts for the degree and extent of denial of the right in question, that is, the most vulnerable or those with most urgent needs must not be ignored.<sup>349</sup>

One of the challenges related to the progressive realisation of the right to health revolves around the equality of access to health care. This is particularly the case when one looks at vulnerable groups such as persons with disabilities, both physical and mental, older persons, refugees, prisoners, children, sex workers, and people with living with and affected by HIV/AIDS. However, this is even more evident in the case of gender inequality. There is an increasing trend in maternal mortality rates and the rate is far higher than other middle income countries. The NCCEMD report showed that 38.4% of these deaths are avoidable<sup>350</sup> and the impact that the HIV epidemic is having on maternal deaths is clearly demonstrated in the report. The number of women being tested for HIV has risen sharply since the last report, from 46.3% in 2002/04 to 59% in 2005/07. This is probably a reflection of the expansion of the Prevention of Mother to Child Transmission Programme but, having said that, 41% of the pregnant women were not tested. The biggest cause of maternal death is non-pregnancy related infections which is mainly AIDS; 17.6% of the maternal deaths were due to AIDS. The increasing availability of ART makes many of the deaths due to AIDS avoidable. This is unfortunate proof that women are not accessing health care services as well as they should.

There is growing recognition that mental health is a crucial public health and development issue in South Africa. Latest reviews of disease burden in this country rank neuropsychiatric conditions third in their contribution to the burden of disease, after HIV/AIDS and other infectious diseases. For the first time, a major representative epidemiological study has revealed that some 16.5% of South Africans reported having suffered from common mental disorders in the last year.<sup>351</sup> This figure does not include schizophrenia and bipolar mood disorder, which according to expert consensus, would affect 0.5–2.0% of the population during an average year. This is a highly neglected disorder and 75% of people do not receive any kind of treatment for mental illness. There are strong links between mental ill health and poverty. People with mental health problems are more likely to drift into poverty due to increased health expenditure, loss of employment or reduced productivity, and those living in poverty are more likely to develop mental health conditions. Currently there is no adopted mental health policy. The Mental Health Guidelines refer to the relationship between poverty and mental ill-health in South Africa, but stop short of advocating a poverty-reduction framework for mental health.

Women are particularly affected, with a high prevalence rate of mental ill health and higher prevalence in suicide rate. Miranda and Patel<sup>352</sup> hypothesise that child mortality and maternal mental health are linked due to the fact that a mother's poor mental health has been shown to be associated with a host of indicators negatively associated with child development: poor nutrition, stunting, early cessation of breastfeeding, and diarrhoeal disease.<sup>353</sup> Incompletion of immunisation regimes for children has even been linked to poor maternal mental health.

Mental health hospitals are geographically inaccessible, particularly for people in rural areas, and they attract a high level of stigma making them unlikely choices for mental health care for most South Africans. Mental health care is not sufficiently integrated into primary health care clinics at the district level. An example of successful integration of mental health into broader health services is the Peri-natal Mental Health Project based at Mowbray Maternity Hospital in Cape Town, which aims to provide a holistic mental health service at the same site in which women receive obstetric care.

348 Khoza (note 26 above).

349 Creamer, K. *The impact of South Africa's evolving jurisprudence on children's socio-economic rights on budget analysis*, (2002).

350 NCCEMD (note 275 above).

351 Mental Health and Poverty Project (note 277 above).

352 Ibid.

353 Ibid.



Many refugees and immigrants lived through traumatic experiences and there is a lack of data concerning their mental health status. Furthermore there is a high degree of stigma in communities towards people living with mental illness and limited awareness creation aimed at addressing this.

Mental ill health is also linked with HIV and AIDS. A study across five provinces has shown that 43.7% of people living with HIV have a mental disorder, indicating that there is likely to be a high level of co-morbidity across South Africa.<sup>354</sup> Furthermore, one can improve ARV medication compliance by treating the mental health commonalities that often coexist with HIV problems e.g. treating depression. Often persons with disabilities (mental and physical) are denied access due to their physical, educational or literacy challenges, putting them at increased risk of contracting HIV.<sup>355</sup>

In general there is a need to develop basic skills and competencies at primary health care level, in primary health care clinics, so that practitioners are able to detect, diagnose and manage basic mental health problems, and if complex to refer them to a specialist. Furthermore, specialist services need to be adequately resourced to support and manage the referrals from primary health care services.

It was raised by Professor Househam from the Western Cape Department of Health in the hearing that “*the implementation of the Mental Health Act was challenging as it was not fully funded. For example, the 72 hour observation requirement places a severe load on health facilities in the province where ‘tik’<sup>356</sup> is a major problem. ‘Tik’ patients are extremely disruptive and violent and therefore have to be observed in ordinary hospitals for 72 hours and the department had challenges in managing that*”. Finally, insufficient access to health information for persons with disabilities limits their access to health care.

It should be noted that there are gaps in terms of regulations operationalising provisions of the National Health Act and the Mental Health Act. In addition, a number of guidelines are still in draft stage and should be finalised to provide for full commitment.

Persons living with disabilities often have limited informational and physical access to HIV related services. As a result, this is a group particularly vulnerable to HIV infection, transmission, and insufficient support. This has been confirmed by the National Prevalence Survey which showed that 14.1% of persons with disabilities are HIV positive. This is higher than the national average of just above 10%.

Information, education and communication on HIV needs to be made available in a way that can be understood by the various groups, particularly those marginalised such as persons with disabilities. This inaccessibility is largely due to the inability of health care information frameworks to adequately align systems, processes and training of implementers on their obligations to provide information at care points, and to proactively disseminate information in user friendly formats to target recipients and requestors.<sup>357</sup>

The South African health system consists of both a private for profit health sector and a public health sector, where the majority of the population rely on the public health care sector for their health care needs but expenditure in the private health care sector outweighs that in the public sector.<sup>358</sup> This constitutes a challenge to the progressive realisation of the right to access to health care and therefore a mandatory national health insurance (NHI) to close the gap between public and private divide has been suggested. The aim is that everyone should be able to access health care regardless of their ability to pay and where they access the health care. After a policy was formulated by the ANC working committee on national health insurance, a working group with the Department of Health was established to develop policy proposals and the legislative framework to facilitate the creation of NHI by 2011/12.

<sup>354</sup> Ibid.

<sup>355</sup> Shisana (note 272 above).

<sup>356</sup> Tik is a colloquial term for a drug called methamphetamine.

<sup>357</sup> The Minister of Health (note 25 above) 28. Paragraph 28 of the judgement. The TAC matter reflects a need for the Department to strengthen its information management and sharing systems. Prior to the TAC reaching the courts for access to information, the request itself had been referred inter departmentally to three different structures, ultimately resting with the offices of the state attorneys. This process itself took approximately a year and some months. The expiration of both the initial request timeframes and internal appeal timeframes resulted in requests from the respondent for consultative meetings on the request. This in itself was a further three month process which effectively made the approach to court out of time. The court deemed the behaviour of the respondent government department as ‘evasive and disingenuous’. Its behaviour in court was termed as a ‘war of attrition’ built on technicalities which did not fully appreciate its constitutional obligations and it had failed in its response to the request every step of the way.

<sup>358</sup> SAHRC (note 274 above).



Concern has been raised by the ALP, that “*while an NHI system might appear equalising and thus politically radical, in and of itself it provides no substitute for ensuring effective management, accountability, transparency and appropriate resource allocation and oversight in both the public and private sector. This does not mean that critical steps that are aimed at increasing access to quality health care services should not take place with urgency, but rather that the premature introduction of a poorly conceptualised NHI will further destabilise an already weakened health system*”.<sup>359</sup>

A challenge is the difficulty of new patients living with and affected by HIV/AIDS to access ARV programs due to the lack of additional resources. This has been the case in the Free State from November 2008, where it has been reported that 30 people per day die due to the government’s failure to provide new patients access into the ARV programme. This will challenge the achievement of the objective of the national strategic plan 2007–2011 to reduce the impact of HIV and AIDS on individuals, families and communities by 2011. However, this needs to be considered within a context as additional resources are needed in order to achieve this target. In addition, a moratorium was imposed at Edendale Hospital in KZN indicating that the hospital can no longer cope with the numbers of new patients wanting to be enrolled into the ARV programme. Over 600 patients are on the waiting list and will not be accommodated until such time as the hospital employs more staff.

It should, however, be noted that in the Western Cape, despite a shortfall in the AIDS budget of R28.5 million, the Western Cape Department of Health took the decision to continue to put new patients on ARV treatment, as they regard the national policy as giving people *entitlement* to treatment.

Older persons are another group which is not able to adequately access the health care system. This is particularly when it comes to prevention of HIV and AIDS and is a cause for concern. HIV prevalence among older persons is high with 10.4% of males and 10.2% of females between the ages of 50–54 years, and 6.2% of males and 7.7% of females between the ages of 55–59 years being infected with HIV. Training of older persons on how to prevent HIV is an area that requires attention by the Department of Health.<sup>360</sup>

Prisoners have the right to access health care services including ARVs and various court cases have stipulated that the Department of Correctional Services must immediately remove all restrictions that prevent prisoners needing ARVs from accessing them. In late 2006 the TAC took part in an application requesting that the Judicial Inspectorate of Prisons (JIOP) conduct an investigation into a prisoner’s death and other related matters in Westville Correctional Centre. The allegation was that the prisoner, who was HIV positive, had a delay of 32 months and only received ARV treatment a few weeks before his death. Although the investigating judge did not address the delay in treatment, he did conclude with four important recommendations: firstly, HIV/AIDS in prisons must be addressed as a matter of urgency; secondly, government agencies and departments must cooperate with and assist the DCS to deal with HIV/AIDS in prisons; thirdly, access to ARV treatment and HIV testing services in prisons must be promoted as a matter of urgency; and fourthly, medical parole provisions are not working and should be revisited.<sup>361</sup> Interestingly, this matter was contested before the courts on the basis that requests for information, which if provided timeously could potentially have impacted on the life of the interested party on whose behalf the original request for information was made, had been made. The papers filed before the courts plot a chronology of delayed and frustrating passing of the request within the department. The case highlights the need for efficient and coordinated provision of information by the department to the public, both in instances where information is requested and where information sharing is a component in awareness-raising campaigns and interventions.<sup>362</sup> However, in general it is difficult to ascertain the level of prisoners’ access to health care and particularly ARVs.<sup>363</sup>

Similarly, there seem to be challenges for refugees and asylum seekers in accessing health care services. The Department of Health issued a directive in September 2007 that refugees and asylum seekers, including those without documentation, should have equal access to antiretroviral treatment (ART) at all public health providers. Research has found that public clinics and hospitals in Johannesburg are not implementing the Department of

359 AIDS Law Project (note 362 above).

360 Public Hearings on the Millennium Development Goals and the Realisation of Economic and Social Rights in South Africa Submission by Older Persons June 2009, 1-2.

361 Ibid 351,15, 40.

362 AIDS Law Project (note 280 above).

363 SAHRC (note 274 above).



Health directive to provide ART to non-citizens, but are referring non-citizen patients to NGO health providers, thereby creating a dual healthcare system. Refugees and asylum seekers reported on their inability to access ART because they do not have green bar-coded ID documents. This is a violation of the directive from the Department of Health.<sup>364</sup>

Access to health care services, especially for the poor, is severely constrained by expensive, inadequate or non-existent transport, by serious shortages with regards to emergency transport, and by long waiting times at clinics and other health care facilities.<sup>365</sup> In the enquiries into maternal deaths, problems with transport between institutions were reported in 8.4% of cases requiring transfer. Delays in seeking medical help were reported in 26.7% of cases. The most common reason for the delay was the lack of transport between the woman's home and the health care institution.<sup>366</sup> This has led to NCCEMD recommending that emergency transport facilities must be available for all pregnant women in need at any site. Furthermore, the target is that 70% of ambulances on red code calls must arrive at the emergency site within one hour of the call. The Western Cape Department of Health has separated Planned Patient Transport Services from emergency ambulance services in order to improve access by non-acute patients to health services and to relieve the burden of transporting patients for planned hospital visits from emergency calls. The key challenge is to improve the response time calls. The Western Cape Department of Health has been monitoring it closely with good success, and has a response time within 60 minutes in 69% of their calls.<sup>367</sup>

When looking at the accessibility of immunisation, the challenge is reaching every district in South Africa. The target set for measles immunization for 2007/08 was that of 70% coverage achieved in 80% of the districts and the target for overall immunisation was 90% in 70% of districts within the same time frame. The National Department of Health Annual Report for 2007/08 showed an achievement of full immunisation coverage in 84% of the districts, therefore overachieving on the target of 70%. For measles however, only 38% of districts in South Africa had a 90%+ coverage, and only 62% of districts had coverage of more than 70%, showing that the target for 2007/08 was not achieved. The District Health Barometer (2007/08) showed that the average immunisation rate for rural districts was 79.3%, which is less than the national average of 84.2%.<sup>368</sup> The district with the lowest overall coverage was Kgalagadi (with an overall coverage of below 40%). Similarly, the Kgalagadi district also displayed the lowest measles immunisation coverage of 33.7%.

In terms of the progressive realisation of the right to health care services related to immunisation, the availability and appropriateness of vaccinations shows positive results (even though targets have not been set). A challenge, however, is making these immunisation services accessible to all districts, including rural districts that have below average coverage.

When assessing the goal of reducing child mortality, it is necessary to investigate the reasons for child/infant mortality, and what mechanisms are being put in place to ensure that this goal is being progressively realised.

The Perinatal Problem Identification Programme (PPIP)<sup>369</sup> showed that by 2008 most births (59%) occurred at district hospitals or Community Health Clinic level. Most perinatal deaths<sup>370</sup> also occur at this level. The primary causes of perinatal death were unexplained stillbirths (24%), spontaneous preterm birth (23%), labour related complications (intrapartum asphyxia and birth trauma) (17%), hypertension (13%) and antepartum haemorrhage (10%). Other causes were infections (5%), foetal abnormalities (4%), unexplained intrauterine growth restriction (2%) and pre-existing medical conditions (2%). It was reported by onsite PPIP reviewers at a district level that 44% of the deaths due to labour related complications were avoidable, had the health care provider acted appropriately. Furthermore the lack of equipment to resuscitate hypoxic or immature neonates was seen as a major contributing factor to the mortality rate of neonates.

364 Consortium for Refugees and Migrants in South Africa (CoRMSA) & Forced Migration Studies Programme, University of Witwatersrand, submission to the SAHRC, (2009), 10-13.

365 South African Human Rights Commission (note 274 above), 56.

366 NCCEMD (note 275 above).

367 Western Cape Department of Health, submission to the SAHRC, (2009).

368 Five of these districts are rural, specifically O.R. Thambo, Zululand, Kgalagadi, Ukhahlamba and Umkhanyakude.

369 Pattinson, R.C. Saving Babies 2006-2007: Sixth Perinatal Care Survey of South Africa, (2009).

370 WHO defines perinatal deaths as those occurring during late pregnancy (at 22 completed weeks gestation and over), during childbirth and up to seven completed days of life.



Some progress has, however, been made in terms of reducing child mortality. By 2007, 66.5%<sup>371</sup> of South Africa's health facilities in which children are attended to had more than 60% of health workers trained in the Integrated Management of Childhood Illnesses (IMCI).<sup>372</sup> This figure is, however, higher in the National Department of Health Annual Report (71%), again showing inconsistency in data collection/reporting. Furthermore 40% of Public Health Clinics (PHC) implementing IMCI had at least one IMCI practitioner updated and trained on the Comprehensive HIV and AIDS Plan.

Of health districts, 83%<sup>373</sup> implemented the Household and Community Component of the IMCI, which is meant to improve health seeking behaviours to benefit children. 42% of public health facilities with maternity facilities were accredited as baby friendly. School health services have also improved as 96%<sup>374</sup> of health districts were implementing Phase One (that is screening, assessment for basic health conditions, and referral).

In terms of the progressive realisation of the right of access to health care services related to child mortality, the percentage of preventable deaths, lack of equipment for labour related complications, and unexplained stillbirths point to the unsatisfactory level of the current standard of health care facilities and services, particularly related to neonatal care. Statistics, even though inconsistent, show that the reduction in child and infant mortality is not at a satisfactory pace to enable the achievement of the MDG or the progressive realisation of access to health care services. Both the standard of health care services and the slow reduction rate of child mortality go to show that the health care services are not acceptable enough to ensure adequate health care to prevent child and infant mortality. Community Health Care Clinics particularly need attention in this regard, as most births and deaths occur at this level.

It is important to acknowledge that child mortality is a key challenge due to the poverty inherent in South Africa. It is dependent on various interventions from different role players that can provide services such as such education, access to water and sanitation, nutrition and health care. It is therefore not only a health issue, even though the health sector plays a crucial role in the reduction of child mortality.

### **8.6.2. Availability**

Functioning public health and health care facilities, goods, services and programmes must be available in sufficient quantity within the state.

#### ***Medication***

The National Strategic Plan for HIV/AIDS aims to provide access to ARVs for 80% of those eligible for ARV treatment by 2011. Even though the Department of Health rolled out ARVs to 180 000 new infected people, it is evident that this roll out is not equitably distributed in each province. Since 1 November 2008, the ARV roll out (and also insulin and milk formula for children of HIV positive mothers) has been placed on a moratorium in the Free State, due to a lack of resources to enable Comprehensive HIV and AIDS Care, Management and Treatment. The Department of Health contacted the pharmaceutical companies to get them to supply these drugs.

Many health facilities do not provide post-exposure prophylaxis (PEP) services as they are not "designated health facilities" according to the draft regulations in terms of the Criminal law Amendment Act. The Treatment Action Campaign (TAC) continues to receive reports from health care workers and survivors of rape who have been unable to access PEP services in the public health system timeously.<sup>375</sup> It is crucial that all health facilities should be trained and be able to initiate rape survivors on PEP (after which they could refer them to designated facilities for further care).<sup>376</sup>

Often medication for epilepsy is not available in rural clinics, which leads to an increase in seizure activity and death. Likewise women in some rural areas do not have access to pap smears as health personnel are not trained sufficiently on how to collect it.

371 Department of Health (note 273 above).

372 Strategy developed by WHO, focusing on holistic health care for children from one week to five years of age. This care focuses on improving identification, treatment, care and support of childhood illnesses.

373 Department of Health (note 271 above), 41.

374 Department of Health (note 273 above).

375 SAHRC (note 274 above).

376 AIDS Law Project (note 362 above).



## **Condoms**

The recent commitments to accelerate and improve HIV prevention contained in the NSP are important, but require great political will if they are to be implemented. For example, although there is a national programme to make life skills education, including sex education, available in schools, the Minister of Education has undermined this plan by opposing access to condoms in schools.

Statistics on condom distribution<sup>377</sup> show that an average of 11.8 condoms was distributed per man (over the age of 15) per year. A great variation between districts is however evident, where Cape Town has a distribution rate of 55.2, even though they show the lowest condom use on last sexual encounter. Second to Cape Town's distribution rate is Mopani District in Limpopo, which only has a distribution rate of 17.3, showing the huge differences between distribution in Cape Town and the other districts. The lowest condom distribution rate was in Kgalagadi District in Northern Cape (1.7). An average distribution rate of 11.8 condoms per man per year is not sufficient to allow for consistent condom use.<sup>378</sup> Although 400 million male condoms are distributed per year, it is an insufficient number.

In some parts of the country, female condoms are not distributed as health personnel cannot train women in the use of female condoms. The female condom is more expensive and less popular than the male according to anecdotal evidence. It also requires more contact time between the health care provider and the patient. A submission to the Commission's Public Inquiry: Access to Health Care services in 2007 concluded that no effort had been made by the state at the time to compel the patent-holder of the female condom to reduce the price.<sup>379</sup>

In conclusion, positive results are definitely evident in terms of overall HIV prevalence, prevalence of HIV among the ages of 15–24 years (pregnant women and other youth) and two to 14 years. These positive results show that South Africa is taking the step in the right direction. However, some problems still remain a challenge in terms of the prevalence rate. The adequate availability of HIV services around ARVs, male and female condom distribution should be improved.

### **8.6.3. Acceptability**

All health facilities, goods and services must be respectful of medical ethics and culturally appropriate, sensitive to gender and life-cycle requirements, as well being designed to respect confidentiality and improve the health status of those concerned.<sup>380</sup>

Sex workers' access to health care services is limited. This is partly because of a fear of being discriminated against and partly because of a fear of the consequences of disclosing their identity. This is furthermore aggravated by the criminalisation of sex work. The discrimination can include, for example, failure on the part of health clinic staff to treat STD status confidentially, negative attitudes, refusal to dispense sufficient condoms and unwarranted public accusations of being "vectors" of disease. It also includes threats by health service providers to inform the Department of Social Services of their work and an associated threat that their children will be removed from their care. The fear associated with being treated in this way if identities are disclosed reduces a sex worker's access to proper health care services. This is particularly important in relation to ensuring HIV testing, supply of condoms and STD treatment. This can have detrimental effects as a study in Carletonville in 1998 showed that between 45% and 69% of sex workers were HIV positive.<sup>381</sup>

### **8.6.4. Appropriateness**

Health facilities, goods and services must be scientifically and medically appropriate and of good quality.<sup>382</sup>

The Department of Health has developed a good policy and legislative framework for people to access health care. However, there are gaps in the implementation of the policies and legislation at local, provincial and national level. This made Commissioner Majodina suggest that there is insufficient capacity of well-qualified people to

377 Health Systems Trust (note 298 above).

378 SAHRC (note 274 above).

379 Ibid.

380 Khoza (note 26 above).

381 Sex Workers Education and Advocacy Taskforce, Reproductive Health & HIV Research Unit, Steve Biko Centre for Bioethics and AIDS Legal Network, submission to the SAHRC, (2009).

382 This requires, *inter alia*, skilled medical personnel, scientifically approved treatment regimens, unexpired drugs and adequate hospital equipment, safe and potable water, and adequate sanitation.



offer the health care services. In the *Grootboom* case<sup>383</sup> the Constitutional Court stipulated that a government programme: *“must clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available”*.

Since the transformation to primary and tertiary health facilities, there have been difficulties with internalising roles at each level of government. Ideally, tertiary health care facilities should be reserved for referrals from primary health facilities and all conditions that require more attention than can be afforded at a primary health care facility. As such, a primary health care facility should be the first port of call for health care users. In addition, these district facilities should be accessible to the greater population, particularly outlying and marginalised communities so that all people are able to access free primary health care within walking distance from their homes. This would alleviate the costs associated with transport on the part of patients and transport provision on the part of the state, bearing in mind that transport provision for vulnerable people such as the ill, persons with disabilities and older persons will still be necessary. This primary health care model is the key to service delivery as a whole in South Africa and the success or failure of South Africa’s existing health care system is dependent on the optimal functioning thereof.<sup>384</sup>

To fulfil this requirement of progressive realisation, the Department of Health must make sure that health staff are appropriately trained to implement policies and legislation and that they are properly managed.

With the assistance of the national Department of Health, provinces have developed Service Transformation Plans (STPs) that are intended to assist them to re-shape and re-size their health services, and to develop appropriate, adequately resourced and sustainable health service delivery platforms which are responsive to current health challenges facing each province and the country.<sup>385</sup> The Western Cape Strategic Transformation Plan provides for optimisation of resources so that patients can access health care services at the level most appropriate to their need. The focus is on a primary health care approach at community level and then only accessing the most sophisticated care in tertiary hospitals. However, the concerns are whether community care workers have been sufficiently trained, and whether the primary health care clinics are taking away funding from important services rendered at tertiary hospitals. Tertiary health care is important and its funding cannot be depleted to the extent that the objective of the tertiary facility is negated. Health workers are integral to the functioning of the health care system. Without sufficient numbers of adequately trained and motivated health workers no health care system can fulfil its human rights obligation. There has generally been a health personnel shortage in the public sector with professional nurses, senior doctors and pharmacists accounting for most of the shortage in expertise. The shortage is mainly attributed to low salaries and the salary scale structure. In order to provide for staff retention, particularly in the rural areas, the Department of Health has introduced the Occupational Specific Dispensation (OSD) starting with the nurses in 2007. Medical, Dental, Specialists, Pharmacists and EMS were identified for 2008. Proposals were already developed in early 2008, but could not be implemented due to inadequate funding for the 2008/09 budget cycle, which caused a doctors’ strike during 2009. An agreement was finally reached.

SANAC recognises in its publication on HIV, AIDS and Disability in South Africa (2008) that there is a strong correlation between disability and HIV/AIDS. HIV/AIDS is both a cause and consequence of disability, requiring much more training of health staff and awareness-raising amongst persons with disabilities. This relates to issues of sexuality and reproductive health amongst persons with disabilities which is often undermined when persons with disabilities are overlooked as a vulnerable target group. The prevalence of HIV/AIDS amongst persons with disabilities has not been measured, but given the direct relationship outlined above, it can be deduced that if the prevalence of HIV/AIDS is high, then so is the prevalence of persons with disabilities with HIV/AIDS.

Child mortality is higher for a child with a disability. Insufficient early diagnosis of a disability and specifically neurological disabilities is a huge challenge as it prevents children from having the right treatment. In many areas there are no services for children with epilepsy; for example, in Northern Cape there is no neurologist. Often there is inappropriate treatment by natural healers. This could be reduced in the first place by training traditional healers in disability and mental illness as well as providing them with referral criteria.

383 Government of the Republic of South Africa (note 17 above).

384 SAHRC (note 281,274 above).

385 National Department of Health (note 273 above).



Another concern related to the training of health staff is that the nursing council announced that new qualifications registered with the NQF no longer include courses in gerontological nursing science and gerontology (including geriatrics). With a growing older population, there is a need to increase the number of health professionals with special training in geriatrics as opposed to closing this specialist field for nurses.<sup>386</sup>

As can be seen from the above discussion, the conclusion reached in the Commission's Public Inquiry Report on Access to Health Care Services remains valid, "*it is difficult to assess with accuracy whether the access to health situation has improved or worsened over time, and thus whether there is indeed a progressive realisation of the right to access health care services*".<sup>387</sup>

#### **8.6.5. Government's Understanding of the Progressive Realisation of the Right**

In the course of their presentations and in their responses to questions (for example, in relation to maternal morbidity, the Free State budgetary crisis and roll-out of an HPV vaccine), both the National and Western Cape Department of Health employed the notion of progressive realisation as a "get-out clause" that condones non-fulfilment of the right to have access to health care services where resources are scarce. They appeared not to appreciate that the standard of progressive realisation requires maximising the effectiveness of current resources in order to achieve targets associated with progressive realisation, and that measures which lead to diminished access fall foul of the progressive realisation standard (in that they are likely to amount to retrogressive measures). Despite the apparent lack of general understanding of the nature and content of government's obligations regarding progressive realisation of the right by national and provincial government, there was one exception which came to the fore regarding a specific policy decision. That exception was the Western Cape Department of Health's decision to continue to put new patients on ARV treatment, (despite a shortfall in the budget of R28.5 million) as they regarded the national policy as giving people entitlement to treatment.

People living with mental health illness are often stigmatised in the community they live in due to a lack of awareness of mental illness.

Parents often lack information on health issues related to their children. These can be general issues like how to access health care facilities and child care, particularly issues around nutritional needs or specific issues like disability education and management (medical and psycho-social).

Persons living with disabilities often have limited informational and physical access to HIV related services. As a result this is a group particularly vulnerable to HIV infection, transmission, and insufficient support. Information, education and communication on HIV need to be made available in a way that can be understood by various groups, particularly those marginalised such as persons with disabilities.

The HIV prevalence among older persons over 50 years old is high and is of concern. Training to older persons on how to prevent HIV is an area that needs focus by the Department of Health.

#### **8.6.6. Social exclusion**

Equality of access to health care service has been a challenge as poor and vulnerable groups are encountering blockages in accessing health care. The South African health system consists of both a private for profit health sector and a public health sector, where the majority of the population rely on the public health care sector for their health care needs but expenditure in the health care sector outweighs that in the public sector.<sup>388</sup> This constitutes a challenge to the progressive realisation of the right to access to health care. In addition, access to health care services, especially for the poor, is severely constrained by expensive, inadequate or non-existent transport, by serious shortages with regards to emergency transport, and by long waiting times at clinics and other health care facilities.

Poor rural populations are still disadvantaged when it comes to access to health care services. For example the overall immunisation coverage is below the average in rural districts.

<sup>386</sup> Public Hearings on the Millennium Development Goals and the Realisation of Economic and Social Rights in South Africa. Submission by Older Persons. 2009.

<sup>387</sup> SAHRC (note 274 above).

<sup>388</sup> Ibid 7.



The reduction in child and infant mortality is not at a satisfactory pace for it to be considered progressively realised. Both the standard of health care services and the slow reduction rate of child mortality go to show that the health care services are not acceptable enough to ensure adequate health care to prevent child and infant mortality. Community Health Care Clinics particularly need attention in this regard, as most births and deaths occur at this level.

The gender inequality is particularly reflected in the maternal mortality rate. The NCCEMD report showed that 38.4% of these deaths are avoidable.<sup>389</sup> Although the testing rate has risen since the last NCCEMD report, 41% of the women did not access HIV testing. Furthermore, 17.6% of the maternal deaths were due to AIDS. The increasing availability of ART makes many of the deaths due to AIDS avoidable. Likewise, rape victims (of which almost nine out of ten are women) are sometimes unable to access PEP service timeously if the health facility approached is not designated. This is unfortunate proof that women are not accessing health care services as well as they could and that there is slow progressive realisation of their rights.

Persons with mental disabilities are excluded from accessing the health care system properly. A study revealed<sup>390</sup> that 16.5% of South Africans suffer from common mental disorders and 75% do not receive any kind of treatment for their mental illness. People living with mental illness in rural areas are excluded from accessing mental health care as mental health hospitals are geographically inaccessible and mental health care is insufficiently integrated into primary health care.

Sex workers' access to health care services is limited due to the social stigma attached to sex work, the criminalisation of sex work and the negative attitude of health workers. This can have a detrimental effect on the HIV prevalence rate.

People living with HIV in the Free State province (and Edendale district) are excluded from accessing ART. Likewise, it has been reported that some refugees and asylum seekers are unable to access ART due to the lack of a South African identity document. Also it is uncertain whether the barriers for prisoners to access ART have been removed.

#### **8.6.7. From strategic planning to implementation**

Overall, the Department of Health has developed a good policy and legislative framework for people to access health care. However, there are gaps in the implementation of the policies and legislation at local, provincial and national level. Since the transformation to the primary health care model, there have been difficulties with internalising roles at each level of government.

With the assistance of the national Department of Health, provinces have developed Service Transformation Plans (STPs) that are intended to assist them to re-shape and re-size their health services, and to develop appropriate, adequately resourced and sustainable health service delivery platforms which are responsive to the current health challenges facing each province and the country.<sup>391</sup> The concerns are whether community nurse care workers have been sufficiently trained and whether the primary health care clinics are taking away funding from important services rendered at tertiary hospitals. Tertiary health care is important and its funding cannot be depleted to the extent that the objective of the tertiary facility is negated. Health workers are integral to the functioning of the health care system. Without sufficient numbers of adequately trained and motivated health workers no health care system can fulfil its human rights obligation.

In some rural areas women are unable to access pap smears as health personnel are not trained in how to administer them. Likewise, in some parts of the country female condoms are not distributed as health personnel are unable to train women in the use of condoms. The inability to provide early diagnosis of a disability, and specifically neurological disabilities, is a significant challenge as it prevents children from accessing appropriate treatment. In many areas there are no services for children with epilepsy, for example in Northern Cape there is no neurologist.

389 NCCEMD (note 275 above).

390 Williams D.R., Herman, A., Stein, D.J., Heeringa, S.G., Jackson, P.B., Moomal, H. & Kessler, R.C. 12-Month Mental Disorders in South Africa: Prevalence, Service Use and Demographic Correlates in the Population-Based South African Stress and Health Study, *Psychological Medicine*, (2007), 1-10.

391 National Department of Health. (note 273 above), 28.



The Department of Health has at times been unable to secure the supplies of drugs in a consistent manner. This has been the case with ARV drugs in the Free State, insulin (and milk formula) for children of HIV positive mothers as well as epilepsy drugs. Sufficient quantities of male condoms have not been distributed to all areas of South Africa.

Finally, it should be noted with the increasing incidence of TB and the advent of the MDR and XDR-TB, the national TB Control Programme does not seem to address the disease sufficiently.

## **8.7. Recommendations**

### **8.7.1. Government's understanding of the progressive realisation of the right to access to health care**

- As it was recommended in Commission's Public Inquiry,<sup>392</sup> there needs to be a recognition and realignment of the location of health in the national priorities. This should be reflected in resource allocation and the design and implementation of an effective and functional needs-based system.

### **8.7.2. Access to information**

- There is a need to run awareness campaigns in communities on mental health to de-stigmatise mental illness.
- Community members and specifically mothers need to be educated on health care facilities and child care, particularly issues around nutritional needs.
- Persons with disabilities often have limited informational and physical access to HIV related services. As a result, this is a particular group vulnerable to HIV infection, transmission, and insufficient support. Information, education and communication on HIV need to be made available in a way that can be understood by various groups, particularly those marginalised such as persons with disabilities.
- Disability education and management (medical and psycho-social) should be offered to parents under the heading of newborn illness and childhood illness.
- Older persons need to be targeted with HIV and AIDS prevention awareness.
- Access to information is fundamentally about good governance and accountability. The right of access to information is a foundational or gateway right and awareness should be targeted at both rights bearers and government regarding respective rights and obligations within the context of the right to access health care services. This should further facilitate both individual assertion of rights, as well as public participation in planning and other processes within government.

### **8.7.3. Social exclusion**

- The White Paper on Health must be reviewed in view of the policy prescriptions outlined concerning the proposed National Health Insurance. Introducing a mandatory insurance would enable a greater proportion of the population to benefit from the human resources currently located in the private sector and which are largely accessible only to medical aid members.
- Private sector resources should be accessed through regulation, which lends to collaboration between the private and public sector, for example, through the location of private wards within public hospitals thereby facilitating resource sharing, both human and financial.
- The long-term vision for one inclusive national health system should be pursued.<sup>393</sup>
- Various initiatives by the provinces in reducing the response time for emergency transport should be supported and reviewed to extract a best practice model.
- If South Africa is to meet the target of reducing by three-quarters the child mortality rate by 2015, much needs to be done to decrease child mortality, including infant and neonatal mortality. The percentage of neonatal deaths that were considered preventable highlights the need for ensuring adequate skills among health care workers interacting with neonates, particularly in screening, treating or referring children to ensure adequate medical and parental care. These skills include adequate monitoring in the intrapartum phase, neonatal resuscitation and basic neonatal care, respiratory support (e.g. CPAP), informed staff in terms of nutritional and other needs to keep neonates healthy. The equipment and skills required to fulfil these roles need to be addressed to reduce infant mortality.

<sup>392</sup>

SAHRC (note 274 above), 56.

<sup>393</sup>

Ibid



- The recommendations in the NCCEMD report 2005–2007 should be implemented in order to reduce the maternal mortality rate and particularly the avoidable deaths.
- All pregnant women should be tested for HIV and if positive and fulfilling the criteria be enrolled in ARV programme.
- All staff at health facilities should be trained and be able to initiate rape survivors on PEP (after which they could refer them to designated facilities for further care).<sup>394</sup>
- There should be substantive mental health research that clearly quantifies varying mental disabilities by region and resource allocation.<sup>395</sup>
- In general there is a need to develop basic skills and competencies at primary health care level, in primary health care clinics, so that practitioners are able to detect, diagnose and manage basic mental health problems, and if complex, to refer them to specialist. Furthermore, specialist services need to be adequately resourced to support and manage the referrals from primary health care services.
- Gaps in terms of regulations operationalising the National Health Act and the Mental Health Care Act should be addressed and guidelines in draft form should be finalised.
- Mental health-based policies should integrate and target poverty alleviation strategies and programmes to people with mental health disorders.
- The Department of Health should ensure that resources are allocated so all new patients living with HIV in the Free State and KZN can access ARV medication.
- HIV/AIDS in prisons must be addressed as a matter of urgency; government agencies and departments must cooperate with and assist DCS to deal with HIV/AIDS in prisons; access to ARV treatment and HIV testing services in prisons must be promoted as a matter of urgency; medical parole provisions are not working and should be revisited.<sup>396</sup>
- The Department of Health's directive on refugees and asylum seekers right to access ART including those without documentation, should be implemented. Awareness creation of health clinic staff on refugees and asylum seekers rights should be provided.
- Currently the medical conditions necessary for admission into ART is for HIV positive patients who have a CD4 count of less than 200 cells or those who are in WHO stage IV of the disease. Research is currently being conducted by the University of Minnesota on Strategic Timing of Antiretroviral Treatment (START), to determine whether earlier treatment between CD4 count of 200 and 350 cells/mm<sup>3</sup>,<sup>397</sup> would keep HIV positive people healthier for longer. If this is proven, the DoH should consider providing access to HIV positive people at an earlier stage.
- Advances are most evident where targeted interventions have had an immediate effect, and where increased funding has translated into an expansion of programmes to deliver services and tools directly to those in need. This can be seen in the fight against malaria, in the dramatic reduction in measles deaths, and in the coverage of antiretroviral treatment for HIV and AIDS. In contrast, progress has been more modest when it requires structural changes and strong political commitment to guarantee sufficient and sustained funding over a longer period of time. This is likely the reason behind the poor performance of most countries in reducing maternal mortality.<sup>398</sup> It is therefore recommended that the high HIV prevalence rate of women and older persons are addressed.

#### **8.7.4. From strategic planning to implementation**

- When it comes to planning, monitoring and evaluation, the target for reducing child mortality is somewhat confusing, as the Department of Health has reported on a target of reducing child mortality by 66% (two thirds), which amounts to 20/1000 births; whereas the MDG specifies a target of reducing the CMR by 75%. The target for this goal needs clarification.

394 AIDS Law Project (note 362 above), 63.

395 SAHRC (note 274 above), 61.

396 AIDS Law Project (note 280 above), 15; 40.

397 National Library of Medicine. Strategic Timing of Antiretroviral Treatment (START,) (2009), <http://clinicaltrials.gov/ct2/show/NCT00867048>.

398 United Nations. *The UN Millennium Development Goals Report*, (2009), 5.



- There is conflicting health data resulting from data which is incomplete with regard to appropriate disaggregation, and data that has not been gathered and analysed in a standardised and consistent manner. It is recommended that a standardised manner of gathering data is agreed upon and collaborated upon by government and civil society. One proposal was about scientific periodic review of statistics.
- There is no disaggregation of indicators on maternity mortality or child mortality in terms of disability, both mental and physical. There is therefore limited information available on the rate of mortality for women and children with disabilities and more research is needed to elucidate this.
- Examples of best practice, such as the PeriNatal Mental Health Project in Cape Town, need to be studied and expanded into other settings across the country to integrate and provide access to mental health care in primary health care clinics.
- Because AIDS orphans, detainees, refugees, persons with disabilities are cross-cutting groups that need to be targeted by various departments, often these groups are not prioritised in any one department, and integrated services are lacking. AIDS orphans need to be a priority group for the Department of Health, particularly in terms of providing VCT and ART. Furthermore, medical health care for detainees, persons with mental or physical disabilities, refugees and sex workers particularly need to become particular focal areas for the Department of Health and specifically in the NSP for HIV and STIs.
- Service needs to be strengthened at a district level, thereby effectively operationalising the primary health care approach. To fulfil the requirement of progressive realisation the Department of Health must make sure that health staff at community clinics are appropriately trained to implement the policies and legislation and that they are properly managed. More specifically, it has been reported that they need to be trained in how to diagnose disabilities, disability education and management (medical and psycho-social, also for traditional healers), how to collect pap smears, how to train women in the use of female condoms.
- With an increasing older population there is a need to increase the number of health professionals with special training in Geriatrics, that is, not only medical practitioners but physiotherapists, occupational therapists, nurses, social workers, etc.
- Sufficient funding must be sourced for tertiary health care facilities as well as primary health care facilities.
- The full-time employment and attendance should be ensured of medical professionals at district levels, who are compensated well for their services, ensuring their retention in the system.
- It should be ensured that all facilities are appropriately resourced to deal with only those matters that are dealt with at that level (i.e. primary or tertiary) so as not to duplicate resource allocation.
- HIV/AIDS and TB must be integrated within the context of Primary Health Care. With the increasing incidence of TB and the advent of the MDR and XDR-TB, the national TB Control Programme must be strengthened.
- Both TB and HIV/AIDS control programmes need to reinforce and adapt chronic care models, which are patient rather than process oriented, and linked with information systems that are user-friendly and which strengthen problem solving at primary care level.
- The Department of Health must ensure that there is a consistent supply of drugs like ARV, insulin and epilepsy medication in all districts in South Africa.

# Chapter 9



*The right to land*



## CHAPTER 9: THE RIGHT TO LAND<sup>399</sup>

### 9. INTRODUCTION

In South Africa, studies have found that poverty is generally higher in rural areas, and the incidence of poverty is higher amongst rural households without access to land.<sup>400</sup> The purpose of land reform in South Africa, as stated in the White Paper on Land Reform, is threefold. Firstly it aims to address the injustices of racially based land dispossession. Secondly, it should provide more equitable distribution of land ownership. Thirdly, land reform should assist with reducing poverty and contributing to economic growth.<sup>401</sup> Land reform was to be central to a programme for rural development, and agrarian reform is thus integral to the process of land reform.

It is against this purpose that the progress of land reform will be assessed. In order to achieve this outcome, the land reform programme has three main pillars; firstly, land restitution; secondly, land redistribution and thirdly, land tenure reform. It is argued that land reform has been implemented in an ad-hoc manner based on a supply and not on a needs basis and that it has taken place in the absence of clearly defined outcomes and a proper rural development framework. The consequence of this is that very little has changed in the ownership structure of land in South Africa and rural poverty remains dire. The findings of this report will show that the land reform landscape is littered with failed projects due to a number of policy and implementation failures, and land has not been a vehicle for post-apartheid transformation as originally envisioned.<sup>402</sup> The government has also failed to secure land rights for those lawful occupiers residing on other peoples' land, such as in communal areas and on farms. Even where consent has been tacit, the courts have found that it can also be tacitly withdrawn, which leaves occupiers in a precarious position. The question of what is lawful in the case of tacit occupation has become murky.<sup>403</sup> It is argued in this chapter that the government has not really understood the root causes of programme failure and has thus only adjusted the purpose and target group of the programme, moving further away from a pro-poor agenda. Further, the government has been accused of not really wanting to change the mode of production in land use nor mediate the competing tensions between the private land owners, commercial farmers, traditional leaders and the landless.

The chapter begins with an overview of the international, national, legal and political frameworks and mechanisms for land rights. This is followed by a descriptive section reporting on the indicator for MDG 7, that is, the proportion of the population with access to secure tenure. The chapter goes beyond reporting on the MDG as it is argued that the quantitative targets set do not have real substance. The "main themes arising" section in this chapter will summarise the sections on planning, MDG and the analysis of the progressive realisation of the right to land. It then analyses planning specifically in relation to information gathering and monitoring, and budgetary information.

To overcome what may be considered as a largely quantitative focus, the final section will provide a qualitative analysis of the progressive realisation of the right to access to land in South Africa. This will include an analysis using the 4 As, that is, the government programme must be appropriate to meet the needs of beneficiaries, land must be available where beneficiaries need it, there needs to be equitable access to land for a diversity of land beneficiaries, including vulnerable groups, and the land and support provided to beneficiaries must be adequate. Recommendations are provided at the conclusion of the chapter.

#### 9.1. The Meaning and Content of the Right

In this section, an overview is provided of the main international instruments and South African constitutional and legal obligations regarding the right to access to land on an equitable basis. South African legislation, policies and programmes that have been implemented to give effect to this right are also highlighted. The analysis of the effectiveness and impact of these is discussed in the section on the progressive realisation of the right.

<sup>399</sup> Note: The Department of Land Affairs did not make any written submissions to the SAHRC, an oral presentation was made and their input has been captured through the transcripts. There were only two submissions specifically on land issues from civil society organisations – these were 'Women on Farm's', and the 'Black association of the agricultural sector'.

<sup>400</sup> Cater & May, (1997); May & Deinginger, (2000).

<sup>401</sup> Department of Land Affairs. White Paper on Land Reform, (1997).

<sup>402</sup> Hall, R. (Ed). *Another Countryside*, (2009).

<sup>403</sup> The PIE act has also been interpreted very narrowly, for example by Yacoob J in the Joe Slovo judgement which would make it almost impossible for occupiers to show that it was not living unlawfully on land because it was given tacit consent by the state. Fortunately, the other judges did not concur with this argument. <http://constitutionallyspeaking.co.za/joe-slovo-case-the-good-the-bad-and-the-mostly-unstated/>



## National Legislation and Agreements

The key international instruments which cover land rights are:<sup>404</sup>

- UN Declaration of Human Rights, 1948 which provides for a right to own property and prohibits the arbitrary deprivation of property (Article 17).
- African Charter on Human and People's Rights (ACHPR 1981) which guarantees the right to property, allows state interference with people's property rights in the interests of public need and general community interests, and protects the rights of dispossessed people to lawful recovery of their property and adequate compensation.
- Convention on the Elimination of All forms of Discrimination against Women (CEDAW 1979), which protects rural women's rights to participate in and benefit from rural development, agricultural programmes, agrarian reform and land settlement.
- The Peasants' Charter (UN Food and Agricultural Organisation) which advocates for land tenure reform and land redistribution for those who are landless and for small farmers, and it also regulates changes in customary tenure.

The Constitution not only protects the right to property but also provides for the protection of rights that are less than ownership. Section 25 (1–9) deals with property rights and tenure as follows:<sup>405</sup>

- 25 (1) refers to deprivation of property, that no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
- 25 (2) refers to expropriation of property, which may be expropriated only in terms of law of general application.
- 25 (3) deals with the just and equitable compensation, reflecting an equitable balance between the public interest and the interests of those affected.
- 25 (5) obligates the state to take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain equitable access to land.
- 25 (6) and (9) provides for the security of tenure and obliges parliament to make laws that promote security of tenure, or provide comparable redress for people or communities whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices.
- 25 (7) deals with restitution of property or equitable redress for people or communities dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices.
- 25 (8) ensures that the state can take steps to redress the results of past discrimination without being frustrated by private property rights, so long as the measures are "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom" section 36 (1).
- Sections 25 (5), (6) and (7) form the three pillars of South Africa's land reform programme.

*"While the enforceability of section 25 (5) on land redistribution would be open to challenges on the basis of an 'available resources' determination, sections 25 (6) and (7) grant secure legal entitlements to the intended beneficiaries of the remaining two legs of the government's land reform programme, namely land restitution and land tenure reform."*<sup>406</sup>

## Enabling Legislation, Policies and Programmes

In 2009, the Department of Rural Development and Land Reform (DRD&LA – formerly the Department of Land Affairs (DLA)) identified its priorities as follows:

*"The Department of Land Affairs' key priorities include: redistributing 30 per cent of white owned agricultural land to historically disadvantaged South Africans by 2014 in line with the 2000 ministerial directive; providing post-settlement support; finalising outstanding land claims; and reforming the tenure system."*<sup>407</sup>

404 Khoza (note 26 above).

405 Ibid; the Constitution.

406 Twala, D. (2003).

407 Department of Land Affairs, Budget Vote 27, (2009).



The White Paper on South African Land Policy, 1997 details the government's Land Reform Programme, which has three sub-programmes:<sup>408</sup>

1. Land Restitution focuses on the restoration of land rights. Its purpose is to restore land ownership (or provide compensation) to those who were dispossessed without adequate compensation by racially discriminatory practices after 1913. In the first phase of land reform (1994/99) all claims were assessed by the independent and specialised Land Claims Court. In order to speed up the process of settling claims, the government delegated decision making to an administrative process through the Commission on the Restitution of Land Rights (CRLR) that has branches based in the nine Provinces, and the Land Claims Court that acts as final arbiter in restitution cases.<sup>409</sup>
2. Land Redistribution is intended to provide the disadvantaged and the poor access to land for residential and productive purposes. Its purpose is to ensure equitable distribution of land ownership, to reduce poverty and promote economic growth. The main mechanism for land acquisition was to be "market-assisted" by negotiating with existing owners and providing state grants to beneficiaries. It is also "demand-led" as the initiative for the projects would come from the beneficiaries and not the state, and "community-based" as groups would have to pool their subsidies to purchase the land and farm collectively.<sup>410</sup> It differs from the traditional "willing-buyer willing-seller" approaches in other countries as the beneficiaries, rather than the state, are the willing buyers. The main function of the state in South Africa is to facilitate the administrative process, subsidise the land transfer, provide the grants (R16000–R17000) and plan for land use. The primary target group was the landless poor in the rural areas, who were subjected to a means test in order to qualify. In the 1990s, this process fell under the Settlement Land Acquisition Grant (SLAG)<sup>411</sup> but it was replaced by the Land Redistribution for Agricultural Development (LRAD) programme following a policy review. The main shift in emphasis was a greater focus on the commercial use of the transferred land, and a sliding scale for differently sized grants was introduced (from R20 000–R100 000), depending on what the beneficiaries could contribute in terms of assets, cash or labour.<sup>412</sup> This also meant that the purpose and target group of land reform changed and the focus became emerging farmers, rather than the poorest, and the slant shifted towards a stronger commercial orientation. As a result, the means test was dropped, and the only qualifier was race. The process of approvals of grants was also decentralised from the National to the Provincial Departments.<sup>413</sup> In February 2008, a new policy framework, framed as the Land and Agrarian Reform Project (LARP) was announced. This institutionalised inter-governmental cooperation as it was a joint programme of the DRD&LA and the DOA. This focus on land and agriculture was further entrenched by the reframing of the Department of Land Affairs into the Department of Rural Development and Land Reform under the new dispensation in 2009. A Land Expropriation Bill was also tabled in 2008, but has been contested by commercial farmers, big business and opposition parties, and at the time of writing, was not yet passed. The policy of market-led grant assisted transfers remains in place, even though the Land Summit in 2005 denoted a possible shift in that the government recognised that it hampered reform<sup>414</sup> and that non-market alternatives should be explored.<sup>415</sup>
3. Land Tenure Reform is designed to provide security to all South Africans under diverse forms of locally appropriate tenure. It aims to create a unitary non-racial system of legal tenure rights and to formalise communal land rights in rural areas. This is legislated through the Communal Land Rights Act (CLRA) 11 of 2004 which aims at accordin legal recognition/formalisation of insecure land tenure rights. However, CLRA is still not being implemented.<sup>416</sup> Land tenure reform also addresses strengthening the rights of tenants on mainly white-owned farms.<sup>417</sup>

408 Kariuki, S. Failing To Learn From Failed Programmes: South Africa's Communal Land Rights Bill (CLRB 2003), *Wiener Zeitschrift für kritische Afrikastudien*. (2004), 4(52).

409 Twala, D. (2003); Hall (note 418 above).

410 Hall (note 418 above).

411 Twala, D. 2003; Hall (note 418 above).

412 Hall (note 418 above).

413 Ibid 7.

414 The analysis of this policy will be provided in the section on progressive realisation.

415 Hall (note 418 above), 7.

416 Ibid; CLRA faces a legal challenge on the constitutional grounds that it failed to provide secure tenure, or allow for democratic governance of land rights. It is also said to be racially discriminatory, and fails to promote gender equality. It is also said to allocate excessive discretionary powers to the Minister of then Land Affairs.

417 Twala, D. (2003).



Other key pieces of legislation related to land are:

- The subdivision of Agricultural Land Act 70 of 1970.<sup>418</sup>
- The Interim Protection of Informal Land Rights Act 31 of 1996 (which only remains in force until the CLRA is implemented).<sup>419</sup>
- Communal Land Rights Act (Signed into Law in July 2004, but not yet implemented).
- The Restitution of Land Rights Act of 1994.
- The Extension of Security of Tenure Act (ESTA).
- The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE).
- The Communal Property Associations Act 28 of 1996.
- The Land Reform (Labour Tenants) Act 3 of 1996.
- The Development Facilitation Act 67 of 1995.
- The Transformation of Certain Rural Areas Act 94 of 1998.

## 9.2. The Relevant MDG, Targets and Indicators

Goal 7: Ensure Environmental Sustainability	
Target	Indicators
Target 11: Have achieved, by 2020, a significant improvement in the lives of at least 100 million slum dwellers.	Proportion of the population with access to secure tenure.

The indicator for Target 11 speaks to security of tenure and is intended to measure an improvement in the lives of slum dwellers, and this is discussed in the housing chapter. In this chapter the focus is on security of tenure with regard to property rights, and is primarily focused on land redistribution, land tenure reform and restitution. This is closely linked to issues of rural development and agrarian reform. Agricultural policy issues related to food and land issues related to the environment are dealt with in the chapters on food and environment respectively.

The MDG do not touch on the critical transformative nature of the land question in Africa. Issues regarding land are generally raised in connection with agriculture development, poverty reduction and food security. The goal of security of tenure is raised in relation to slum dwellers. The question of the transformative power of land, linked to historical redress in the countries affected by colonisation, is not covered. Neither is the perspective that access to land is crucial for changing structural inequalities in class and race in agricultural production covered. These issues are important though in the South African context, and are discussed in the section on the progressive realisation of the right.

## 9.3. Main Themes Arising

### 9.3.1. Government's understanding of the progressive realisation of ESR

#### *The rights-based approach*

The land reform programme of the government has failed to take individual beneficiary needs into account and has been focused on protecting existing modes of production, vested commercial interests and promoting a commercial class of black farmers. It has moved increasingly away from its original purpose as defined in the White Paper on Land, as being a pro-poor policy. However, the recent ANC conference in Polokwane re-affirmed the ANC commitment to ensure that land reform is a key instrument of socio-economic transformation.

However, the evidence of the large scale evictions of farm workers and the protection of the rights of traditional leaders in communal areas shows that the executive and the legislature has been unwilling to challenge existing modes of production and land uses in both commercial farming areas and in communally owned land areas.

418 The Subdivision of Agricultural Land Repeal Act 64 of 1998 was passed in September 1998, but has not been signed into law by the President, apparently because of the need for new land management legislation, Hall (note 418 above), 39.

419 Khoza (note 26 above).



### ***The nature and content of the obligation to progressively realise ESR***

In terms of achieving socio-economic rights, the changes in the land reform programmes from SLAG to LRAD did not have a positive impact on land reform outcomes for the poor, and effectively just shifted the purpose and target group for land reform from the very poor to those with better resources. Both promote collective ownership and production, which it is argued have been one of the main causes of failure in achieving improved livelihoods for the poor via land reform. Another key policy failure has been that since more poor black people have lost their hold on land through evictions and migration than have gained access to land through land reform since the end of apartheid, it can be seen that little progress has been made in terms of securing land rights. Further, the failure of almost half of land redistribution programmes meant that there has been little impact on livelihoods. The underlying policy failure though, has been that the land reform programme has not been located within a broader vision for agrarian reform, and hence the needs of most current and potential land reform beneficiaries, who do not want to engage in large scale commercial agriculture, cannot be met.

#### ***Constitutional accountability***

The greatest disregard for constitutional accountability has been the inadequate response of the state to prevent evictions of farm workers, and to ensure that "no one may be evicted from their home ... without an order of court".

#### **9.3.2. Public participation**

##### ***The principle of participatory democracy***

Although not much has been written on public participation in the land sector, it can be argued that the failure to recognise individual needs results from a failure to adequately consult and engage beneficiaries. The land reform summit of 2005 was a positive turning point in land reform, and included a broad spectrum of land stakeholders. However, little has changed since then and policy options are still being considered.

##### ***Access to information***

The data on land reform is very poor and the DRD&LR only reports on two global indicators, namely, the hectares of land transferred and the number of land claims settled each year. The national data base of land reform projects, from which one could gain the project type, location, size, land and other costs, and membership (beneficiaries) is not available for public scrutiny.

#### **9.3.3. Social exclusion**

##### ***Equality of access: poverty and vulnerability***

The evidence is that while those who do have access to land in rural areas have a slightly better quality of life, it has not lifted the majority out of poverty and it can be argued that the state has failed to secure land rights for individuals in communal areas and for farm workers.

##### ***Gender inequality***

Women seem to be the biggest losers of the land reform programme, as they often have to rely on male farm workers to gain access to land, and they also customarily have no rights to land in traditional areas.

#### **9.3.4. From strategic planning to implementation**

The poor administration of land claims, corruption, poor land use planning and decision making, a lack of a comprehensive and integrated post-settlement support programme<sup>420</sup> and weaknesses in data standardisation and reliability all inhibit the progressive realisation of this right. These are explored in more detail in the rest of the chapter.

#### **9.3.5. Planning Systems**

##### ***Information gathering and monitoring***

There is very limited data available on land reform that can be used to make assessments of progress. To reiterate a previous point, the DRD&LR maintains a national data base of land reform projects from which one could gain the project type, location, size, land and other costs, and membership (beneficiaries). However, this is not

420

Despite the name being the Comprehensive Agricultural Support Programme (CASP), it is not directly linked to LRAD beneficiaries and hence systems and procedures are not aligned.



available to the public and therefore it is not possible to disaggregate by types of land reform projects, geographic spread or beneficiary profile.<sup>421</sup> The Department only reports on the number of land claims settled each year and the total number of hectares of land redistributed to land reform beneficiaries.<sup>422</sup> The lack of data on evictions was raised as a concern in the 2007 hearings of the Commission on Land Tenure Security, Safety and Labour Relations in Farming Communities since 2003. Section 9 of ESTA which requires owners to inform the DRD&LR of the termination of the right of residence has either not been adhered to or the department has not presented this data. This is an important indicator as it speaks to compliance with the law and measures the scale of evictions and resulting homelessness.

At a local level, the municipal land audit to determine the availability of smaller agricultural properties has not been done.<sup>423</sup> It is inconceivable how planning is expected to occur without necessary audits of the availability of land.

Monitoring the impact of land redistribution on livelihoods is also critical, and there have been attempts to develop indicators and a framework for measuring impact but thus far there has been no agreement on the indicators to be used. The DRD&LR did implement Quality of Life surveys, but changes to methodology and sampling makes comparisons over time difficult. The surveys are, however, a useful instrument and do provide insights into land use patterns and incomes generated from land rights.<sup>424</sup>

### **Budgetary planning and oversight**

Budget data was obtained from Annual Reports of the Department of Rural Development and Land Reform. Departmental annual financial statements are recorded from 1 April to 31 March of every year. An analysis of the overall spending patterns of the government (Table 25) shows that the Gross Domestic Product (GDP) increased. In the years 2005 to 2006, the government showed a steady increase in terms of GDP but the figure dropped to 5.1% in 2007 from 5.4% in 2006. However, it is important to note that GDP has been growing steadily over the past few years and this may mean that government's options to increase its social spending have improved.

**Table 25: Real GDP Growth (Inflation adjusted figures) from 2005 to 2007.**

Year	Real GDP Growth (Rbn)	Increase/Decrease
2005	1 115.14	5.0%
2006	1 175.22	5.4%
2007	1 235.63	5.1%

**Table 26: Total Government Revenue and Total Expenditure, from 2005/06 to 2007/08**

Total Government Revenue and Total Expenditure, from 2005/06 to 2007/08			
Year	Total Revenue	Total Expenditure	%
Jun-05	R 411.70	R 416.70	101
Jul-06	R 475.80	R 470.60	99
Aug-07	R 544	R 533.90	98

The table above shows that government has been spending the majority of its funds and in 2005 the government overspent on its revenue by R5 billion or spent 101% on its total revenue. The increase in total expenditure had positive implications for funding allocation to the Department of Rural Development and Land Reform. This is evident in the increased allocation and expenditure on land in Table 27 below.

Table 27 explores the state's allocation and expenditure patterns for public service provision in different categories. Although there is no specific reference to government expenditure on land for the years 2005/07, indicators in the "other" sector indicate that it increased from 15% to 17% in the years 2005 and 2007, respectively. However, the year 2007 shows a slump to 12.6% in government expenditure on other sectors.

421 Hall (note 418 above), 25.

422 Department of Land Affairs (note 423 above).

423 Hall (note 418 above), 39.

424 Ibid 44–45.



**Table 27: Government Expenditure in 2005–2007**

Government Expenditure 2005/07					
Sector	2005		2006		2007
Transport and Communication	4%		6.7%		7.3%
Welfare	17%		15.5%		14.9%
Protection Services	17%		15.3%		14.7%
Water and Agriculture	4%		5.3%		5.1%
Education	18%		17.8%		17.6%
Housing	2%		1.8%		7.5%
Health	11%		10.5%		10.4%
Debt	12%		10.0%		9.3%
Other	15%		17.0%		12.6%

Budget income and expenditure (Table 28) for the Department of Rural Development and Land Reform indicates that overall there has been a gradual increase in the budget allocation from the National Treasury Department over the periods 2005/06 to 2008/09. However, this increase has been met with some under-expenditure. In 2005/06, the department underspent by close to 30% on its budget of R3 897 117. This means that the Department only spent 73% of its total budget in that year. This is the largest shortfall to date. In the financial years of 2006/07 to 2008/09, the department managed to spend at least 99.5% of its total budget.

**Table 28: Budget allocation, expenditure and variance for the National Department of Rural Development and Land Reform from 2005/06 to 2008/09**

Department of Land: Appropriations and Expenditure from 2005/06 to 2008/09																
R'000	June 2005-06			%	July 2006-07			%	August 2007-08			%	September 2008-09			%
DLA	Receipt R	Payments R	Receipt R		Payments R	Receipt R	Payments R		Receipt R	Payments R	Receipt R		Receipt R	Payments R		
<b>Total</b>	3 897 117	2 848 223	73.1	3 730 196	3 725 551	99.9	5 928 269	5 897 497	99.5	6 659 396	6 654 636	99.9				

Trends in annual growth and real percentage rates for the Department of Rural Development and Land Reform are varied. From 2005/06 to 2006/07, the percentage annual growth of appropriations was negative at -4.2% because the department was awarded less funding for 2006/07. Taking into consideration inflation for the year, the real growth was -7.6%, which means that growth was not only negative, but also slowed down. In 2006/07, the Department spent R877 328 more than in 2005/06. This translates to 30.9% annual growth and a lower percentage of real growth at 27.5%. The following year, 2006/07 to 2007/08, the annual percentage growth for appropriations proved to be more positive than in 2005/06 at 58.9%. Real growth for this period remained steady at 54.2%. In terms of expenditure, actual expenditure from 2006/07 to 2007/08 jumped to 58.3%. When one takes inflation into account for that period, the real percentage growth lies at 53.6%.

#### 9.4. Progress Made in Terms of the Relevant MDG

##### *Proportion of the population with access to secure tenure*

The land question in South Africa goes beyond the proportion of the population with secure tenure, as it also contains a transformative agenda. The proportion of land that is owned by black people is also a critical consideration. Another important dimension is the land use rights that people have who live on land that belongs to another. These include labour tenants as well as people who reside on communally owned land. In this section the quantitative targets regarding land reform in the three programme areas of government are discussed, namely redistribution, restitution and land tenure reform. The analysis of the success and challenges of these programmes is provided in the section on progressive realisation. However, the stumbling block in determining the access to



secure tenure is that government does not report on the numbers of beneficiaries of land reform programmes but only on the amount of land transferred. This makes it difficult to report on the indicator *per se*, and the hectares transferred become a poor proxy indicator because it does not take forced evictions into account. As highlighted below, significant numbers of black people have lost their hold on land since 1994 due to a combination of forced evictions, coercion and migration.

### ***Redistribution***

The target for redistribution of land owned by whites into black ownership is 30% by 2014, a total of 24.5 million hectares. Since 1994, the Department has delivered approximately 5.2 million hectares (2.1% of the target) of white owned agricultural land to land reform beneficiaries and is planning to redistribute a further 19.3 million hectares by 2014.<sup>425</sup> Only about 2.7 million hectares have been transferred under the redistribution program since 2004.<sup>426</sup> This has increased from 144 000 ha of land in March 2005.<sup>427</sup> The pace of redistribution is thus exceedingly slow and the Department is unlikely to meet its set target. In 2002, Cousins estimated that it would take 200 years to transfer land to the estimated 20 000 rural communities in the ex-homeland areas.<sup>428</sup> Hall further argued that the target of 30% was arbitrarily established and was initially set for the first five years of land reform, and then extended when it was clear that it was significantly under-achieved. It has now become the goal with which all land reform projects are justified and she describes it as the "holy grail of land reform". "*The core problem that remains is the disjunction between the target and the means adopted in pursuit of it, neither of which is informed by a vision of intended policy outcomes.*"<sup>429</sup> It is this disjunction that is discussed in the section on progressive realisation.

### ***Restitution***

In total 1.9 million hectares of land have been transferred through the restitution programme<sup>430</sup> and it seems that the Department has a good record of settling lodged claims, albeit, not at the pace originally envisaged.

*"The department has settled 94 per cent (74 989) of the 79 696 land claims lodged since 1994. Despite the efforts of the Land Claims Commission to settle the remaining 4 707 very complex rural land claims by March 2008, these will not be settled before 2010/11. Most of these claims are in dispute and have to be settled in the Land Claims Court. Project Gijima provides guidance on how to finalise different categories of claims."*<sup>431</sup>

Since many of these claims were settled with cash payments, the access to land remains low, and according to the Special Rapporteur:

*"The state has acknowledged that only 3%<sup>432</sup> of land was redistributed between 1994 and 2006, resulting in many remaining landless and thus without prospects for development or poverty alleviation."*<sup>433</sup>

425 Department of Land Affairs (423 above), 618.

426 Department of Rural Development and Land Affairs (DRD&LA), presentation to the SAHRC ESR public hearings, (2009). According to Hall (note 418 above), only 4% of white owned agricultural land has been redistributed through all aspects of land reform combined.

427 South African Human Rights Commission. 6<sup>th</sup> ESR Report, (2006), 4. This assumes the figure quoted above of 2. m ha is also land transferred under LRAD.

428 Cousins in Kariuki, 2004, 63.

429 Hall, R. & Cliff, "Introduction," in Hall, R. (ed). *Another Countryside? Policy Options For Land and Agrarian Reform in South Africa*, (2009), 2.

430 DRD&LA (note 442 above).

431 Department of Land Affairs (note 423 above), 618.

432 It is not always specified in the source documents whether reported percentages of land transferred are for each specific programme area, or whether they are for all transferred land.

433 UN Human Rights Council, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Miloon Kothari: addendum: mission to South Africa, (29 February 2008), A/HRC/7/16/Add.3, <<http://www.unhcr.org/refworld/docid/47d55d3f2.html>>.



One can therefore infer that the land restitution programme has not achieved the aim that was originally intended or envisaged and given that the majority of claims were settled via financial compensation, the programme did not alter the agrarian structure in South Africa.

### **Land Tenure Reform**

Tenure reform has only transferred 165 000 hectares of land<sup>434</sup> which means that the pace of settlement of labour tenant claims has been slower than the other pillars of land reform. According to the 2007 Annual Report of the DRD&LR, none of the 200 disputed labour tenant cases referred to court were settled and 589 undisputed cases were settled out of a target of 6271 for the year.<sup>435</sup>

The unintended negative impact of farmer reactions to attempts to secure land rights to labour tenants has been evictions. A national evictions survey conducted in 2005 found that an estimated 940 000 farm dwellers were forcibly evicted between 1994 and 2003, and double that number moved off farms due to forced eviction and voluntary migration. According to the survey the “... rate at which black people have been forcibly evicted from farms since 1994 – often simultaneously losing their jobs, homes, household assets and livestock – exceeds the rate of forced removals from farms in the last decade of apartheid. This suggests that more black South Africans lost their hold on land, through coercion, since 1994 than gained it through all land reform measures combined.”<sup>436</sup>

In the final analysis, both the percentage of land transferred, and the numbers of people who have lost land needs to be tallied to determine whether security of tenure is increasing or not. The figures quoted above highlight that if all the figures are combined, even in quantitative terms, little progress has been made regarding the proportion of the population gaining secure tenure. Ultimately though, the land reform programme must be judged against its intended outcomes, and the Department of Rural Development and Land Reform highlighted that chasing targets has caused quality problems:

*“Precisely because of an attempt to chase targets in terms of hectares, a whole lot of mistakes have been committed. Sustainability has suffered in terms of projects that we have implemented. We released a report last year that indicated that about 49% of our projects could be said to be sustainable, in 51%, there is something terribly wrong with that.”<sup>437</sup>*

The section on progressive realisation will interrogate the causes of the failures of the land reform programmes, and also highlight some success. The oral submission of the Department of Rural Development and Land Reform suggests that it has identified the following reasons as the causes of the failure of land reform programmes:

1. Chasing targets vs. sustainability.
2. Who should be given access to land and the suitability of applicants, “we must deal very soon with the issue of, particularly in the redistribution program, in terms of who actually gets given access to land. Is it everybody that is looking at owning something or is it someone who can develop and produce on that piece of ground”.<sup>438</sup>
3. Limited funding for the programme.
4. The willing-seller willing-buyer model.<sup>439</sup>

*“We are currently reviewing the willing-seller willing-buyer approach, as you know there is going to be a lot of contestation around that, it’s not an issue that is going to be resolved very soon; so something needs to be done to push prices down because the fiscus cannot afford to fund the program at this scale at which prices are going up. So that is what we need to do very quickly.”*

### **9.5. Findings on the Progress Made by the State on the Realisation of the Right**

In this section an analysis of the progressive realisation of the right to have access to land on an equitable basis is provided. Fulfilment of the right is analysed according to the 4 As, that is, the government programme must be appropriate to meet the needs of beneficiaries, land must be available where beneficiaries need it, there needs

434 DRD&LA (note 442 above).

435 Department of Land Affairs Annual Report, (2007), 60.

436 Hall (note 445 above), 10.

437 DRD&LR (note 442 above).

438 Ibid.

439 Advocate Mngwengwe does not specify whether it is for acquisition of land and post-settlement support.



to be equitable access to land for a diversity of land beneficiaries, including vulnerable groups, and the land and support provided to beneficiaries must be adequate. Ultimately, the question of progressive realisation of equitable access to land is an evaluation of the land reform programme of the government, and as such it must be measured against its intended purpose. One of the problems with this is that the purpose of land reform has shifted, and the target group has been changed, as the government attempts to learn from past failures and increase its success rate. This means that the intended outcomes will also have changed. Yet, the latest analysis of policy shows that there are inherent problems that need to be addressed in land reform if the right to land is to be achieved. A recent review by the Department of Land Affairs and Rural Development indicated that only 49% of land reform projects are sustainable in terms of agricultural production and the livelihoods of beneficiaries.<sup>440</sup> The possible causes of failure are discussed below.

### 9.5.1. Appropriateness

The ANC initially envisaged land reform as being central to a strategy of rural development.<sup>441</sup> Yet, Hall and Cliffe argue that this has not been the case and rural development has focused on transport and industrial infrastructure within spatial development nodes.<sup>442</sup> They argue further that rural development has not received adequate attention when compared to programmes for the urban working class. In addition, there are also structural policy issues that have not been appropriate to meet the needs of the landless. Firstly, the low grants in the first policy phase (SLAG), meant that groups of people had to come together to acquire land in the form of a Trust or Communal Property Association. These were often disparate groups of individuals that came together and lacked any social cohesion or common vision for land use. The revision of the policy and the introduction of LRAD meant that individual, as opposed to household grants, were introduced. The lacuna in this policy revision is that due to the high land prices group projects remain typical which obviates the actual objective.<sup>443</sup>

Various forms of collective ownership and production exist, including group-based ownership and production, group-based ownership with household production, individual or household based projects (mainly from family based land claims), joint-ventures, strategic partnerships and co-management. The latter two are now favoured, even though the first is still dominant. These collective forms of ownership have resulted in many problems:

1. Firstly, management and production became confused. Both were implemented collectively and therefore most land reform projects are run as production collectives.<sup>444</sup> One gap was the management of individual household assets such as livestock, which in some cases were supposed to be kept in communal areas (traditional lands), and tensions arose over land use.<sup>445</sup> Often beneficiary communities settled on land without any prior understanding among themselves about what their respective use rights would be, and this is problematic as it often results in elite capture. To quote from the transcript of the hearings: *"You have a land reform process involving 100 people, three people own all the livestock that the land can carry. The rest do not benefit. That's problematic; it doesn't reach the obligation in the Constitution for equitable benefit".*<sup>446</sup>
2. The second problem that emerged was conflict over the distribution of benefits.<sup>447</sup>
3. Thirdly, the government's programme has not been appropriate in that land use planning has been poor resulting in very limited benefits to land users.
4. Fourthly, the overall paradigm encapsulated the expectation that the mode of production would imitate the model of white commercial farming. However, the problem was that beneficiaries had neither the capital nor the skills to manage large commercial type enterprises, and thus highly capital intensive modes of production were not appropriate, and led to poor outcomes.<sup>448</sup> This assumption of income generated by communal production led to an omission in business plans – production for own consumption. As the benefits of communal production either did not materialise or took time to be realised, project members began cultivating for their

440 Department of Land Affairs (note 423 above), 618.

441 Hall (note 445 above), 1.

442 Ibid, 2.

443 Hall (note 418 above), 26.

444 Ibid 26.

445 There are other complications regarding grazing for communally owned and individually owned livestock and details can be found in the Hall book, chapter 1.

446 SAHRC Hearings, Transcript, (2009).

447 Hall (note 418 above), 26.

448 Ibid 27.



own household needs (at times sub-dividing land informally) and thus deviated from the land use envisaged in the business plans.<sup>449</sup> To quote Hall, the “Failure to provide for and support household-based production within group projects has been a major failing in land reform plans, arising from a blind-spot in policy”.<sup>450</sup>

5. In cases where Communal Property Associations experienced an attrition of members (largely due to failed plans), they were automatically in contravention of their legal status and therefore were not able to access the balance of their grants from the government, or enter into contracts with other third parties.<sup>451</sup>
6. The sixth problem relates to the transactability and credit worthiness of land when it is communally owned. Where the legal and financial system is not supportive, group ownership prevents access to credit where land is to be used as collateral. To a large extent this is the current situation in South Africa, which leaves already struggling beneficiaries without any means to apply for credit.
7. Joint ventures are another form of land reform that is increasingly encouraged. They typically involve a partnership (often very unequal in power relations) between a group of beneficiaries and the state or private commercial entities. However, they have been criticised for failing to provide benefits of access to land such as land usage for own production, security of tenure and access to capital. In the case of farm-worker equity schemes, for example, workers may only benefit while they are employed on the farm and relinquish their rights to land and housing when they are not. Contract farming or out-grower schemes seem to be more appropriate, yet domination by large purchasers up the supply chain often causes downward price pressure at the farm gate leading to the self-exploitation of producers. Strategic partnerships are becoming the predominant mode of restitution claims, particularly in Limpopo, Mpumalanga and to some extent in KwaZulu-Natal.<sup>452</sup> Beneficiaries receive full-ownership of claimed properties, but farming operations are controlled by companies in which they are shareholders. In these cases, the mode of production remains unchanged and continuity of production is deemed to be the indicator of success. The key problem here is that there are no short-term gains for beneficiaries as profits are usually ploughed back into the business, and rental incomes are often below market rates, and they do not have land use rights. In some cases beneficiaries do have preferential access to employment, but this often means displacing existing farm workers.<sup>453</sup>

The common theme here is that the mode of production in land reform has favoured commercial agriculture, and has not provided for a diversity of beneficiary needs. The comment by the representative of the Department of Rural Development and Land Reform at the hearings that only those suitable for commercial farming should possibly be considered as land beneficiaries is an indicator of this thinking. The danger here is that land reform is thus not appropriate to the needs of many of the landless, who may want to subsidise other forms of income via household production, or may not want to use the land for agricultural purposes at all, but only for settlement. Another major obstacle to changing the mode of production and recognising the diversity of land needs is the difficulty of sub-dividing agricultural land. In fact, as an indicator of political will, the state has shown that it is not able or willing to tackle commercial farming interests. The Subdivision of Agricultural Land Repeal Act 64 of 1998 has not been signed into law by the president, even though it was passed by parliament a decade ago.<sup>454</sup> Without subdivision, LRAD perpetuates the problems it was intended to solve, as the grant size may have increased, but there is no equivalent flexibility in land size. “*Thus, there is a mismatch between policy mechanisms emphasising entry at a variety of different levels (ranging from food safety-net projects to small and medium-sized farms) and the actual array of properties available to would-be beneficiaries.*”<sup>455</sup>

Individual land use has been successful where beneficiaries are able to contribute considerable investment into land and inputs.

449 An example of this is the Makana CPA outside of Grahamstown. Hall (note 418 above), 27–28.

450 Ibid 28.

451 Ibid.

452 Examples are the Zebediela Citrus Estate in Limpopo, Makuleke co management agreement in the Kruger Park, STentor Sugar cane plantation and Giba banana plantation both in Mpumalanga.

453 Hall (note 418 above), 30–32.

454 Ibid 39.

455 Ibid.



*"It should be acknowledged up-front that different kinds of scales of production are needed in land reform to fit different needs and situations. However, what is striking from the South African experience is, on the one hand, the marginalisation of individual or household options for ownership and use, except for those with substantial own resources. Business plans often aim to curb, rather than support, efforts at self-provisioning by beneficiaries, while the grant system and farm sizes impede household-based ownership and production, whether for consumption or sale."*<sup>456</sup>

This reveals that land reform has not been supported as a means of changing the nature of production in former white owned farm lands. In fact, Hall argues that projects have been designed largely to change as little as possible, beyond the ownership structure, and production regimes remain unaltered. The attempt has been to create a new class of commercial black farmers, a move away from the original purpose of land reform, where the beneficiaries were the rural poor and landless.

The example of the Richtersveld case, which was settled in the Constitutional Court in 2007 after ten years of legal battles, reinforces the argument that land reform policy, and the instruments of implementation, have not always been favourable to transformation. It is estimated that it cost the state in excess of R50-million in legal costs to fight this case.<sup>457</sup> In an analysis of the ruling of the Land Claims Court, which found against the claimants in what is seen as an Aboriginal Claim, Roux argues that it appears that the court fell back on a formalistic mode of legal reasoning in order to justify an outcome that was actually motivated by policy considerations.

*"... the issue of the recognition of the doctrine of aboriginal title in South Africa is highly controversial, since the recognition of this doctrine would call into question the validity of a great many title deeds. In this instance, the culture of legal formalism is less a straitjacket from which the court is unable to escape, than a convenient disguise for the policy choice the court feels unable openly to articulate."*<sup>458</sup>

The issue of land use planning and mining rights makes the government's commitment to land redistribution and land tenure questionable. There are many instances where communities have been relocated as a result of mining activities, and it appears that mining rights almost eclipse the rights on the land.<sup>459</sup>

The changes to policy thus far have not brought South Africa any closer to providing equitable access to the right to land, and the solution is "... not merely to deliver more of the same, faster. Instead a bold new direction in policy was needed, alongside a complete overhaul of the way in which it is implemented".<sup>460</sup> A policy rethink is necessary, with a focus on the intended economic outcomes and located in a broader agrarian reform agenda. The ANC policy conference in Polokwane in June 2007 reflected this thinking, as the report on economic transformation reiterated that a transformation of land use patterns is necessary which balances the social and economic needs of society.<sup>461</sup> However, the government's narrow focus on meeting land redistribution targets, which in themselves have proven to be arbitrary, and the shift away from a pro-poor policy which promotes transformation, shows a limited understanding of the constitutional obligation for progressive realisation of the right to access to land in an equitable manner. The government's commitment to land reform is also called into question as it has failed to audit its own land that could be available for redistribution. Finally, the one-size-fits all policy, which is clearly not based on the meaningful engagement and participation of beneficiaries in defining land use patterns, defies a rights-based approach which recognises the full diversity of individual needs in society and is premised on notions of participation and empowerment.

456 Ibid 34.

457 "Tears of joy as Richtersveld land claim is settled," *Mail and Guardian*, (9 October 2007), <<http://www.mg.co.za/article/2007-10-09-tears-of-joy-as-richtersveld-land-claim-is-settled>>.

458 Roux, T. 'Pro-poor court, anti-poor outcomes: explaining the performance of the South African Land Claims Court,' *South African Journal on Human Rights*, (2004), 20.

459 SAHRC hearings, submission from panellist, (2009).

460 Hall (note 445 above), 11.

461 Hall (note 418 above), 24.



## Tenure reform

The other key policy consideration and state programme is tenure security, which critics argue has been the least focused on and possibly the most transformative aspect of land reform.<sup>462</sup> The government's focus has been on transferring land ownership of communal land to "traditional communities", as opposed to securing individual land rights. The state supported land-right administration collapsed with the end of the Bantustans, leaving a gap in the registration of permission to occupy (PTOs). This has left many people with very insecure rights over communal land and resources and due to statutory land tenure systems under apartheid, rights of black people to hold, occupy or use land were not registered under the central deeds registration. The implication is that there are many long-term occupiers who are not able to establish a clear legal right to the land. This has left millions in the former "homelands" in a vulnerable position.<sup>463</sup>

Steps were taken in the 1990's to update title deeds, and to provide interim protection to land rights holders while new comprehensive law reform was awaited.<sup>464</sup> The most significant law reform has been the promulgation of Communal Land Rights Act (CLRA) in 2004, which promotes a model of privatisation under local control. This act has not yet been implemented as it faces a constitutional challenge. It is argued that it fails to secure tenure or provide for democratic governance of land rights, discriminates on the basis of gender and allocates excessive discretionary powers to the Minister of Land Affairs.<sup>465</sup> CLRA has also been criticised for failing "... to come to terms with the sociological complexity and uniqueness that defines South Africa's rural societies with respect to land matters. A poorly drafted tenure policy is bound to exacerbate the historically ingrained problems facing the rural population".<sup>466</sup> Issues such as the community conflicts of allegiance to tribal leadership, heritage, power dynamics, tribal lineages and apartheid constructions of rural communities, all belie the notion of a community whose rights to land are derived from shared rules as defined in section 1 of the Act.<sup>467</sup>

The CLRA and existing tenure legislation has also been criticised for putting financial barriers in place for land conversion in that the whole process could cost thousands of rand.

*"Today, surveyors are obliged to document the land, town planners have to draft a development plan and conveyances are required to make the legal transfer. A deeds register must be opened and a fee paid to register the property. In the end, it costs thousands of rand to make the conversion."*<sup>468</sup>

Thus while the informal right to land is protected, it needs to be made meaningful through a process of registration that is accessible. People on communal land need to be able to transact the right to land, and seek development assistance in order to give meaning to their right to land.

The tenure security of farm workers has really come under threat since 1994<sup>469</sup> and the large extent of evictions is highlighted under the section on the progress towards the MDG above. The failure of the state to protect the rights of farm workers is mainly ascribed to a lack of political will on the part of the government to protect farm workers:

*"While the current Minister periodically lambastes white farmers for forcibly evicting farm dwellers, there is little to indicate that the government wishes, or is willing, to stop this. Instead, government posts dedicated to enforcing farm tenure laws have been done away with and new legislation to be introduced in 2009 is expected to establish one law to regulate evictions, possibly diluting the (already weak) rights enshrined in the key farm tenure law, the Extension of Security of Tenure Act 62 of 1997 (ESTA)".<sup>470</sup>*

The Commission produced a report on the progress made in terms of Land Tenure Security, Safety and Labour Relations in Farming Communities since 2003.<sup>471</sup> The key observation regarding Land Tenure Security was that little progress had been made since 2003. Other findings were that:

462 Hall (note 445 above), 9.

463 Khoza (note 26 above).

464 Hall (note 445 above), 10.

465 Ibid.

466 Kariuki (note 424 above).

467 Ibid.

468 Grube, L. 'Communal Land Rights Act needs to be revised', SA Reporter, (26 June 2009), <[http://sareporter.com/index.php?option=com\\_content&task=view&id=696&Itemid=60](http://sareporter.com/index.php?option=com_content&task=view&id=696&Itemid=60)>.

469 This is discussed in greater detail in the housing chapter.

470 Hall (note 445 above), 10.

471 South African Human Rights Commission. *Progress made in terms of Land Tenure Security, Safety and Labour Relations in Farming Communities since 2003*, (2008).



1. Farm dweller populations remain mainly invisible in municipal planning and decision making.
2. The government has not clearly articulated its policy perspective with regard to providing farm dwellers access to services, whether these will be provided/strengthened on or off farms.
3. There is a breakdown in trust within this sector between organised agriculture, the government and NGOs.
4. Amendments to ESTA have not been made as intended. The negative unintended impacts of ESTA on the land security of farm workers, together with the lack of a larger development programme to address living and working conditions on farms, has left farm workers in an even more disadvantaged and vulnerable position.
5. There is inadequate data on illegal or other evictions, and the data that is available from NGOs is contested by the agricultural association.
6. SAPS remains uninformed about the legal requirements of ESTA and tends to favour farmers in tenure disputes.

The issue of farm workers tenure security, particularly the lack of compliance with ESTA provisions by farmers and the narrow rulings of the courts, is discussed in the housing chapter. What is pertinent in this chapter is the access to land for farming for farm workers, and what the findings have highlighted is how their efforts to secure land have been frustrated by administrative and judicial processes. This is illustrated in the case study below which was taken from the submission to the Commission by the Women on Farms project.

#### **Case study: Struggle to secure agricultural land for women**

The Rawsonville Women's Agricultural Cooperative is comprised of 15 unemployed women farm workers, most of whom have been working on farms all their lives. Since 2006 they have tried everything possible to access land. These efforts have included:

1. Securing a signed contract with the Breedevalley Municipality in 2006 for land. This contract was subsequently withdrawn by the municipality on the basis that an administrative mistake had been made on their part and promising that alternative land would be allocated. The women are still waiting.
2. Negotiations with a farmer who was willing to sell a piece of land for below market value. However, because the Department of Rural Development and Land Reform did not respond in time, the farmer sold the land to another white farmer instead.
3. Lodging an official land redistribution application with Department of Rural Development and Land Reform. However, the budget was fully spent for that year and the undertaking was that the application would be considered the following year. This is despite the fact that the cooperative was part of the group that welcomed the Minister Lulu Xingwana to Rawsonville in 2007 when she came to launch the new land reform programme, promising the Rawsonville women that they would be prioritised for land reform.

At the recent provincial Food Summit, the women heard again that will be a priority. Despite the claims of urgency about the food crisis, nothing has as yet unfolded on the ground

The women have reached a point of desperation. They have exhausted all official avenues and do not know what else to do. In their own words, they *“don't have dreams of becoming rich. We are just tired of seeing our children going to bed hungry at night when we can see all the unused land around us with white farmers owning more land than they possibly can farm.”*

#### **9.5.2. Availability – ‘willing buyer willing seller’ market led policy approach**

The availability of land for redistribution purposes has been based on the “willing buyer willing seller” policy approach which has come under fire from many quarters. In South Africa, land reform has been premised on open land markets, where the role of the state has been to provide small land-acquisition subsidies.<sup>472</sup> The Department in its submission argued that the high cost of land is one of the main reasons that the land budget is inadequate. In a PLAAS publication, Edward Lahiff expounded on the challenge related to the willing buyer willing seller approach as follows: *“The ‘willing buyer, willing seller’ approach has come to signify not only a lack of compulsion on landowners and the payment of market-related prices for land, but also a minimal role for the state in strategic planning and implementation. This has led to a slow rate of land transfer and inappropriately designed, under-financed and isolated settlements poorly integrated to the agricultural economy and state support services”*.<sup>473</sup>

472 Hall (note 445 above), 3.

473 Lahiff, E. State, Market Or The Worst Of Both? Experimenting With Market-based Land Reform In South Africa, PLAAS Occasional Paper No. 30, (2008), 1.



In another publication, Hall outlined the problem with the land reform programme as follows: “*The programme has been characterised by an overwhelming dependence on markets to determine the shape and pace of reform, through landowners’ decisions as to which properties are offered for sale and the ruling market price. Coupled with this has been a highly bureaucratic process, which has delayed the disbursal of land acquisition grants (for redistribution applicants) despite some moves towards decentralisation. There remains a mismatch between the limited and ad hoc market opportunities that arise and the bureaucratic means available to respond to them, neither of which may bear much relation to actual land needs of would-be beneficiaries or rural development priorities*”.<sup>474</sup>

Hall further argued that talking about a demand-led approach is also misleading, as many people who need land may be too disempowered or lack awareness of their rights to demand it.<sup>475</sup> However, the Department of Rural Development and Land Reform has recognised that due to the controversy around amendments to this policy (and more aggressive expropriation), which actually lies at the heart of the private property debate that raged at the time of drafting the constitution, it is not going to be resolved soon.

This was clear during the interactions at the hearings given the antagonistic approach from Agri SA which resulted in Department of Rural Development and Land Reform making an appeal to Agri SA to realise that “*we are in this together*”.<sup>476</sup>

#### **9.5.3. Access to land (social exclusion)**

Women, farm workers, the disabled and the youth have been identified as marginalised groups to be prioritised for land reform in government documents related to land reform. The focus on the “poor” was removed with the introduction of LRAD, and replaced with these marginalised groupings. There is, however, no strategy targeted specifically at these groupings and no data to show the extent to which they have been beneficiaries of land reform. There are two aspects of LRAD that generate exclusions; firstly the requirement to commit one’s own resources and secondly, the business planning process that requires profit generation. In the 2007/08 research of the Commission on progress made in terms of Land Tenure Security, Safety and Labour Relations in Farming Communities since 2003, the following were findings regarding women and children as marginalised groups:<sup>477</sup>

1. The failure to provide tenure security on farms has been particularly problematic from a child rights perspective as these children are denied access to opportunities for education, health care and so on;
2. Women are in a particularly vulnerable position as they mostly depend on their male partners for tenure security.

The role of traditional authorities in terms of distributing or allocating land user rights within communities is of particular concern from a gender perspective as it limits women’s right to access to land, notwithstanding the fact that many of them are sole providers.

With regard to benefits for the poor, Lahiff makes the following commentary: “*The extremely slow pace of reform (far below official targets) is the most obvious limitation to equity gains, but this is compounded by an emphasis on disposal of state land and tenure upgrading, which leaves the vast majority of white-owned land untouched. The disposal of land already allocated for use by black people, together with the mass removal of farm dwellers, merely serves to complete processes begun under apartheid, and results in little nett redistribution of assets. In addition, a range of barriers imposed by the functioning of the market and by bureaucratic processes, together with the lack of a credible strategy for poverty alleviation, make it likely that the principal equity gains will be along the lines of race, but with limited benefits flowing to the very poor. More definitive conclusions will require much better data than is currently available. Indeed, it is symptomatic of the unstrategic nature of the programme that it attempts to operate without an effective feedback of quality data into the planning and implementation process*”.<sup>478</sup>

Another particularly vulnerable group are the Khomani San people. In 2003, the Commission conducted an inquiry into the human rights violations of the Khomani San people. The inquiry found that their much hailed land claim had resulted in failed dreams and tells a story of neglect by most government institutions, including at the local level.

474 Hall (note 445 above), 3.

475 Hall (note 418 above), 67.

476 SAHRC Hearings (note 462 above).

477 Farm workers issues have been discussed separately.

478 Lahiff (note 489 above), 19.



The report found that substantive planning had taken place during the settlement process. “*The implementation phase, however, failed to initiate a process of sustainable development at different levels, to protect basic human and other rights of the land claim beneficiaries, as well as to capacitate the long-disadvantaged Khomani San people*”.<sup>479</sup>

#### **9.5.4. Adequate land and provision of services (from strategic planning to implementation)**

One of the main problems with the government’s programme has been post-settlement support.

“*The growing evidence of a lack of post-settlement support and the resulting failure on the ground to improve the livelihoods of those returning to their land has, in the past few years, started to erode the symbolic achievements of restitution*”).<sup>480</sup>

The ability of the state to provide post-settlement support is hampered by the willing buyer willing seller policy, as it precludes proper planning and a consolidated approach. Land reform has also been isolated from local development planning. In line with this, land use planning has been identified as one of the major challenges in access to land, and the land use planning and land settlement decision making process has been somewhat disjointed, particularly between the three tiers of government. The Land Use Management Bill is expected to assist with this by establishing a new National Land Use Commission and a communalised system of land use regulators.<sup>481</sup> However, the bill was withdrawn from Parliament in 2008, to be reviewed. Related to this is that land restitution or redistribution may result in a settlement which is not recognised as such by the municipality, which means that there is no planning for the delivery of services or infrastructure to that community.<sup>482</sup> In respect of land restitution, the current plans are that the restitution branch of the Commission for Land Restitution must be phased out by 2011, and that all land claims should be settled by then. The current process for this phasing out has seen the Department of Rural Development and Land Reform forge a relationship with municipalities so that municipalities can take care of existing claims. However, municipalities have major reservations about taking over the Department’s unfinished work in the face of overburdened municipal functions and insufficient funds to pay land claims.<sup>483</sup>

The Comprehensive Agricultural Support Programme (CASP) is the main vehicle for “emerging farmers” to receive support, yet in most regions infrastructure was the only form of support provided.

“*Support in the form of technical advice, training, marketing, production inputs and risk management had been largely ignored by implementers, and while some land reform beneficiaries had access to CASP funds, in other areas officials directed these away from land reform towards emerging farmers considered to be more commercially oriented*”).<sup>484</sup>

The link between those acquiring land through LARP and those receiving benefits from CASP has not been institutionalised, resulting in fragmented services delivered through different institutions which have different administrative and financial procedures and priorities. This makes the process very cumbersome.<sup>485</sup>

The other key aspect that limits the realisation of rights is maladministration and corruption in land institutions. The primary example in this period is the reported wide scale fraud and corruption at the Land Bank, including misappropriation of funds from the AgriBEE fund intended for emerging farmers for personal gain by Land Bank officials.<sup>486</sup>

In sum, the failure of almost half the land reform projects is also problematic in terms of progressive realisation of socio-economic rights, as the right to land is not delivering the restoration of dignity or economic benefits to

479 South African Human Rights Commission. *Report on the inquiry into the Human Rights Violations of the Khomani San Community*, (2004), 27.

480 CASE (note 207 above).

481 Parliament of South Africa. “New land management bill proposes reform of land use in SA,” Portfolio Committee on Agriculture and Land Affairs, (1 June 2008), <[http://www.sabinet.co.za/sabinetlaw/news\\_par662.html](http://www.sabinet.co.za/sabinetlaw/news_par662.html)>.

482 SAHRC (note 462 above).

483 Interview with official at the Commission on Land Restitution, Western Cape.

484 Hall (note 418 above), 127.

485 Ibid 129.

486 “Are we winning the war on corruption?” *Mail and Guardian* (27 November 2009), <<http://www.mg.co.za/article/2009-11-27-are-we-winning-the-war-on-corruption>>.



hopeful beneficiaries and is not contributing to improved rural development. The effectiveness of land reform projects is hampered by many factors, including the various policy and programmatic initiatives which preclude the needs and aspirations of individuals wishing to have access to land either in the form of ownership or land use rights. SLAG and LRAD, for instance, promote collective ownership and production, and do not cater for individual household provision in most cases. The willing buyer willing seller model is supply driven and does not consider the land use needs of beneficiaries, and the planned use of the land as per the intention of the beneficiaries is not integrated into redistribution decision making.

Current policies do not cover enough of those who need access to land and thus the progressive realisation of the right to land is only applicable to those in the policy net. Excluded are farm dwellers, women in traditional areas and those who cannot establish a clear legal right to the land. The fact that more poor black people have lost their hold on land via evictions than have gained from land reform in the post 1994 period means that there has been a regression in the realisation of the right to land. The state has not acted decisively to intervene in evictions and has not taken reasonable measures to assist those who have lost access to land and housing. The findings in this section imply that the land reform program in its current form is unworkable. This is predominantly due to the state's conventional ownership paradigm that is inconsistent with the reality on the ground. The one-size-fits-all mentality in respect of the different tenure systems that exist in South Africa will inevitably lead to failed projects. As a result, the practical implementation of the various programmes has failed. This is due to three main factors:

1. The failure to secure land rights for those living on farm lands and in communal areas, and to act decisively against evictions;
2. A one size fits all paradigm regarding the mode of production (being commercial in nature) that leads to failed projects; and
3. Poor post-settlement support programmes have contributed to the assessment that the right to land is not being progressively realised.

## 9.6. Recommendations

A new phase of land reform located within a wider agrarian reform is needed and will require new institutional arrangements.<sup>487</sup> These will have to encompass the following:

- (a) A policy review in terms of the understanding of community in rural areas.
- (b) A review in respect of the arrangements with regard to Traditional Leaders.
- (c) Improved land use planning and consideration of land use planning and restitution/redistribution when considering land resettlement and the provision of mining rights.
- (d) Implementation of and reporting annually on the recommendations of the Commission's 2007 hearings on Land Tenure Security, Safety and Labour Relations in Farming Communities.
- (e) Consideration of the standardisation of an indicator framework for measuring outcomes that is people centred within a people centred development paradigm. Possible indicators could be improved food security; employment, and a more egalitarian distribution of income; increased well-being; improved housing, ownership of household items and access to fuel for cooking; reduced vulnerability; increased mobility and improved sustainability: more sustainable use of the natural resource base.<sup>488</sup>
- (f) Implementation of quality of life surveys on a regular basis and maintaining standard sampling methods and research tools for ease of comparison and tracking over time.
- (g) Creation of substantive rights in land for occupiers..
- (h) Implementation of a well-resourced programme of information dissemination, support to farm dwellers and enforcement of the tenure laws.
- (i) Proactive creation of new, sustainable settlements in farming areas.
- (j) Finding ways of separating tenure and employment rights.

487 Cliffe, L. Policy options for land reform in South Africa: New Institutional Mechanisms?, PLAAS Policy Brief 26, (2007), <<http://www.plaas.org.za/publications/policy-briefs/pb26.pdf>>.

488 Hall (note 418 above), 41.



However, there are immediate and achievable steps that should be taken now to improve the situation. The Constitution makes it clear that "*no one may be evicted from their home without an order of court.*" Therefore, this should be given effect immediately. In addition, it must be ensured that, when a matter does go to court, farm dwellers are given a fair hearing, which must include legal representation. In the long term the creation of a new dispensation in farming areas must be developed that includes commercial farms, small farms, space for new and emerging farmers, and new settlements for farm dwellers. Such new settlements must give farm dwellers homes of their own and new economic and production opportunities.<sup>489</sup>

# Chapter 10



*The right to housing*



## CHAPTER 10: THE RIGHT TO HOUSING

### 10. INTRODUCTION

In this chapter the progressive realisation of the right to adequate housing for the period 2006 to 2009 is reviewed against international commitments and the Constitution. South Africa's progress towards meeting the relevant MDG related to improving the lives of slum dwellers and security of tenure is assessed (Goal 7: Ensure environmental sustainability; Target 11: Have achieved, by 2020, a significant improvement in the lives of at least 100 million slum dwellers and Indicator: Proportion of the population with access to secure tenure). While the indicator for MDG 7 provides a starting point for analysis, it does not challenge the extent to which progressive realisation of the right to adequate housing is being realised in qualitative terms within a rights-based framework. This discussion and analysis is provided in the final section of the chapter, which includes an analysis using the 4 As – accessibility, adaptability, availability and acceptability. The chapter also looks at government planning in terms of monitoring and evaluation as well as an analysis of the budget. Recommendations for further action are provided at the end of this chapter. The "main themes arising" section is a summary of the sections on planning, the relevant MDG and the analysis of the progressive realisation of the right to adequate housing.

It is argued in this chapter that while South African policy and legislation generally shows a commitment to fulfilling both international and constitutional obligations, and there are signs of evolution in the housing policy that are directed to providing more sustainable and suitable housing solutions, in this review period there is a still a large gap between policy and implementation. More worrying, is the postulate of a conservative state attempting to erode gains made via political transformation in an attempt to speed up service delivery. In this regard, even though the National Legislature and the Constitutional Court have shown their progressive understanding of the right to adequate housing,<sup>490</sup> in some instances the Constitutional Court has made conservative judgments in the name of the 'greater good'<sup>491</sup> and in favour of provincial governments. It is therefore critical that the Commission ensures that improving the lives of slum dwellers and ensuring tenure security does not convert into a discourse and practice of slum eradication and the relocation and marginalisation of the poor and working classes in the name of delivery.

#### 10.1. The Meaning and Content of the Right

##### **Meaning in human rights law**

In international discourse the right to adequate housing is derived from the right to an adequate standard of living, which is contained in Article 11 (1) of the ICESCR and Article 28 of the UN Convention on the Rights of Persons with Disabilities (UNCRPD),<sup>492</sup>

*"The states parties to the present covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realisation of this right, recognising to this effect the essential importance of international cooperation based on free consent."*

As a signatory to the convention, South Africa has committed itself to not act contrary to the object and spirit of the treaty. The UNHRC has identified the following principle issues which should be considered important in relation to this right:

1. The right to adequate housing applies to everyone and enjoyment of this right should not be subject to any form of discrimination.
2. The right to adequate housing should be seen as the right to live somewhere in security, peace and dignity, and should be ensured to all persons irrespective of income or access to economic resources. According to the Commission on Human Settlements and the Global Strategy for Shelter to the year 2000, adequate shelter means "adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities – all at a reasonable cost."<sup>493</sup>

490 For example, the rejection of the KZN Slums Act and amendments to PIE.

491 For example, the Joe Slovo relocations and evictions.

492 The UNCRPD was ratified by South Africa in November 2007, <<http://www.africanadecade.org/reads/uncrpd-ratification-update/>>.

493 The right to adequate housing (Art.11 (1)): 13/12/91., CESCR General comment 4. (General Comments) 4: The right to adequate housing Art. 11 (1) of the Covenant), (Sixth session, 1991) Contained in document E/1992/23



Taking into account cultural, environmental, social, economic and other factors, the Committee believes that certain aspects of the right are appropriate in any context and can be considered the key determinants of adequate housing. These are: legal security of tenure; availability of services, materials, facilities and infrastructure; affordability; habitability, which includes application of the Health Principles of Housing of the World Health Organisation; accessibility (taking into account the special housing needs of vulnerable and / or disadvantaged groups); location; and cultural adequacy.

In terms of progressive realisation and considering resource availability, the state should undertake immediate actions to improve the housing situation. There are certain steps that countries can take immediately without needing significant budgets, for instance, abstaining from certain negative practices. Effective monitoring is also identified as being critical. Forced evictions are deemed as “*... prima facie incompatible with the requirements of the covenant and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law*”.<sup>494</sup>

The South African government is a signatory to the International Declaration on Targets for the Eradication of Backlogs in Basic Service Delivery.

### **National Legislation**

The Constitution<sup>495</sup> explicitly addresses the right to adequate housing. Section 26 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.*”

Section 28 (1) (c) of the Constitution also calls for the right of children to shelter. Other constitutional rights that can be used to protect housing include:

- Section 9: The right to equality.
- Section 33: The right to just administrative action.
- Section 10: The right to dignity;
- Section 28 (1) (b): The right of the child to family care or parental care and section 12 (1) the right to freedom from violence (especially in the case of domestic violence situations).<sup>496</sup>
- Section 25 (5): The right to have access to land, “*the stronger the right to land, the greater the prospect of a secure home*”.<sup>497</sup>
- Section 25 (6) also protects vulnerable groups by reinforcing security of tenure.

The Constitutional Court, in the *Government of the Republic of South Africa and Others v Irene Grootboom and Others* (2000 (11) BCLR 1169 (CC)), added impetus to the understanding of the right to access adequate housing as it requires available land, appropriate services such as the provision of water and the removal of sewage, and the financing of all of these, including the building of the house itself. For a person to have access to adequate housing, all of these conditions need to be met: there must be land, there must be services, and there must be a dwelling. Access to land for housing is therefore included in the right of access to adequate housing in section 26. A right of access to adequate housing also suggests that it is not only the state that is responsible for the provision of houses, but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing. The state must create the conditions for access to adequate housing for people at all economic levels of our society, and the housing policy must take this into account.<sup>498</sup> The state’s primary obligation to those who can afford to pay lies in unlocking the system, providing access to housing stock, and providing a legislative framework to facilitate self-built houses through planning laws and access to finance.<sup>499</sup>

494 UN Human Rights Council, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Miloon Kothari: addendum: mission to South Africa, 29 February2008, A/HRC/7/16/Add.3, <<http://www.unhcr.org/refworld/docid/47d55d3f2.html>>.

495 The Constitution.

496 Khoza (note 26 above).

497 Ibid.

498 Government of the Republic of South Africa (note 19 above).

499 Ibid 36.



The Grootboom judgment was the first of a long line of cases which informed the Constitutional Court's decision in the case of *Residents of Joe Slovo Community v Thubelisha Homes and Others* CCT 22/08. The judgment in this case underscored the necessity for the state to provide adequate alternative accommodation when it evicts a settled community from their homes.<sup>500</sup> The judgment also stipulated standards with which the "temporary accommodation units" had to comply, including the provision of services and facilities. Furthermore, the court ordered the government to allocate 70% of the Breaking New Ground (BNG) houses<sup>501</sup> at Joe Slovo to the relocated communities (the remaining 30% would be allocated to the back-yarders of Langa). Finally, the court found that the consultation process with residents had been too limited and ordered the authorities to "meaningfully engage" with the community on the logistics of the eviction, such as the timetable and the provision of transport facilities to places of work, schools and clinics.<sup>502</sup>

The judgment in the *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others* (2001 (7) BCLR (CC) held that the government could change legislation and land-use zoning if that legislation hampers it from fulfilling its constitutional obligations.<sup>503</sup>

In terms of the responsibilities within government for housing, the National Executive Branch is in charge of the design of national policies while the provinces have responsibility for the delivery of housing programmes and other state services and implementation of national policy. Municipalities also have competence in local matters affecting their jurisdictions. They implement national housing policies in their areas of jurisdiction if accredited to do so and also have legislative competence for settlement planning under Schedule 4 of the Constitution.<sup>504</sup>

In the years following the first democratic election in 1994, the housing programme was characterised by policy formulation, restructuring of the various housing departments into one, establishing institutional capabilities, a legislative and regulatory framework and delivery processes that were intended to redress apartheid housing ills and promote non-discriminatory and equitable provision of housing. Since 1994, the government of South Africa has put in place a number of legislative and other measures aimed at fulfilling the right to adequate housing, including the provision of rental housing, allocation of land for purchase and subsidising the building of housing, among others.<sup>505</sup> Some key pieces of legislation include the following:

- The 1995 White Paper on a New Housing Policy and Strategy for South Africa and the Reconstruction and Development Plan (RDP) which had a quantitative focus and aimed to eradicate the housing back-log in ten years by constructing 350 000 housing units per year.
- The Housing Act 107 of 1997 which repeals all discriminatory laws on housing, dissolves all apartheid housing structures and creates a new non-racial system for implementing housing rights in South Africa.<sup>506</sup> It makes a commitment to the progressive realisation of adequate housing and commits local government to take *reasonable* steps to ensure this.
- The Extension of Security of Tenure Act 62 of 1997 (ESTA) which provides security of tenure and protection from arbitrary evictions for people in rural areas and peri-urban land, and requires that a land owner must get a court order before evicting occupiers.
- The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) provides a framework to prevent unlawful occupation and at the same time ensure that unlawful occupiers are treated with dignity, giving special consideration for the most vulnerable occupiers. PIE makes it a criminal offence to evict someone without a court order.

<sup>500</sup> The Olivia Road Case (Case CCT 24/07) the judgement, however, says that the City cannot be expected to make provision for housing beyond what its available resources allow, but that at least the City must meaningfully engage with the evictees in a reasonable way.

<sup>501</sup> BNG houses are low-cost government housing available at low rentals.

<sup>502</sup> "Joe Slovo eviction: Vulnerable community feels the law from the top down," *Business Day*, (22 June 2009).

<sup>503</sup> SAHRC (note 443 above).

<sup>504</sup> *Ibid.*

<sup>505</sup> Much of the information in this section is from Khoza (note 26 above).

<sup>506</sup> It defines "housing development" as: ... the establishment and maintenance of habitable, stable and sustainable public private residential environments to ensure viable households and communities in areas allowing convenient access to economic opportunities, and to health, educational and social amenities in which all citizens and permanent residents of the Republic will, on a progressive basis, have access to permanent residential structures with secure tenure, ensuring internal and external privacy and providing adequate protection against elements; and potable water, adequate sanitary facilities and domestic energy supply.



Other key pieces of legislation are:

- The Housing Consumers Protection Measures Act 95 of 1998 (HCPMA) which protects housing consumers by establishing the National Home Builders Registration Council (NHBRC), tasked with ensuring quality in housing provision.
- The Rental Housing Act 50 of 1999, which defines the role of the government in rental housing, creates structures and defines relationships to regulate the proper functioning of the rental housing market, which is also favourable to low-income groups.
- The Home Loan and Mortgage Disclosure Act 63 of 2000 aims to promote fair lending practices. The Act establishes an Office of Disclosure which is supposed to play a central monitoring and enforcement role.

In 2000, the National Housing Code was launched, the purpose of which is to set out clearly the National Housing Policy of South Africa, in one comprehensive document.

Further enhancements to the policy and legislation framework to improve performance since the last ESR reporting period are:

- The Housing Development Agency Act 23 of 2008 which established the Housing Development Agency (HDA), which is tasked with the development, management and co-ordination of housing provision nationally. It is established to serve as the focal point and special purpose vehicle for municipalities, provinces and national government, including parastatals, to prioritise land assets in favour of housing.
- The Social Housing Act 16 of 2008, which provided a legal framework for the regulation of the social housing sector that will ensure a viable and sustainable social housing sector, which will also contribute to the overall functioning of the housing sector, and cater for low-income groups. The Act identified important principles for Social Housing so as to address the priority needs of low and medium income households. These reflect the key determinants of the ICESCR right to adequate housing, such as supporting the economic development of communities, consultation and participation.

### **Government Plans and Programmes**

- The Housing Subsidy Scheme was introduced in 1995 to fast track the pace of housing delivery and to provide housing opportunities through different housing programmes.
- The Emergency Housing Programme (found in Chapter 12 of the National Housing Code) was created in 2004 as a result of the Grootboom judgment. Assistance is provided through grants to municipalities to enable them to help people in emergencies by providing land, municipal services infrastructure and shelter. People who get assistance under this programme can later apply for subsidies for permanent housing under the Housing Subsidy Scheme if they qualify.
- In September 2004, the government approved a Comprehensive Plan for the Creation of Sustainable Human Settlements – commonly known as Breaking New Ground (BNG). In this plan, the government and other key stakeholders committed themselves to improve every slum in the country and house the homeless; broaden the range of housing finance; ensure minimum standards for housing provision; and ensure the attainment of MDG 7, Target 11. The strategy for slum improvement was in-situ upgrading, as contained in Chapter 13 of the National Housing Code which covers the rules for in-situ upgrading of informal settlements.<sup>507</sup>
- The BNG plan was supplemented by the signing of the Social Contract for Rapid Housing Delivery on 22–23 September 2005, whereby signatories committed to removing or improving slums; fast-tracking housing for the poorest of the poor; providing rental and bonded houses; ensuring social housing nearby employment opportunities; removing blockages and improving permissions time related to the built environment; and ensuring consumer education/understanding in all housing development projects.<sup>508</sup>

<sup>507</sup> National Department of Housing. National Housing Programme: Upgrading Of Informal Settlements (Final version), (2004).

<sup>508</sup> Department of Human Settlements, submission to the SAHRC, (2009).



- In order to ensure that provinces, municipalities and housing institutions improve their service delivery models, the National Department of Human Settlements (DHS, formerly known as the National Department of Housing) realigned its organisation and budget structure, creating the Strategic Relations and Governance programme and strengthening the Housing Planning and Delivery Support programme, to provide support for the development and implementation of these service delivery models.<sup>509</sup>
- The Farm Resident Housing Assistance Programme was introduced in 2008, which allows for farm workers' engagement in the settlement planning process.
- An Individual Rural Subsidy Instrument was also introduced in collaboration with the Rural Housing Loan Fund, and is focused on people living in communal areas with no or limited security of tenure.
- In 2008/09, a strategy for accelerated housing delivery for Military Veterans of the anti-apartheid struggle was introduced.

In the Western Cape, Parliament endorsed the Human Settlements Strategy in its Road Map to Dignified Communities Strategy.<sup>510</sup> This strategy breaks from the conventional thinking around housing delivery that characterised the post 1994 period, where the RDP housing and the service sites model reinforced poverty along apartheid racial and geographic lines, keeping the poor on the urban edge. The strategy highlights that, using the conventional paradigm with the current funding allocation, the backlog in housing will never be eradicated. Instead, it promotes a shift away from a focus on housing for the poor, and a one dimensional housing policy, to providing a range of different interventions, including incremental in-situ-upgrading; incremental housing development within green-field developments; social housing units; rental units; formalised back-yard tenancy; backyard homes; and GAP housing. One of the objectives of providing this mix of housing options is to ensure that the poor are integrated into towns and cities. Furthermore, with the move away from a dualistic housing market one must still ensure that densities do not drop below 100 people per hectare.<sup>511</sup>

### ***Institutions established***

The government created seven institutions to assist with housing provision particularly for the proportion of the population that did not qualify for a full subsidy under the Housing Subsidy Scheme, but which was also excluded from Private Sector Financing – about 30% of the population.<sup>512</sup> These institutions are: National Home Builders Registration Council (NHBRC); National Housing Finance Corporation (NHFC); National Urban and Reconstruction Agency (NURCHA); Rural Housing Loan Fund (RHLF); SERVCON; Social Housing Foundation (SHF); and Thubelisha Homes. In 2009, the Department engaged in the rationalisation of housing institutions and task teams were overseeing the closure of Servcon and Thubelisha Homes.

In their place, the Housing Development Agency was established in March 2009 with the aim of doubling the housing delivery rate from about 250 000 to over 500 000 units per year. According to the then Housing Minister, Lindiwe Sisulu, the agency would address the shortage of well-located land where housing projects could be developed. *"The agency is a special-purpose vehicle that will acquire, hold, develop and release land for residential and community purposes to enable the creation of sustainable human settlements."*<sup>513</sup>

509 Housing Vote 26, National Treasury

510 Western Cape Department of Local Government and Housing. The Road Map to Dignified Communities, <<http://www.capecagateway.gov.za/Text/2007/10/wcshss.pdf>>.

511 Ibid.

512 Department of Human Settlements website, <[www.housing.gov.za](http://www.housing.gov.za)>.

513 "Housing Agency to Speed up Delivery," *South Africa Info*, (3 March 2009), <<http://www.southafrica.info/about/social/housing-030309.htm>>.



**Table 29: Description of the current National Housing Programmes per Intervention Category<sup>514</sup>**

Financial	Incremental Housing Programmes	Social and Rental Housing Programmes	Rural Housing Programme
Individual Housing Subsidies	Integrated Residential Development Programme	Institutional Subsidies	Rural Subsidy: Informal Land Rights
Enhanced Extended Discount Benefit Scheme	People's Housing Process (PHP)	Social Housing	-
Social and Economic Facilities	Informal Settlement Upgrading	Community Residential Units	-
Accreditation of Municipalities	Consolidation Subsidies	-	-
Operational Capital Budget	Emergency Housing Assistance	-	-
Housing Chapters of IDPs	-	-	-
Rectification of Pre-1994 Housing stock	-	-	-

### **Major housing projects**

The major housing projects implemented by the government since 1994 are Eastern Cape, Duncan Village and Zanemvula; Free State, Grasslands; Gauteng, Cosmo City, Brickfields and Chief Albert Luthuli; KZN, Emnambithi and Mount Moriah; Limpopo, Diteneng and Legae La Batho; Mpumalanga, Klarinet and Emsangweni / Nkanini; North West, Khutsong; Northern Cape, Lerato Park and Ouboks and Western Cape, N2 Gateway.

### **Provision of basic services**

The Department of Cooperative Governance and Traditional Affairs (DCGTA, formerly the Department of Provincial and Local Government) oversees the support system for local government, which is mainly responsible for the provision of basic services. The provision of bulk infrastructure lies with the provinces and national government, and thus co-ordination and inter-sphere cooperation is required. Project Consolidate was launched in 2004, and has evolved into the government wide five year local government Strategic Agenda, which includes basic service delivery as a key performance area. In January 2008, Cabinet approved a task team to facilitate the Apex Priority Project referred to as "Speeding up of Community Infrastructure Delivery."

The DCGTA has also produced a National Indigent Policy Framework and the implementation guidelines for municipalities. DCGTA also issued Infrastructure Asset Management Guidelines in March 2007, and has been facilitating implementation within municipalities through the Comprehensive Infrastructure Planning Process (CIP).

In sum, the evolution of government legislation and policy reflects attempts to address shortfalls, and improvements have been introduced over the years. Delays in implementing the ESTA amendments do pose a problem for the rural poor, particularly farm workers, but this is discussed in the chapter on Land. The Western Cape takes its lead from the BNG strategy and seems to be leading the way in reconceptualising the approach to housing that moves away from a housing policy based on the singular notion of a "poor household". The analysis of policy and the gaps therein are discussed in more detail in the section on the progressive realisation of the right to housing.

514 Department of Human Settlements (note 528 above).



## 10.2. The relevant MDG, Targets and Indicators

Goal 7: Ensure Environmental Sustainability	
Target	Indicators
Target 11: Have achieved, by 2020, a significant improvement in the lives of at least 100 million slum dwellers	Proportion of the population with access to secure tenure

The Mid-term Country Report on the MDG for South Africa includes the following types of settlements or dwellings as part of the definition of a slum: informal dwellings in informal settlements; backyard informal dwellings; sublet inner city tenements (which often cannot be differentiated from a non-sublet dwelling); hostels; and domestic workers' rooms.<sup>515</sup>

South Africa has set a target of providing housing for all; achieving access to land tenure and eliminating slums altogether by 2015. In addition, it has pledged to increase the subsidisation for housing and increase the percentage of the population with access to modern infrastructure, utilities and services during the same period.<sup>516</sup>

The indicator on the proportion of households with secure tenure is inter-related with other MDG. In terms of the Constitutional Court's finding on the meaning of adequate housing,<sup>517</sup> the target on the improvement in the lives of slum dwellers is also related to targets on land and water. The pace of housing delivery impacts on the right to adequate water and sanitation, as those living in informal settlements may have long waiting periods for access to these services.<sup>518</sup> The right to water and sanitation services is discussed in the chapter on environment, water and food in more detail.

Target 11 is a challenge to countries to improve the lives of slum dwellers while helping cities to grow without new slums. Slum households are defined by UN-Habitat as households that lack decent water supply, adequate sanitation facilities, sufficient living area (not overcrowded), decent structural quality and/or security of tenure. However, the attached indicator does not speak directly to the target. The indicator is about secure tenure and is quantitative, whereas the target is about improving the lives of slum dwellers and is both qualitative and quantitative. The assumption behind the choice of indicator is that the provision of secure tenure will significantly improve the lives of slum dwellers. However, there is no target set for the proportion of the population that should have secure tenure by 2020. Therefore, one can only measure one's progress against one's own targets and baseline. Assessing the qualitative improvement in the lives of slum dwellers is best covered in the section on the progressive realisation of rights, whereas the section on the progress of the MDG will cover the quantitative aspects of the indicator and the challenges raised by government in meeting these.

## 10.3. Main Themes Arising

There are a number of main themes which arise in this section from the analysis of progress on the relevant MDG and the analysis of the progressive realisation of the right to adequate housing.

With regard to the government's understanding of the progressive realisation of the right to housing, the evidence is that legislation and policy reflect the urgency for housing provision and the need to provide secure tenure for all, particularly the poor. While, for the most part, the government housing policy recognises the provision of housing as a socio-economic right, the policy process is still under refinement, and important new bodies such as the Housing Development Agency and legislation such as The Social Housing Act have been introduced during this reporting period 2006 to 2009.

515 SAHRC (note 2 above).

516 Ibid.

517 Government of the Republic of South Africa (note 17 above).

518 Langford, M. *Human Rights and MDGs in Practice: A review of country strategies and reporting*, (2009).



However, there are concerns that the state is not following a rights-based approach, as it is increasingly adopting a discourse and practice of negative measures and is seeking legislative changes in order to speed up delivery that militate against the principles of a rights-based approach. This is evidenced in the lack of application of in-situ upgrading in favour of slum eradication via evictions, which marginalises the poor and vulnerable even further. Thus, while quantitative progress is being made towards achieving increased security of tenure, the lives of slum-dwellers may not be improving in the process. The example of the first phase of the N2 Gateway project which displaced the Joe Slovo informal residents to Temporary Relocation Areas indefinitely on the urban edge is evidence of this. It is also seen in attempts to introduce the Slums Act in KZN and amendments to PIE, both of which were not accepted by the Constitutional Court. The state has also failed to adequately and meaningfully engage housing beneficiaries and slum dwellers in the means and ends of housing provision. The Joe Slovo judgment of the CCT,<sup>519</sup> which required the Western Cape government to have meaningful consultations with the residents on their impending evictions, is proof of the failure of the state to do this. Even this judgment of the Constitutional Court does not go far enough to promote meaningful engagement on the substance of the housing provision, as it merely compels the state to engage around the logistics of the relocation. This is not substantive engagement around the needs of housing beneficiaries. While the *availability* of housing may be increasing (2.3 million housing opportunities have been provided since 1994 and the current backlog is 2.2 million), the extent to which housing provision is *adequate, accessible, and affordable* is questionable. Recent policy analysis (including BNG in 2004 and Isidima by the Department of Local Governing and Housing in the Western Cape in 2007) recognises that perhaps it is the nature of the housing policy itself that needs to be changed. The 1994/04 housing policy is based on a singular notion of a "household" for the poor, and the main means of providing housing opportunities has been through providing RDP type houses and serviced sites. However, there is little evidence that BNG has been applied in the provinces during this reporting period. In addition, with current funding levels, these strategies will not deliver housing fast enough, and also do not cater for the diverse housing needs of people, including those with special needs, older persons, immigrants and women survivors of domestic violence. The lack of policy for these vulnerable groups is a concern and is exclusionary. Other groupings that are not adequately catered for in the provision of housing and basic services are farm dwellers, military veterans, rural people (including those on communal lands), inner city residents and backyarders.

With regard to constitutional accountability, government documents uphold the Constitution as the guiding framework for policy and legislation, yet the state is often more mindful of political targets in respect of housing delivery, than the constitutional obligation to provide *adequate* housing. Housing provision has often been of poor quality, delivered on the urban edge, and in dormitory type neighbourhoods without adequate infrastructure, services, and with limited or difficult access to economic, educational and recreational opportunities and facilities.

As indicated, the participation of housing beneficiaries and stakeholders in determining the scope of housing provision has been inadequate and mostly instructive on the part of the state. The realisation of the right to adequate housing in South Africa resembles a top-down approach in which beneficiaries and those affected by evictions and relocation are engaged only in pseudo-participation, if at all. Access to information is also problematic, particularly with regard to the process of conversion to the Housing Demand Data Base from the waiting list system. This lack of participation and transparency in housing allocation causes mistrust between the state on the one hand, and the people on the other.

Another impediment is the gap between strategic planning and implementation. Poor planning, fragmented policies and weak programme design and implementation are seen as root causes of many of the housing challenges. Firstly, good planning relies on reliable and accurate information. However, housing statistics are too global and need to be disaggregated, for example, in respect of key demographics or geographic location. Another problem is the interchangeable use of terms that have different connotations, particularly housing opportunities (which include serviced sites) with houses (which include a top structure). The tracking of population trends and population movements is critical for housing planning and needs to be more current. With regard to planning, monitoring and evaluation, the Department of Human Settlements is making progress with building platforms for improving planning, co-ordination and cooperation for housing delivery, such as the Informal Settlement Atlas and the National Demand Data base.

519

Residents of Joe Slovo Community Western Cape v Thubelisha Homes and Others (Centre on Housing Rights and Evictions and Community Law Centre University of the Western Cape as *amici curiae*), CCT22/08.



The actual figure on the proportion of the population with access to secure tenure is not evident in any documentation. The closest figure is the percentage of the population in formal dwellings, which in 2007 was 70.6%. The DCGTA is improving planning with municipalities through the introduction of the Comprehensive Infrastructure Planning Process (CIP) but translating plans into actions and quality service delivery remain a challenge.

Inter-governmental relations and communication is a further challenge, and the DCGTA raised the problem in its submission of vertical integration which is contained in how the powers and functions of the three tiers of government are defined in the White Paper on housing. Housing, for example, is not specified as a municipal function, and as such municipalities see housing provision as an unfunded mandate and many are not accredited to provide housing in accordance with the BNG policy.

In so far as service delivery is concerned, the National Department of Human Settlements is beginning to understand its role as facilitator and coordinator of the implementation of national legislation, policy and programmes. Provinces and municipalities need a lot more support to deliver integrated human settlements that meet the requirements of adequate housing provision. The quality and habitability of houses that have been built has also been poor and has been raised as a major challenge by government departments and dissatisfied beneficiaries. Diversifying the access points for housing provision, including the private and NGO sectors, could play an important role in housing service delivery. However, a clear message has been sent by the private financial sector that they will not provide bonded or low cost rental housing for the poor, and it is essential that the state fills this gap. Those in the low income market struggle the most with maintaining their bonds, particularly in the context of the tough economic climate. It is becoming increasingly difficult for a low income earner to enter the housing market as a new home owner. In this respect, the role of property speculators in pushing up housing prices and the practices of bulk buyers should be investigated. The diversification of housing options is a key issue if the pace of progressively realising the right to adequate housing is to keep up with growing demand. The Western Cape government adopted diversification as a strategy in 2007, moving away from the policy approach based on a purely quantitative analysis of the problem, being numbers of people who need access to land and services, with an equally quantitative solution, being the creation of a single homogenous product – the capital subsidy for an RDP house. The other aspect to consider is the provision of basic services, which at current estimates will take forty years to complete, not taking population changes into account. There still does not seem to be any creative thinking about how to solve this conundrum.

Having provided an overview of the main findings from the period under review (2006/09) related to housing, the following section will review the planning systems of the government in more detail. Planning is considered in terms of information gathering and monitoring; and budgetary planning and oversight.

### **10.3.1. Planning Systems**

#### ***Information gathering and monitoring***

There are a number of government efforts to improve planning and monitoring systems. These include the Guidelines for the Preparation of Multi-year Housing Development Plans (MHDP) for 2008/14; the Housing Investment Atlas, which is closely aligned with the Presidency's National Spatial Development Perspective (NSDP) initiative and the National Demand Data Base; and a national housing subsidy operational system (HSS). These are seen as platforms for improving co-ordination and cooperation for housing delivery. The Department of Human Settlements also maintains several data-banks that record urbanisation trends, home-ownership and links with other key data-banks to ensure that housing assistance beneficiaries are appropriately assessed and screened in accordance with the qualifying criteria determined in the housing policy. Furthermore, provincial performance reviews are held on a quarterly basis where reports including financial and non-financial performance are presented by provincial housing departments. This initiative assists in improving the alignment and accuracy of housing delivery statistics and project information. Provincial housing departments are provided with the opportunity to use the platform to escalate specific policy implementation and delivery challenges, and get almost immediate responses from the national department.<sup>520</sup> The other key elements of the Department's planning and monitoring strategy for housing are the monitoring, evaluation and impact assessment policy and implementation guidelines, and the operating system for the policy and guidelines.



The Commission has identified a number of weaknesses related to the monitoring of housing provision. These include the lack of sufficient reporting on the proportion of urban and peri-urban dwellers with access to secure tenure and basic services limits; the lack of current information on housing delivery, demand and needs, including people with special needs; and the lack of conclusive data on the number of informal settlement dwellers and on increases or decreases in that number.<sup>521</sup> There is also a lack of consolidated information and although the figures on housing provision are mostly available, those on the backlogs and demand are not. While South Africa is not required to report on housing to the ICESR, the reporting requirements are important to note as they would provide this overview of the housing environment that is much needed. It is impossible to gain this information from a single source currently, and it could be the basis of establishing a more comprehensive reporting system than the output driven indicators that are contained in the budget vote.

In their submission, the Western Cape Department of Human Settlements noted that the availability of reliable performance information is wanting. This was identified as a strategic focus area in the 2007/08 financial year.

With regard to the provision of basic services, the DCGTA is rendering assistance to municipalities to improve their planning through the introduction of the CIP. Most municipalities did not have the necessary information to be able to quantify backlogs and outline delivery programmes to achieve universal access within their municipalities, and thus the process of completing CIPs has been delayed. To date, 11 out of the 52 district and metropolitan CIPs are completed. Further, a special index will be established by Stats SA to measure universal household access to basic services and community infrastructure.<sup>522</sup>

The implementation of the indigence policy by municipalities is a concern. Only guidelines have been provided and each municipality, depending on its resources, is expected to develop its own strategy of extending free basic services to poor households while ensuring that the non-poor pay for services. However, there appears to be no monitoring of this process.

Another problem is the interchangeable use of the terms "housing opportunities" and "houses built". For example, an analysis of the figures provided on the National Human Settlements website<sup>523</sup> showed the Western Cape delivered a total of 34 157 houses. However, in the submission by the Western Cape Provincial Human Settlements Department, houses built were registered as 16 093, and the remaining 18 064 were actually serviced plots.<sup>524</sup>

#### ***Budgetary planning and oversight***

Budget data was obtained from Annual Reports of the Department of Human Settlements. Departmental annual financial statements are recorded from 1 April and end on 31 March of every year.

An analysis of the overall spending patterns of government (Table 30) shows that the Gross Domestic Product (GDP) increased. In the years 2005 to 2006, the government showed a steady increase in terms of GDP. However, the figure dropped to 5.1% in 2007 from 5.4% in 2006. GDP has been growing steadily over the past few years.

**Table 30: Real GDP Growth (Inflation adjusted figures) from 2005 to 2007**

Year	Real GDP Growth (Rbn)	Increase/Decrease
2005	1 115.14	5.0%
2006	1 175.22	5.4%
2007	1 235.63	5.1%

521 Huchzermeyer, M. presentation to the SAHRC ESR public hearings, (2009).

522 DPGL, submission to the SAHRC, (2009).

523 Department of Human Settlements (528 above).

524 (note 526 above).



Table 31 explores total revenue and expenditure by the government for the years 2005 to 2007.

**Table 31: Total Government Revenue and Total Expenditure, from 2005/06 to 2007/08**

<b>Total Government Revenue and Total Expenditure, from 2005/06 to 2007/08</b>			
<b>Year</b>	<b>Total Revenue R</b>	<b>Total Expenditure R</b>	<b>%</b>
Jun-05	411.70	416.70	101
Jul-06	475.80	470.60	99
Aug-07	544	533.90	98

As the table indicates, the government has been spending the majority of its allocation and in 2005 it overspent on its revenue by R5 billion or 1% more than its total revenue. The increase in total expenditure had positive implications for funding allocation to housing at the provincial level.

**Table 32: Government Expenditure in 2005/07**

<b>Government Expenditure in 2005/07</b>			
<b>Sector</b>	<b>2005</b>	<b>2006</b>	<b>2007</b>
Transport and Communication	4%	6.7%	7.3%
Welfare	17%	15.5%	14.9%
Protection Services	17%	15.3%	14.7%
Water and Agriculture	4%	5.3%	5.1%
Education	18%	17.8%	17.6%
<b>Housing</b>	<b>2%</b>	<b>1.8%</b>	<b>7.5%</b>
Health	11%	10.5%	10.4%
Debt	12%	10.0%	9.3%
Other	15%	17.0%	12.6%

Table 32 explores trends in the government's expenditure in different service provision categories. This table shows expenditure on housing by the government was at 2% of the total revenue in 2005, 1.8% in 2006 and grew to 7.5% in 2007. There was an average growth of 5.7% in the government's expenditure on housing between 2006 and 2007, suggesting that it was prioritising housing provision. However, in Table 36, total revenue and expenditure indicate that in 2006, the government slightly underspent its funding.



### Provincial Human Settlements Expenditure<sup>525</sup>

The provincial expenditure by Housing Departments (Table 33) for the years 2005/06 to 2008/09 is obtained from all nine provinces of South Africa.

**Table 33: Provincial Expenditure for the Department of Human Settlements between 2005/06 and 2008/09.<sup>526</sup>**

Provincial Human Settlements Expenditure				
million	2005–06 R	2006–07 R	2007–08 R	2008/09- Pre audited outcomes R
Eastern Cape	607.00	637.00	337.00	981.00
Free State	370.00	528.00	467.00	859.00
Gauteng	1 357.00	1 760.00	2 614.00	2 778.00
KwaZulu-Natal	816.00	1 705.00	1 311.00	1 627.00
Limpopo	383.00	605.00	633.00	825.00
Mpumalanga	269.00	330.00	652.00	797.00
Northern Cape	103.00	105.00	231.00	219.00
North West	615.00	697.00	786.00	952.00
Western Cape	552.00	769.00	1 122.00	1 306.00
<b>TOTAL</b>	<b>5 072.00</b>	<b>7 136.00</b>	<b>8 153.00</b>	<b>10 344.00</b>

Table 33 indicates that in terms of expenditure on housing, the Gauteng province recorded the highest expenditure followed by KZN and the Western Cape. The lowest expenditure rates can be seen in Mpumalanga and the Northern Cape, respectively. In 2006/07, all provincial expenditure was increased in each province. In 2007/08, three provinces - the Eastern Cape, Free State and KZN - recorded the lowest rates of expenditure than in their previous year. The Eastern Cape spent up to R300 million less than in its previous year, which indicates a decrease in expenditure by 50%. Overall, the provincial budgets indicate an increase in provincial spending for housing.

525 These figures are drawn from the budget votes. We are using this source of information because Provincial Annual Report documents per Province for all three years were difficult to obtain.

526 These figures are drawn from the budget vote, which means that they are not audited amounts. We used budget votes because Provincial Annual Report documents per Province for all three years were difficult to obtain.



**Table 34: Provincial allocation, expenditure and variance for the periods 2006/07 to 2009/10.**

This table illustrates variance between budget allocations and expenditure in provinces from the years 2006/07 to 2008/09.

R'000	2006/07		%	2007/08		%	2008/09		%
	Receipt R	Payments R		Receipt R	Payments R		Receipt R	Payments R	
<b>Eastern Cape</b>	1 009 138	1 009 138	100.00	585 353	585 353	100.00	1 192 697	1 192 697	100.00
<b>Free State</b>	745 870	738 610	99.03	904 074	891 902	98.65	1 070 617	1 068 442	99.80
<b>Gauteng</b>	2 171 717	2 174 866	100.15	2 659 097	2 659 097	100.00	3 255 260	3 834 198	117.78
<b>KwaZulu-Natal</b>	1 251 183	1 251 183	100.00	1 520 850	1 520 850	100.00	1 846 160	1 846 160	100.00
<b>Limpopo</b>	1 145 405	1 145 405	100.00	1 054 018	1 054 018	100.00	1 204 912	1 204 912	100.00
<b>Mpumalanga</b>	559 227	557 156	99.63	945 568	966 540	102.22	291 978	355 083	121.61
<b>Northern Cape</b>	261 535	261 281	99.90	297 878	297 500	99.87	365 070	364 672	99.89
<b>North West</b>	872 813	872 813	100.00	1 113 079	1 113 079	100.00	1 261 661	1 261 661	100.00
<b>Western Cape</b>	1 264 517	1 264 517	100.00	1 429 106	1 429 106	100.00	1 614 028	1 614 028	100.00
<b>TOTAL</b>	<b>9 281 405</b>	<b>9 274 969</b>	<b>99.93</b>	<b>10 509 023</b>	<b>10 517 445</b>	<b>100.08</b>	<b>12 102 383</b>	<b>12 741 853</b>	<b>105.28</b>



Table 35 reveals consistent expenditure at an average of 100% for each province across all three years. In general, variance across all provinces tended not to exceed 100%, suggesting that provinces spent their whole allocation. Two provinces, however, stand out in terms of excessive expenditure in the year 2008/09. Gauteng overspent on its provincial budget by 17.8% whilst Mpumalanga overspent on its budget by 21.6%. In the previous year, 2007/08, Mpumalanga overspent by 2% on its budget allocation. These variances are inexplicably high and call for further investigation in each province. A review of total provincial appropriations and payments are provided below.

**Table 35: Total allocation and expenditure for provinces for the period from 2006/07 to 2008/09<sup>527</sup>**

R'000	Total Receipts R	Total Payments R	% Variance
Eastern Cape	2 787 188	2 787 188	100
Free State	2 720 561	2 698 954	99
Gauteng	8 086 074	8 668 161	107
KwaZulu-Natal	4 618 193	4 618 193	100
Limpopo	3 404 335	3 404 335	100
Mpumalanga	1 796 773	1 878 779	105
Northern Cape	924 483	923 453	100
North West	3 247 553	3 247 553	100
Western Cape	4 307 651	4 307 651	100
<b>TOTAL</b>	<b>31 892 811</b>	<b>32 534 267</b>	<b>102</b>

Total provincial expenditure was consistent at an average of 100%. As mentioned in the provincial budget analyses above, Gauteng and Mpumalanga overspent on their provincial budgets and experienced total budget over-expenditure for all three years of 7% and 5%, respectively. Thus, the total payments made by provinces amounted to 2% over the full-expenditure.

Growth patterns of total expenditure of Provincial Human Settlements Departments show that for the years 2005/06 to 2006/07 there was a substantial growth in expenditure of 40.1%, and in real terms this translates into a 37.3% growth rate. The years 2006/07 to 2007/08 show a significant decline in the annual and real percentage growth. The annual percentage growth for provincial departments was only 14.3% from 40.3% in the previous year. Real percentage growth was 9.6% whilst in the previous year it was 37.3%. From 2007/08 to 2008/09, the annual percentage growth rate was 26.9% and the real percentage rate was 19.8%.

#### **National Budget allocation, expenditure and variance**

Table 36 shows that budget expenditure for the National Department of Human Settlements indicates that overall there has been an increase in the budget allocation from the National Treasury Department over the periods 2005/06 to 2008/09. However, at the time of writing this report, estimates for expenditure for the period 2008/09 were not available in the annual report although the budget vote shows that 100% of funds for the period were spent. In terms of percentage, budget expenditure for the national department confirmed that the national department has been spending less by an average of 2% each year even though budget allocation from National Treasury had increased by over R1,6 million each year.

527

These figures are drawn from the budget vote, which means that they are not audited amounts. We used budget votes because Provincial Annual Report documents per Province for all three-years were difficult to obtain.



**Table 36: Budget allocation, expenditure and variance for the National Department of Human Settlements from 2005/06 to 2008/09**

Department of Human Settlements: Appropriations and Expenditure from 2005/06 to 2008/09												
R'000	June 2005/06			July 2006/07			August 2007/08			September 2008/09		
Human Settlements	Receipt R	Payments R	%	Receipt R	Payments R	%	Receipt R	Payments R	%	Receipt R	Payments R	%
<b>TOTALS</b>	5 265 672	5 241 916	100	7 333 726	7 165 962	98	8 982 358	8 586 272	96	10 928 487	10 920 272	99.9

Trends in annual growth and real percentage rates do not show significant increases. There was a R2 068 054 increase in the budget allocation between the periods 2005/06 and 2006/07. Although this illustrates a 39% growth rate in the allocation for the year 2006/07, if inflation for that period is taken into account, the real percentage growth lies at 35.9%, 4% less than the nominal percentage growth rate. For the period 2007/08, the department received R1 648 328 more than in the year 2006/07 which was a 22.5% increase in the budget allocation. However, in the context of the undermining effect of inflation for the period 2006/07 to 2007/08, the real percentage growth lay at just 17.8%.

In 2008/09, the department received R1 946 129 more than in the year 2007/08. This means that the budget allocation was 17.8% higher than in 2007/08.<sup>528</sup>

The percentage growth rate for the budget allocations is only 0.5% lower than that for expenditure. For the period 2006/07, the department spent R1 924 046 more than in the period 2005/06. This translates into a 36.7% increase in the annual percentage growth. However, taking inflation into consideration, the real rate of growth for the year 2006/07 was 33.3%. In 2007/08, the annual percentage growth rate for the Human Settlements department was 25.3% more than in 2006/07. This means that the budget grew by R1 816 396. However, the real growth rate for the year was 20.1%. In 2008/09, the department received R1 946 129 more than in 2007/08, a 17.8% increase in the budget allocation. In real terms, the budget increased by a mere 10.7%

Overall, trends in growth illustrate that the real percentage growth rates of the Department Human Settlements reduced the value of the rand. The Consumer Price Index (CPI), the government's key inflation indicator, indicates that between 2005/06 and 2006/07, the Consumer Price Index (CPI) was 3.4%. This means that budget allocation and expenditure by the national Department of Human Settlements for the year was 3.4% less than nominal allocation and expenditure. For the year 2006/07, the CPI was slightly higher than the 3.4% of the previous year as it had gone up by 0.5% to 5.2%. This means that the impact of inflation for expenditure was higher.

In sum, there has been an increase in the percentage annual growth of budget revenue and expenditure in the Department of Human Settlements. Expenditure on housing by the government was at 2% of the total revenue in 2005, 1.8% in 2006 and grew to 7.5% in 2007, which indicates a commitment to increase the allocation to housing. However, there was also slight underspending in 2006/07 and 2007/08 and 2008/09 of up to 2%. There was an average growth of 5.7% in the government's expenditure on housing between 2006 and 2007, suggesting that government was prioritising housing provision. From 2006/07 to 2008/09, funding allocation to the provinces has grown in the region of R1 billion and more for seven out of nine Provinces from year to year. Expenditure rates for the department are also generally high at 100% and more, suggesting an added commitment by the department to progressively realise socio-economic rights of people with limited access to housing.

#### 10.4. Progress made in Terms of the Relevant MDG

##### **Definition of security of tenure**

Secure tenure is one of the most essential elements of shelter as it protects people against arbitrary forced eviction, harassment and other threats. Insecure tenure inhibits investment in housing, distorts land and service prices, reinforces poverty and social exclusion, causes severe stress and illness and has the biggest impact on women and children.<sup>529</sup> The different types of tenure include rental accommodation (private or public), owner-occupation, cooperative housing, lease, emergency housing and informal settlements, including occupation of

528 Department of Human Settlements website, <[www.housing.gov.za](http://www.housing.gov.za) <<http://www.housing.gov.za>>.

529 DFID Fact sheet, (2004), <<http://www.bvsde.paho.org/bvsacd/cd29/slumdwellers.pdf>>.



land or property. The government must take steps aimed at ensuring security of tenure to people and households that do not have security of tenure.<sup>530</sup> The Joe Slovo judgment elaborated on the extent of the security of tenure, and the court found that tacit consent given by the City of Cape Town to residents to occupy land “... could be tacitly withdrawn”,<sup>531</sup> as long as the state has a plan for the upgrading of the area. This makes the tenure of people in informal settlements, where their occupation is tacitly given, very insecure, and it means that if they are unlawful occupiers as per the PIE Act, they would not qualify in respect of its provisions.

#### ***Progress on indicator regarding security of tenure***

It is difficult to measure actual provision against baseline data due to migration and population patterns. The number, size and structures of households in South Africa have changed in the last 10 years. While the total number of households has increased from an estimated 9 059 571 in 1996 to an estimated 12 726 000 in 2005, the average household size has declined from about 4.48 in 1996 to about 3.69 in 2005.<sup>532</sup> Therefore, even though there has been much progress in the provision of housing, demand is continuously growing. The mid-term progress report of South Africa failed to mention the impact of population growth and urbanisation on achieving this target, but the submission of the Department of Human Settlements to the Commission highlighted these as challenges. The submission further highlighted that the 2008 Medium Term strategic outlook acknowledged the total estimated inadequate housing backlog and need of 2.2 million households. In other words, nearly 1 675 000 households currently live in freestanding informal settlements. There is a further estimated 525 000 households that reside in backyards, farms and communal land that also forms part of the housing backlog.<sup>533</sup> The submission noted that the informal settlement upgrading programme aims to deliver secure tenure to slum dwellers. However, considering the Joe Slovo judgment, the process itself may be harmful as people may be relocated without secure tenure.

530 Ibid and Khoza (note 26 above).

531 De Vos, P. *Joe Slovo case: the good, the bad and the (mostly) unstated*, Constitutionally Speaking, (14 June 2009), <<http://constitutionallyspeaking.co.za/?p=1122>>.

532 Population And Household Projections For South Africa by Province And Population Group, 2001 – 2021, Unisa.

533 The Mid-Term Country report on the MDGs reports that 46% of South Africa's urban dwellers were living in slums in 1990, a proportion that decreased to 29% by 2005. It is unclear if these results refer to inner-city dwellings, in which case peri-urban dwellings are omitted from the results.



An analysis of the types of housing provided per province in the 1996 and 2007 years is provided below.

**Table 37: Types of Housing per Province in 1996 and 2007<sup>534</sup>**

Province	Formal <sup>b</sup>		Informal <sup>c</sup>		Traditional		Other <sup>d</sup>	
	1996	2007	1996	2007	1996	2007	1996	2007
EC	46.8%	54.7%	10.9%	8.0%	41.1%	36.7%	1.1%	0.6%
FS	62.5%	71.0%	26.0%	18.4%	10.2%	4.6%	1.3%	6.1%
Gau	73.9%	73.5%	23.8%	22.7%	0.7%	0.4%	1.6%	3.5%
KZN	55.3%	60.5%	11.2%	8.6%	32.0%	27.4%	1.5%	3.5%
Lim	62.0%	83.2%	4.9%	5.6%	31.8%	9.0%	1.4%	2.2%
Mpu	64.9%	77.0%	15.6%	11.7%	17.9%	7.0%	1.7%	4.3%
NW	69.5%	66.5%	22.1%	23.8%	7.0%	2.3%	1.3%	7.4%
NC	80.1%	80.4%	14.0%	10.5%	3.9%	4.3%	2.0%	4.5%
WC	81.3%	83.4%	16.6%	14.2%	0.9%	0.8%	1.2%	1.7%
SA	64.4%	70.6%	16.0%	14.4%	18.2%	11.7%	1.4%	3.3%

Source: 2007/08 Survey, p504

a The proportions for the provinces denote the percentage of that type of household out of all households in that province. The proportions for South Africa denote the percentage of that type of household out of the total number of households in the country. Thus in 2007 some 54.7% of all households in the Eastern Cape lived in formal dwellings. Similarly 70.6% of all South African households lived in formal dwellings.

b Formal refers to house/brick structure on separate stand or yard, flat in block of flats, town/cluster/semi-detached house, unit in retirement village, and a room/house/dwelling in backyard.

c Informal refers to dwelling/shack in backyard and not in backyard.

d This includes caravan/tent, hostels and compounds, and unspecified dwellings.

This table shows that the proportion of the population living in formal housing increased by just over 50% between 1996 and 2007, from 5 384 819 to 8 819 521. Thus 70.6% of South African households lived in formal dwellings in 2007, compared to 64.4% in 1996. During the same period, the population grew by 7.9 million, while the average household size decreased from 4.6 to 3.9 people per household. Although the table shows a proportional decline in the number of informal houses (by 10%), the actual number increased from 1.5 million to approximately 1.8 million during this period.<sup>64</sup> Informal housing decreased from 16% of total housing in 1996 to 14.4% in 2006. The number of traditional dwellings decreased from 1 644 388 to 1 459 380 during the same period.<sup>535</sup>

According to the submission of the Department of Human Settlements, in September 2006 the department recorded having delivered over 2.2 million houses to an estimated 8.4 million people since 1994. By 31 March 2009, the department recorded having delivered over 2.8 million houses to an estimated 13 million people. This is an increase of 0.6 million houses provided in the period under review for 4.6 million people. As of 2007, 2.4 million subsidies have been approved for housing construction by government.<sup>536</sup>

The Department of Human Settlements highlighted in their submission that:

*“Considering that the housing programme delivers secure tenure (land), access to basic services (water, sanitation and energy) as well as shelter (housing) it can be confirmed that enormous progress is being realised progressively in the achieving the Millennium Development Goals. Furthermore, enhancements to the ‘Informal Settlements Upgrading’ programme aimed at accelerating the development and/or formalisation of informal settlements is bearing results.”<sup>537</sup>*

Although at the hearings the Department of Human Settlements argued that for the first time since the end of

534 SAIRR. SAIRCC Today: Service Delivery – An Overview, (2008), <[http://www.sairr.org.za/sairr-today/news\\_item.2008-11-21.0078415165/?searchterm=housing](http://www.sairr.org.za/sairr-today/news_item.2008-11-21.0078415165/?searchterm=housing)>.

535 Ibid.

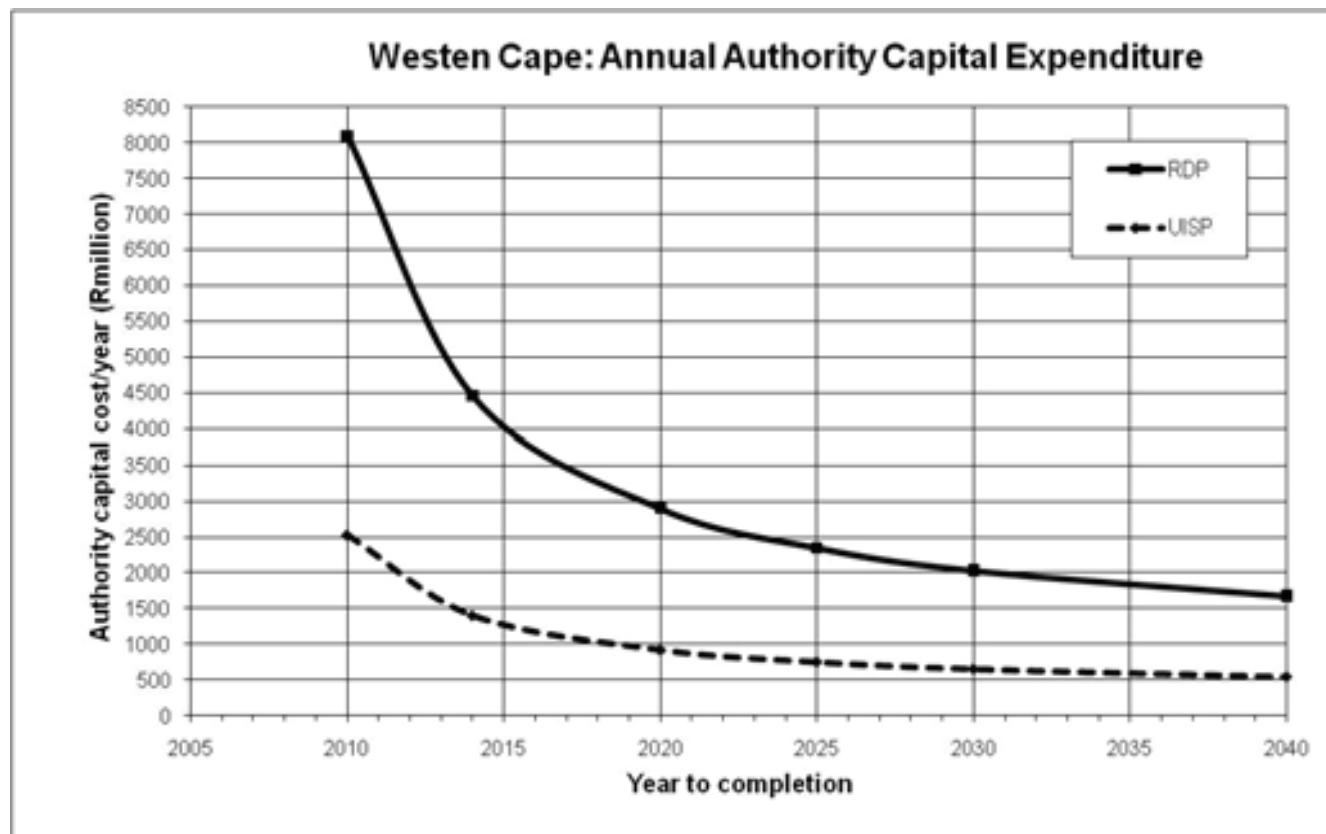
536 United Nations Human Rights Council (UNHRC). Mission to South Africa: Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in its Context, (2008).

537 Department of Human Settlements (note 524 above).



apartheid the housing backlog is less than the number of houses provided, in certain provinces the housing backlogs are ever increasing. According to an article in *The Times*, the housing backlog in the Western Cape is growing by 12 000 to 18 000 per annum and between 1996 and 2001, the number of informal households increased by over 36 000.

**Figure 3: Estimated backlog in housing provision at current budget levels<sup>538</sup>**



This graph, from the Western Cape Department of Local Government and Housing strategy (Isidima), shows that in that province, with current funding levels, the backlog will not be eliminated within 30 years.

538

Western Cape Department of Local Government and Housing (note 526 above), 20.



### Progress in the Provinces

Table 38 shows the number of houses that have been built, some of which are underway, by the Provincial Departments of Housing between the years 2007/08 and 2008/09. The Gauteng province has built the most housing units.

**Table 38: Number of Houses Built, 2007–2009**

2008/09 Financial Year*		2007/08 Financial Year		2007–2009
Province	TOTAL	Province	TOTAL	TOTAL Houses Built
Eastern Cape	22 180	Eastern Cape	12 684	34 864
Free State	14 667	Free State	12 482	27 149
Gauteng	80 469	Gauteng	90 886	171 355
KwaZulu-Natal	36 068	KwaZulu-Natal	34 471	70 539
Limpopo	16 686	Limpopo	18 970	35 656
Mpumalanga	17 626	Mpumalanga	16 569	34 195
Northern Cape	4 914	Northern Cape	8 686	13 600
North West	15 912	North West	19 945	35 857
Western Cape	31 011	Western Cape <sup>18</sup>	34 157	65 168
<b>TOTAL</b>	<b>239 533</b>	<b>TOTAL</b>	<b>248 850</b>	<b>488 383</b>

\* Financial year is from 01 April until the following year 31 March

### Western Cape<sup>539</sup>

The Western Cape Department of Human Settlements was one of two provinces to make a submission on housing at the hearings.<sup>540</sup> It reported the building of 16,093 houses in the 2007/08 year and a further 15,717 in 2008/09. In 2007/08, 18,064 plots were serviced and in 2008/09 a further 15,297 plots were serviced. In 2007/08 and 2008/09, 3 542 houses received quality improvements under the rectification programme. Unfortunately, reporting is not consistent, so figures provided for one year are not always provided for in another year, for example, 15,322 households were assisted under the Emergency Housing Programme (EHP) in 2007/08, but there are no figures for the 2008/09 year.

In terms of projects approved under the informal settlement upgrading programme, 20 projects were approved in 2007/08 and a further 19 in 2008/09.

**Table 39: Housing provision in the Western Cape**

	Target	Actual	Target	Actual
	Year 2007/08		Year 2008/09	
Building new houses	16 000	16093	19050	15717
Serviced plots	18000	18064	18011	15297
Informal Settlement upgrading projects approved	-	20	-	19
Rectification programme	-	2473	-	1051
Peoples housing process	-	277	-	No reporting

The department is also launching its first social housing project in Steenberg with 450 low income units.

539 Western Cape Department of Local Government and Housing Cape was the only provincial government department to make a substantive submission on the right to land and housing, which is the reason for the focus on this department.

540 The other was Mpumalanga, but there were no figures provided.



## **Challenges faced**

The National Department of Human Settlements submitted that it is proud of its record of delivery in terms of the number of units provided, although it does acknowledge the numerous challenges. The key challenges raised by the department are the unavailability of suitably located land for human settlements; quality of housing contractors and adherence to specifications; urbanisation, migration and immigrant impacts; and the alignment of the powers and functions of the three tiers of government.

### ***Unavailability of suitably allocated land for human settlements***

The National Department of Human Settlements noted access to suitable land as one of the key challenges of housing provision. Specifically, the prioritisation in respect of land development procedures, land use management, and land use planning is outside the direct core control of the housing sector and “... *prioritisation in respect of these is dislocated from core housing objectives and priorities*”. The response of the department to this challenge has been the establishment of the Housing Development Agency.

The department faces other challenges related to land where communities are settled on unstable land (e.g. dolomite in Mpumalanga) yet refuse to relocate.

### ***Quality***

The quality of housing provision has become a key issue in housing delivery. Even the flagship N2 Gateway and Zanemvula have experienced quality problems and Thubelisha Homes, the state owned housing developer, has been accused of trying to cut corners by building smaller houses in the latter.<sup>541</sup>

Many of the RDP housing projects over the last years have been fraught with quality issues, including building techniques and the use of sub-standard materials, particularly concrete. In their submission, the Department of Local Government and Housing from the Western Cape highlighted that as the quality of housing has increased over the years, so the costs of building have risen accordingly.<sup>542</sup>

The need for rapid service delivery should not take precedence over quality service delivery and community participation, as it is evident that this creates additional problems and distrust between communities, government departments and service providers.<sup>543</sup> The state's response to these problems has been to enhance the functions of the Inspectorate / Building control functions at various levels, and to ensure that the National Homebuilders Registration Council enforces new norms and standards that are aligned to provincial delivery cycles.

### ***Rapid urbanisation, migration and immigration***

Rapid urbanisation, migration and immigration are further challenges raised by the Department of Human Settlements, although it recognises that the movement of people is a natural and logical process. Nonetheless, it noted that urbanisation, migration and immigration impacts on the achievement of housing targets and backlog eradication as it increases the need for new housing and planning. The submission of the department suggests a policy rethink in terms of how to respond to the needs of irregular immigrants, and calls for a new realistic and feasible approach.

### ***Poor co-ordination within and between Government Departments and the tiers of Government***

There are several blockages in the housing pipe-line which affect rapid up-scaling of housing delivery, including administrative and planning capacity. The responsibility for housing delivery is spread across the functional mandates of all three spheres of government and several line-function departments. This poses problems for the co-ordination within and between government departments and tiers of government. In the Budget Vote 26 of 2009 it was emphasised that “... *the powers and functions of the state in the three spheres of government are often complex to align towards a common objective*.”<sup>544</sup> This was also picked up by the Special Rapportuer of the UNHRC, who observed that the realisation of the right to adequate housing in South Africa is compromised by the government's fragmented approach to the implementation of housing law and policy. He noted specifically

541 “Zanemvula in Disarray with 600 New Houses Defective,” *The Herald*, (24 January 2008), <<http://www.internafrica.org/2008/01/zanemvula-in-disarray-with-600-new.html>>.

542 Department of Local Government and Housing (note 526 above).

543 SAHRC (note 2 above).

544 Department of Human Settlements (note 524 above), 13.



the following: the lack of cooperative governance in housing development; the insufficient information sharing between levels of administration; the lack of integrated housing development which ignores the need for social services within housing projects; and poor quality construction.<sup>545</sup>

However, the signing of the Memorandum of Understanding with the Federation of the Urban and Rural Poor and Slum Dwellers International has given impetus to the provincial steering forums that provide space for key stakeholders to collaborate and support project level implementation.<sup>546</sup>

### **Limited budgets**

The Western Cape Department submitted that the greatest limitation to delivering new housing solutions is the budget, as the subsidy scheme has not kept pace with housing costs. In 1994, the R15 000 subsidy produced a site and “starter home” of 27m<sup>2</sup>. Improvements to housing quality and increased costs mean that a 40m<sup>2</sup> home with two bedrooms, bathroom, ceilings, plaster and paint costs about R75 000.

## **10.5. Findings on the Progress Made by the State on the Realisation of the Right**

In this section the progress made by the state in the progressive realisation of the right to adequate housing is investigated and assessed. Definitions of “adequate” housing are provided in section 1 of this chapter, and when applied to the framework of the 4 As, it can be categorised as follows:

- Appropriate: The extent to which government policy, legislation, programmes and approaches are appropriate in terms of both content and process. The key question is whether the measures adopted by the state are appropriate for progressively realising the right to housing, taking the specific contextual and changing needs of society into account.
- Available: The ability of people to live somewhere without fear of eviction outside of the rule of law, and with the availability of services, materials, facilities and infrastructure.
- Accessible: Whether the diverse needs of people are provided for, including those with special needs, women, children, migrants and the poor. Housing must also be affordable.
- Acceptable: This pertains to the quality of housing provision, habitability (including adequate privacy, space, security, lighting and ventilation), and whether housing is provided in sustainable communities and ensures that people are able to access economic opportunities from where they live and are close to employment and basic amenities.

### **10.5.1. Appropriate – from Policy to Implementation**

A study by the Centre on Housing Rights and Evictions, 2005, found that South African housing law and policy is largely compliant with the ICESCR and the Constitution. Where there are policy and programmatic gaps that inhibit compliance with Covenant requirements, the government has taken steps to address the situation. The Special Rapporteur on housing also acknowledged that South Africa has progressive legislation and policy in place regarding fulfilment to the right to adequate housing. The primary problem is that while people wait for long periods for the provision of adequate housing, they are not able to access and enjoy these rights. Significant gaps exist in the provisions for a variety of categories, namely:

- (a) People who qualify for a subsidised house and are waiting in the queue for one.
- (b) People who earn too much for a government subsidy but too little to secure a commercial bond and thus end up living in backyards or informal settlements.
- (c) People who could afford rentals but cannot rent because there is not enough rental stock at affordable prices.
- (d) Backyard dwellers.
- (e) People in rural areas.

Many problems occur while they wait. For instance, their basic housing and tenure rights remain vulnerable for as long as they are waiting, which could take many years. There are three main overarching problems that have affected housing provision. The first is when the “... South African state circumvents or does not adequately follow the PIE Act procedures”.<sup>547</sup> The second is that “... while well intentioned policies have been developed at a

545 UNHRC (note 552 above), 36.

546 Department of Human Settlements. Housing Budget Summary Vote 26, (2009).

547 Centre on Housing Rights and Evictions. Any Room for the Poor? Forced Evictions in Johannesburg, (2005).



*National level, few mechanisms seem to be in place to ensure that these policies are implemented*.<sup>548</sup> Examples are the informal settlement upgrading programme and the emergency assistance programmes, which could assist with reducing waiting times, but which have neither been adequately piloted nor implemented. Instead, the state has applied or sought to apply methods of relocation and evictions which may not have improved the lives of the slum dwellers, although they may be eradicating slums. The third is the state's attempt to introduce amendments to the PIE Act of 1998 which would have facilitated the eviction of illegal occupants. This is another indicator of the lack of understanding of a rights-based approach. These changes were not accepted in Parliament, which shows that the government still holds human rights as paramount.

### **Informal settlement upgrading**

The progressive realisation of rights is concerned with both the content and process of the achievement of rights. Despite the quantitative progress in the delivery of housing opportunities, there is a growing critique of the discourse and methods of informal settlement upgrading, as the process of upgrading seems to be becoming increasingly synonymous with evictions. Civil society organisations and panellists at the hearings have questioned the methods and discourse of slum eradication, and highlight the slow pace of piloting in-situ-upgrading as provided for in the informal settlement upgrading programme (Chapter 13 of the National Housing Code, 2000). Civil society organisations have argued that the state is taking increasingly negative measures to do away with informal settlements or slums, which are contrary to the spirit of the legislative and policy framework on the elimination and prevention of slums or informal settlements.<sup>549</sup> While the Department of Human Settlements emphasised that two of the proposed nine pilot sites are being implemented,<sup>550</sup> Huchzermeyer (Associate Professor, School of Architecture and Planning, Wits University), submitted that there was no evidence that these informal settlement upgrading projects were implemented under Chapter 13 of the Housing Code.

In the case of the N2 Gateway, the state has argued for relocation as it deems in-situ upgrading to be unfeasible. The state argument that it does not have the capacity to manage in-situ upgrading because it does not have experience of it is fallacious, as the provision for pilot projects in the Informal Settlement Upgrading Programme was introduced exactly for the purpose of learning and developing best practices.

The manifestation of the more direct approach to slum eradication is the criminalisation of land invasions, and the use of apartheid-style methods of forced relocations, evictions and controlled transit camps as measures for prevention of the emergence and re-emergence of slums.<sup>551</sup> This more direct approach is having a negative impact on the relations between the state and the urban poor.<sup>552</sup> Further, Huchzermeyer argued that the state has failed to develop or promote broader reforms that would enable appropriate land release and servicing, other than through controlled transitional relocation areas (TRAs).<sup>553</sup>

In its report, the UN Special Rapporteur also noted that:

*... there may have been a misunderstanding as to how to respect international commitments, such as the Millennium Development Goals, that may have led to efforts being directed to the eradication of slums rather than the improvement of the lives of slum dwellers.*<sup>554</sup>

The submission from Mpumalanga Department of Human Settlements notes as progress that provincial by-laws on the eradication of informal settlements are being drafted.

Another example of legislation promoting direct outcomes is the KZN Elimination and Prevention of Re-emergence of Slums Act, 2007 which was signed into law by the Premier of KZN in 2008. Abahlali baseMjondolo<sup>555</sup> raised this issue in the Constitutional Court and the court ruled that section 16 of the act was unconstitutional. This section

548 Ibid 37.

549 Particularly the Housing Act 107 of 1997, Chapter 13 of the Housing Code, (2000) & the Breaking New Ground Policy, (2004).

550 Cape Town Municipality (N2 Gateway Project) and in the Nelson Mandela Bay Municipality (Zanemvula).

551 North West Province. Budget 2007/08, 259.

552 Huchzermeyer, M. Eradicating slums in South Africa: The need to return to positive and indirect measures entrenched in policy and legislation. In Hofmeyr, J. (ed.), *Transformation Audit 2008: Risk and Opportunity*. Institute for Justice and Reconciliation, (2008), 94.

553 Ibid.

554 UNHRC (note 552 above).

555 Abahlali is a Social Movement of shack-dwellers that started in Durban in 2005.



reflected a provision in the 1951 Prevention of Illegal Squatting Act, which mandated landowners to evict illegal occupants irrespective of their desperation. The attempt to reintroduce this type of legislation shows regression on the part of the state, and not a progressive realisation of the right to adequate housing.<sup>556</sup>

An example of how slum upgrading has gone awry is the Joe Slovo informal settlement that is giving way to aspects of the N2 Gateway Project. The story of the upgrading of the Joe Slovo informal settlement is one of poor communication between the state and affected communities, lack of peoples' consultation and participation in planning, and broken promises resulting from poor planning. Planning and consultation are two of the criteria for measuring progressive realisation. Firstly, the state deemed in-situ upgrading to be impossible and opted for relocation of the residents to Delft. They were thus not attempting to pilot in-situ upgrading. Secondly, promises made to the residents that 70% would be able to return were broken. Thirdly, residents were moved to a temporary relocation area (TRA) in Delft with little or no access to services and which is further way from the city than their original settlement (about 15km from Joe Slovo in Langa).

The next phase of the project has been termed the “*largest judicially sanctioned eviction of a community*”<sup>557</sup> since the end of apartheid in South Africa. Based on the experience of Phase 1, most remaining residents refused to relocate for Phase 2 of the project. “*The housing authorities then applied for and obtained an eviction order from the Western Cape High Court in terms of the PIE Act of 1998. The residents of Joe Slovo appealed to the Constitutional Court and judgment was handed down on June 10 2009. The Constitutional Court rejected the arguments of the residents that the state was not entitled to seek their eviction in terms of the Act. It also held that their eviction and relocation to Delft to enable the upgrading and development of the Joe Slovo settlement was just and equitable in the circumstances. On August 24th 2009 the Constitutional Court quietly issued a new order suspending the evictions until further notice.*”<sup>558</sup>

However, three significant legal and practical victories were won by the residents. Firstly, all five judges underscored the necessity that the state provides adequate alternative accommodation when evicting a settled community from their homes,<sup>559</sup> and the court stipulated detailed standards for the temporary relocation units in Delft. Secondly, the government was ordered to allocate 70% of low-cost housing at Joe Slovo to the relocated communities, for people who apply and qualify and the remaining 30% would be allocated to the back-yarders of Langa. Finally, the authorities were required to “meaningfully engage” with the community on the details of the eviction and relocation, for example the provision of transport for work and school.<sup>560</sup>

Elements of the Constitutional Court judgment have been criticised by a number of commentators, predominantly because it failed to condemn the poor consultation and the reasonableness of the plan, and in fact condoned them in interests of the greater good. Hence, many of the Constitutional Court judges failed to take seriously the court’s own insight that procedure and substance are inextricably connected. For example, there are serious questions whether an in-situ upgrade would have been less disruptive and more effective.<sup>561</sup> Further, the court failed to interrogate with sufficient vigour what would constitute suitable alternative accommodation for the poorest evictees.<sup>562</sup> Although the court did order a meaningful engagement with the residents in the future, this was more on the logistics of the relocation rather than on the plan itself.

In respect of judicial matters, a concern is the extent of the enforcement of such court orders in housing rights cases, as it is crucial to ensuring that successful litigation results in social change on the ground.<sup>563</sup> Irene Grootboom died eight years after the ruling in her favour, waiting for the enforcement of the judgment in her case.<sup>564</sup> This can only be interpreted as a huge indictment.

556 Huchzermeyer (note 569 above); “Ruling in Abahlali case lays solid foundation to build on,” *Business Day*, (4 November 2009).

557 “Joe Slovo eviction: Vulnerable community feels the law from the top down,” *Business Day*, (22 June 2009).

558 De Vos, P. *Sanity and humanity prevails for now*, Constitutionally Speaking (8 September 2009), <<http://constitutionallyspeaking.co.za/sanity-and-humanity-prevails-for-now/>>.

559 In this instance the Judges drew on other cases, beginning with Grootboom (note 17 above), when the court held that the state must make reasonable provision for those facing homelessness or living in intolerable conditions.

560 *Business Day* (note 574 above).

561 *Business Day* (note 574 above).

562 De Vos, C. L. Foundation Chair in Constitutional Governance, Department of Public Law, University of Cape Town, pers comm., (7 September 2009).

563 Dr. Lilian Chenwi. Community Law Centre, UWC, Panelist report for the SAHRC ESR public hearings: land and housing, (2009).

564 “Grootboom dies homeless and penniless,” *Mail and Guardian*, (8 August 2008), <[www.mg.co.za /article/2008-08-08-grootboom-dies-homeless-and-penniless>](http://www.mg.co.za/article/2008-08-08-grootboom-dies-homeless-and-penniless)



The warning signs are that the state's growing impatience with the pace of service delivery is increasingly going to be a justification for a focus on the ends rather than the means.

The best practice example of in-situ upgrading is the Freedom Park programme implemented by the City of Cape Town, under the presidential Urban Renewal Programme, and supported by the Development Action Group and private donors. This example clearly shows how participatory planning (People's Housing Process), coupled with the effective use of available programmes and public-private partnerships can be used to deliver in-situ upgrading.<sup>565</sup>

#### ***Application of the Emergency Housing Programme (EHP) (Chapter 12 of the National Housing Code)***

Government departments need to do more to encourage the application of the Emergency Housing Programme. A particular challenge with the programme is that municipalities are required to initiate the process, and thus many poor people faced with evictions who would have benefitted from the programme are not able to as they are not able to initiate the process as individuals.<sup>566</sup> The programme has also been criticised for its very narrow definition of emergency and the type of housing solutions offered. The reason for this is that the programme sees the solution in temporary housing such as shacks or tents, which have to be made available on land that the municipality identifies for this purpose. In most cases, this is likely to be far from the city or otherwise poorly located. Significantly, this emergency programme is not intended for funding NGOs to set up emergency shelters.

#### ***A one dimensional housing policy***

The third main problem with the pace of housing delivery has been the appropriateness of how housing delivery has been conceptualised in the policy itself. One problem with housing policy is that it is based on the concept of a household and does not recognise the multiple needs in communities, including single person households. In the post 1994 period, the focus was on the homogenous delivery of RDP houses by the state for poor people within one modality – a 40m<sup>2</sup> house based on a capital grant. The Special Rapporteur encouraged the authorities to replace the household approach with a focus on the human rights of each individual and family member from the very initial stage of policy design. However, there are slow indications that the government is realising that people's housing needs are different. Therefore there appears to be recognition to provide a variety of housing solutions, including single person households, family households, rental stock, social housing, bonded houses and so forth.

However, in the period under review, the extent to which the housing provided by the state is appropriately meeting the needs of beneficiaries is questioned. While the size of houses has increased in this period, the provision of single bedroom houses for large families cannot be considered to be adequate. In sum, there has been progression in the appropriateness of government policy in addressing the diverse housing needs of the population in South Africa. Policy is evolving and the introduction of social housing legislation is an indicator of this. However, at the same time the measures adopted by the state to implement housing policy are increasingly inappropriate within a rights-based context, and cannot be considered a reasonable means of realising the right. The state has also failed to appropriately implement important innovations in housing policy, particularly sections 12 and 13 of the Housing Code.

#### **10.5.2. Availability**

##### ***RDP houses***

As highlighted in the section on the progress towards achieving the MDG, 70.6% of South Africans living in formal dwellings, and 2.3 million housing opportunities have been provided since 1994. These have mainly been in the form of RDP type houses, funded by a capital grant from the state, or serviced sites in urban areas, on the urban periphery.

##### ***Social housing for rental housing***

The Special Rapporteur noted with particular concern the critical lack of availability of public rental housing stock for low income people, as current market related rental increases make this option inaccessible and unaffordable.

565 UNHRC (note 552 above).

566 Dr. Lilian Chenwi (note 580 above).



According to the Budget Vote 26, there is currently a national housing supply shortage of more than 600 000 units for households earning between R2 500 and R8 600 per month.

The National Housing Finance Corporation launched a pilot project in 2007 to test the market for a retail product and the findings will be used to inform the corporation's strategy.<sup>567</sup>

### **Inner city housing**

Housing policy has not adequately addressed the problem of inner-city accommodation for low income groups, some earning less than R200 per day from working in the informal sector in the inner-city. The housing subsidy scheme has not been suitable for accommodating people in the inner-city and the majority of RDP houses are located on the outskirts of the cities. The problem of inner-city housing is particularly bad in Johannesburg, where a drop in property prices and invasions of buildings led to landlords abandoning buildings or no longer having any control over them. This has resulted in people living in buildings that are deemed to be unsafe, and where water and sanitation services have been turned off. Local government has also evicted people from these buildings without providing alternative accommodation. The Constitutional Court in 2008 ruled in favour of inner-city residents<sup>568</sup> and declared that it is essential for the City of Johannesburg to engage people meaningfully before evicting them from their homes if they would become homeless following an eviction. The court also argued that although the City of Johannesburg does have an obligation to do away with unsafe and unhealthy buildings, the constitutional duty to provide access to adequate housing means that it has to consider the housing situation of people when deciding to evict people. Lastly, the court found that it is only a crime for people to remain in a building after a court has provided an eviction notice, and not after receiving an eviction notice from the City of Johannesburg. Thus, the part of the National Building Regulations and Building Standards Act that makes it a crime is deemed unconstitutional.

Insecurity of tenure and unavailability of affordable housing for the very poor in the inner city lies at the core of this problem. The Social Housing Act 16 of 2008 was introduced to address this problem but the commencement date of this Act has yet to be proclaimed.

### **Backyard shack dwellers**

Backyard shack dwellers do not enjoy sufficient security of tenure as the regulation of the tenant-landlord relationship is not adequate or applicable. In instances where the prime tenant receives a new house (for example under the National Housing Subsidy Scheme), the backyard dwellers are often evicted.<sup>569</sup> The submission from the Belhar Community Health Forum noted that there is a problem with the increasing numbers of backyard dwellers and that "*many times it looks like there is not light at the end of the tunnel for them*".<sup>570</sup>

As noted by the Report of the Portfolio Committee on Human Settlements on Budget Vote 26 and Strategic Plan 2009 – 2011 of the Department of Human Settlements and its Entities dated 24 June 2009, there is no national strategy to deal with backyard dwellers. This represents a serious problem, as it is in fact a vulnerable group that has been consistently excluded from policy planning.

The Western Cape Department of Human Settlements reported that it has been planning a pilot programme for backyarder assistance that will be implemented in the coming years. They are drawing on the lessons of the Gauteng Pilot Backyarder Assistance Programme. The Western Cape road map envisages formalised back-yard tenancy with access to capital subsidies and loans by landlords to upgrade living conditions and backyard homes. This implies some form of secure title and support directly to owners, including the possibility of sub-division and sale.<sup>571</sup>

### **Hostel Dwellers**

The Community Residential Unit (CRU) is unable to address challenges facing hostel dwellers due to the absence of a coherent policy.

567 Department of Human Settlements (note 563 above).

568 *Occupiers of 51 Olivia Road Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others 2008 (3) SA 208 (CC).*

569 UNHRC (note 552 above), 52.

570 Belhar Community Forum (note 101 above).

571 Department of Local Government and Housing (note 526 above).



## **Rural Areas**

It was raised in the hearings that the focus of housing development seems to be in the urban or peri-urban areas and that housing in the rural areas, especially on communal lands, has been neglected. This needs to be considered in the context of spatially redesigning the apartheid legacy.

### **Housing demand data base**

One of the key issues with regard to the availability of housing is the housing demand data base. Much clarity is still needed on the housing data base, as it was clear from the hearings that provinces are still lagging behind in the process of doing away with the waiting list. Information is needed on what the departments are doing to speed up this process, ensure transparency of the data base, and ensure that beneficiaries are aware of (and educated on) how the data base system operates. The public needs more information on the process of transferring names from the old waiting list system to the new demand data base as this affects their expectations for housing delivery. The process of housing allocation is not transparent, and there were accusations of corruption at local level raised at the hearings. The Department of Human Settlements submitted that corruption should be reported to the corruption helpline.

### **Private sector**

BNG and Isidima recognised that the state cannot be the sole provider of new housing. In 2008, the Department of Human Settlements concluded four memorandums of understanding with external stakeholders: Intersite, to facilitate access to certain land parcels; the Development Bank of Southern Africa, for programme and implementation capacity support; Anglo Platinum, for integrated human settlements development around large mining operations; and the Umsobomvu Youth Fund, for youth service in housing development. A project implementation agreement for the Klarinet sustainable integrated housing project in Emalahleni was concluded with ABSA Development Company.<sup>572</sup>

In sum, there are major gaps in housing delivery. Progress has been made in terms of social housing, with the legislation and institutional arrangements, but now there is a need to focus on developing alternative mechanisms for other types of housing and tenure security particularly for back-yarders, inner-city dwellers, hostel dwellers and those in the rural areas on communal lands. The private sector could play a greater role in housing provision.

### **10.5.3. Acceptability – Service Delivery**

In this section the focus is on whether housing provision has been of an acceptable quality; has a basic infrastructure; is delivered in an acceptable manner (particularly with regard to participation and empowerment); and whether the locations are acceptable in terms of access to economic opportunities, amenities and schools.

#### **Quality**

As raised in the section on the progress made in terms of the MDG, the quality of housing that has been built in the last few years has been a significant problem, and has resulted in additional inefficiencies in that the government now has to pay to either demolish and rebuild, or fix up poor quality houses. Many houses built are barely habitable, with *inter alia*, weak foundations, cracks, inadequate ventilation, inadequate insulation and insecure roofs. This causes further delays in service provision. The Western Cape provincial government at the hearings also raised concerns about the quality of houses built through the People's Housing Processes, which they also budget to fix. The introduction of the NHBRC in 1998 was an attempt to improve quality control, as was the establishment of Thubelisha Homes, but the latter was closed due to inefficiency.

The private sector also needs to be held more accountable for sub-standard quality building. This issue is crucial as it has resulted in poor people not being able to fully enjoy their housing rights as they continue to live in inadequate housing, and if not addressed, the provision of substandard housing will continue, impacting negatively on housing rights.

572

Department of Human Settlements (note 563 above).



### **Geographic location – proximity to economic opportunities and amenities**

State subsidised housing is likely to be on the urban periphery which does not bode well for economic integration and maintaining fragile livelihoods. This is because the policy of greenfield sites depends on large pockets of land at low cost, which tend to be on the urban edge. The TRA's also tend to be on the urban edge, so the result of evictions and or relocations during slum eradication is that the poor are pushed further out into the periphery of the city with less access to economic opportunities and higher transport costs.

### **Basic service delivery**

One of the main requirements in respect of acceptability for adequate housing is the provision of basic services. There are problems with both the availability of basic services and access to free basic services, and housing solutions without these services are unacceptable. According to the DCGTA submission, 215 million<sup>573</sup> households, mainly in informal settlements, still require adequate and permanent water, sanitation and electricity services through the upgrade of informal settlements. The DCGTA maintained it has the budget to address the formal historic backlog by 2014 provided the bulk infrastructure is in place. The problem is that there is not enough within the budget to cover the new houses that have been built which it proclaimed would add 215 million households to the list. This has been exacerbated by the withdrawal of commitment by the Department of Human Settlements to fund the R27 billion required. At current budget allocations, it will take 40 years to deliver bulk infrastructure to carry services to all these households (the current budget is R1 billion per year, and the total estimated cost is R40 billion). The DCGTA recognised that there are vast disparities in levels of access to services across provinces and municipalities which require a national coordinated approach that is spatially differentiated. This is currently lacking. The Municipal Infrastructure Grant falls short of need by R11 billion per year. Municipalities are expected to contribute resources from self-generated income, but this is impossible for municipalities with a weak economic base.

Access to free basic services is an important question, and the DCGTA submitted that municipalities currently provide free basic water to 75% of poor households, and that 73% of indigent households are served with Free Basic Electricity. There are still 3 million households without access to a basic level of solid waste management, and 53.2% of those that do get it receive a free basic service. The DCGTA raised concerns that most municipalities have not aligned their indigent policies with the DCGTA National Indigent Policy Framework and the implementation guidelines. Critical issues were raised at the hearings about the suitability of asking families to declare themselves indigent before receiving free basic services, as this is a barrier to access. It was submitted that the number of households registered as indigent is lower than the actual number of households in need.

Further, there is a lot of mistrust by the people of pre-paid water and electricity metres, which the government maintains it needs in order to be able to manage distribution of free services. The issue of delivering free basic services to farm dwellers was also raised, and the Department said that more cooperation is needed between the municipalities and the private sector.

The DCGTA in their submission highlighted the following as key constraints to the delivery of basic services: quantum of funding required; human resource capacity to spend the funds effectively; alignment between funding streams; and management capability to deal with movement patterns, growth and urbanisation.

A Project Preparation Fund has been established by the Presidency and the DCGTA in partnership with the Business Trust to fund technical support to or for municipalities for improving infrastructure project planning and preparation.

In sum, it is evident that the poor quality of housing provision, the location of housing far from economic opportunities and the inability of the state to provide basic services currently and into the future, means that housing provision has not been acceptable. Although the government has recognised quality problems and has introduced measures to address this, the thinking around how to densify housing and how to ensure the provision of basic services is only in its early stages.

#### **10.5.4. Accessibility – Social Exclusion**

Access includes non-discrimination and when one considers special needs groups such as women and children experiencing domestic violence, non-nationals residing in South Africa and people with disabilities, then the analysis of the policies reveal gaps.

<sup>573</sup> This figure differs somewhat to that of DHS submission, which says that the number of households in informal settlements is 1 675 000.



### **Appropriateness of housing solutions (including special needs of vulnerable groups)**

The submission of the Department of Human Settlements did not indicate what it is doing in terms of adopting a comprehensive special needs housing policy and enshrining special needs housing in the housing code.<sup>574</sup> In its absence, some provinces have implemented a variation of the Institutional Subsidy Mechanism, which will provide funds for a top structure only for group housing for people with special needs.

### **Regular and irregular migrants**

According to the Department of Human Settlements' submission, irregular (illegal) immigrants do not qualify for housing assistance and this means that they will continue to live in informal settlements.<sup>575</sup> It further argued that the Department of Home Affairs is not adequately dealing with the housing challenges of illegal immigrants as is expected of them according to the set procedures in the upgrading policy. Although the policy of integration is progressive, it cannot absolve the state from responsibility for providing housing solutions for non-nationals who face multiple barriers of integration. CoRMSA, in their submission, maintained that the right to "adequate housing" in the Bill of Rights is extended to "everyone" living in South Africa, regardless of their nationality or legal status:

"Whilst South Africa's refugee policy encourages integration, the complete exclusion of legally resident asylum seekers and refugees from various national housing policies is an obstacle to migrants' social and economic integration into the communities in which they live."<sup>576</sup>

Other specific problems related to documented and non-documented nationals raised at the hearings were the provision of transit or emergency shelter; exploitation by private landlords who are unable to distinguish between legal and illegal migrants; the exclusion of non-nationals from the services of many non-governmental shelters for homeless persons and vulnerable women and children, including those which receive funding from government sources; and housing challenges for foreigners who were displaced due to xenophobic violence in informal settlements around the country.<sup>577</sup>

### **Housing and evictions of farm dwellers**

The submission by the Black Association for the Agricultural Sector noted that the housing conditions for farm workers are extremely poor, often without access to regular water and electricity, insufficient sanitation, and leaking houses.

The tenure of farm workers is also insecure as farm owners either flagrantly violate eviction procedures under ESTA or use the courts to evict people when they are clearly in no position to defend their cases, and without first ensuring that alternative accommodation is available to the occupiers. The submission claimed that farmers, through their consultants and lawyers, have learned "... to exploit the loopholes of these laws and use it against the farm workers". Farmers dismiss farm workers and then remove their housing by using section 8 (2) of ESTA which states "*the right of residence of an occupier who is an employee and whose right of residence arises solely from employment, may be terminated if the occupier resigns from employment or is dismissed in accordance with the provisions of the Labour Relations Act (LRA)*". However, farm workers are often dismissed unfairly and not in accordance with the LRA. If they are knowledgeable enough to go to the Commission for Conciliation, Mediation and Arbitration (CCMA) with an unfair dismissal case, they are denied housing in the interim.

The Special Rapporteur also noted with concern the lack of security of tenure for farm workers, their families and children, and quoted a 2005 study<sup>578</sup> which indicated that only 1% of evictions involved any legal process, including court judgments, illustrating that the evictees had problems asserting their rights and securing legal representation.<sup>579</sup>

574 Dr. Lilian Chenwi (note 580 above).

575 Elsewhere in the submission it says that irregular immigrants qualify for limited housing assistance.

576 CoRMSA (note 380 above).

577 Ibid.

578 Wegerif, M., Russell, B. & Grundling, I. *Still searching for security" The reality of Farm Dweller Evictions in South Africa*, (2005).

579 UNHRC (note 552 above).

The submission by Women of Farms covered a number of cases indicating the particularly vulnerable position of women and children on farms, to show that: “... women farm workers, especially seasonal workers, are in most cases dependent on their male partners for housing as housing contracts are usually in the name of the male permanent worker. This means that women and children are most vulnerable to being evicted when the father or male partner dies or his employment is terminated”.

Women’s reliance on men for accommodation on farms is particularly problematic in light of the high levels of abusive relationships.<sup>580</sup>

### **Women and children affected by domestic violence**

“South Africa currently faces a confluence of three factors – high levels of domestic violence, a dire lack of access to adequate housing and the largest HIV epidemic in the world – that demands an urgent consideration of the right of access to adequate housing of women experiencing domestic violence.”<sup>581</sup>

Combrink’s analysis of existing housing programmes is that they fall short of constitutional requirements, Grootboom requirements and international law in that the policies in respect of women experiencing domestic violence are too fragmented and they do not consider issues of substantive equality.<sup>582</sup> She argued that causes of eviction can be gender-specific, including cases of domestic violence or discriminatory inheritance laws or customs that result in the eviction of women from their homes and lands, and that these instances should be as “forced evictions”. Further, the emergency housing programme is not suitable for women in these crisis situations due to the locations and type of shelter provided, which is usually on the urban edge, unsafe and without services. The institutional subsidy which can be used for shelters is also based on the “household” concept, and does not apply to single women without children, but only to people over 18 years old who are lawfully resident in South Africa, thus excluding many vulnerable girls and non-national women from the subsidy benefit. The transitional housing programmes (KZN, Gauteng and Western Cape) are variations of the institutional housing subsidy yet because the rules are more “relaxed” they are more suitable mechanisms for providing women’s shelters.

The Special Rapporteur acknowledged the efforts of the South African government levels to meet its goal of delivering 30% of housing to women-headed households. However, he made a strong point about how the challenges of housing provision impact particularly negatively on women and children in situations of domestic violence as they are forced to remain in unsafe conditions, “such situations violate not only the right of access to adequate housing but the human right to be free from violence, which is protected under the South African Constitution”.

### **Older persons**

The 1997 Housing Act, requires all spheres of government to promote special housing needs, including, but not limited to, the needs of people with disabilities. The White Paper for Social Welfare of the same year declares that appropriate, adaptable and affordable housing for older persons and their families is regarded as a cornerstone of any new dispensation. The latter document states that the Department of Welfare would cooperate with the then Department of Housing to develop a strategy to address this need as a matter of priority. However, there is no evidence of progress in this regard in policy or in practice.

### **Military Veterans**

Through this government initiative to assist and integrate military veterans into society socially and economically, all military veterans were called upon to apply for government-subsidised housing before 31 December 2008. By October 2008, more than 10 000 veterans had registered for a housing subsidy and more than 1 500 subsidies had been allocated.<sup>583</sup>

580 Ibid.

581 Combrinck, H. *Living in security, peace and dignity. The right to have access to housing of women who are victims of gender-based violence*, Community Law Centre research series, (2009).

582 ‘In this sense, it is important to note that the Constitutional Court has recognised that domestic violence in particular is a violation not only of the right to freedom from violence, but also of the right to equality and non-discrimination. p 120 At the same time, international human rights law has firmly located violence against women within an equality paradigm. An understanding of the interrelationship between women’s right of access to adequate housing and the right to freedom from violence therefore has to be approached against the backdrop of a constitutional state founded on dignity, equality and freedom, where the government has positive duties to promote and uphold these values;’ Ibid p 121.600 SA Yearbook 2008/2009 Housing.

583 SA Yearbook 2008/09 Housing.



### ***Affordability – the role of the private sector***

In order to be accessible, houses need to be affordable and the private sector has a definite role to play in this regard. None of the private sector banking institutions made submissions to the Commission but they did participate in the Public Hearings on Housing, Evictions and Repossessions in 2007. At these hearings the banks argued that evictions are an exception to the rule but this was disputed by community groups. The report of these hearings noted that not enough attention had been paid to the consumer protection of low income mortgage holders. The Banking Association categorically stated that banks will not give away housing finance without making a profit. The question is, what can the banks do to help normalise the low income housing market?

Another issue of concern raised regarding the private sector is the practices of the bulk buyers of repossessed houses who either ignore banks' requests to sell properties back to the original owners, or exploit or evict the previous owners/occupiers. According to ABSA though, it is not the low income market who default on payments, but the R800 000 – R1 million bracket.

With regard to access, the government must urgently focus on the needs of vulnerable groups in housing provision. The homogeneity of housing policy has had a negative impact on the needs of vulnerable groups. In this sense, the progressive realisation of their right to access to adequate housing is not being advanced, in particular for women and children affected by domestic violence, non-nationals residing in South Africa and people with disabilities.

### **10.6. Conclusions with regard to Progressive realisation of the right to adequate housing**

#### ***Government understanding of the progressive realisation of the right to adequate housing***

Housing legislation and policy recognises South Africa's commitments to providing access to adequate housing both in terms of the Constitution and international frameworks. The government is also engaged in a process of policy improvements in order to more appropriately address the needs of housing beneficiaries.

While the most current figure (2007) is that the percentage of the population with access to adequate tenure (defined as living in formal dwellings) is 70.6%, it is unlikely that the state will reach its desired target of providing housing for all, achieving access to land tenure and eliminating slums altogether by 2015. It is important to acknowledge that the process of refining and improving policy and legislation, setting systems and institutions in place and decentralising housing delivery by strengthening capacity at municipal level, takes time. There is also a commitment by the National and Provincial Departments to meet the MDG and the Departments' more ambitious targets. Similarly, it is equally important to recognise that setting unrealistic delivery targets can compromise quality and affect the process aspects of the rights-based principles (such as meaningful engagement and participation). However, while the right to adequate housing can be realised progressively, a steady pace of delivery is critical because as the poor and vulnerable wait, they are denied the most fundamental rights to an adequate house and to receive some relief for their urgent basic needs. For this reason, a more nuanced housing policy is needed that recognises the individual needs of beneficiaries and promotes various modes of delivery and provision.

This is vital, as there is a worrying trend, as evidenced by an increasing discourse and practice, of negative measures introduced on behalf of the state that is under pressure to deliver the eradication of slums.

#### ***Public participation and access to information***

The lack of meaningful consultation and a road map for housing delivery at a community level is resulting in a breakdown in the relationship between the state and the poor and marginalised, and while such consultation and participatory planning may take more time initially, it is likely to lead to more sustainable and relevant housing solutions in the long term. One of the main challenges regarding access to information is the lack of transparency in the process of housing allocations and the move from the housing waiting list to the National Demand Data base.

#### ***Social exclusion***

There are still significant gaps in policy regarding special needs and housing provision for marginalised groups such as immigrants, women and children displaced due to domestic violence, backyard dwellers, rural populations and military veterans (although there has been some progress with regard to the latter).



### ***From strategic planning to implementation***

Part of the problem with implementation has been that housing delivery has been based on a flawed analysis of the problem of housing provision which has led to a one dimensional solution. There is little evidence that the new policy direction of BNG which promotes a more sustainable approach to human settlements has been implemented, and that Chapters 12 and 13 of the housing code, regarding Emergency Housing and in-situ upgrading respectively, have been applied. Another major challenge has been the lack of accurate and reliable information on housing demand, and the government has addressed this by implementing the Informal Settlements Atlas and the National Housing Demand Data Base. These are, however, both in the early stages of development. Identifying and addressing population trends, quality, the role of the private sector and the provision of basic services have also been major challenges in this period. There are still major gaps between policy and implementation which delay the delivery of adequate housing solutions. One critical gap is the powers and functions of the tiers of government with regard to housing provision wherein municipalities view housing as an unfunded mandate.

The following recommendations are intended to help focus the priorities of the relevant Departments.

### **10.7. Recommendations**

#### **Government's understanding of the progressive realisation of the right to adequate housing**

##### ***Informal settlement upgrading***

- (a) The new Housing Minister and ministry should recommit itself to a positive and indirect approach to doing away with slums as promoted by the Housing Act and BNG. The example of Freedom Park should be considered for in-situ upgrading. Informal settlement upgrading needs to be patiently piloted in order to build the skills experience, the professional support as well as the relevant institutional mechanisms that are needed, along with far reaching urban planning and land management reform that will help reduce the need for people to resort to informal settlements.
- (b) The state needs to develop or promote broader reforms that would enable appropriate land release and servicing, other than through controlled transitional relocation areas (TRAs).<sup>584</sup>
- (c) The consistency of the KZN Elimination and Prevention of Re-emergence of Slums Act, 2007 with constitutional provisions, relevant Constitutional Court judgments, and international human rights obligations should be examined further. Implementing the EPWP in the housing sector needs to be considered and seeing how UN support can be leveraged for this, as it is currently supporting the National Department of Public Works and the Limpopo provincial government with addressing service delivery challenges.
- (d) The departments should engage with the City of Cape Town to ensure that the identification of bad building process does not result in forced evictions or violation of the rights of the poor.

##### ***Social exclusion***

- (a) Policy needs to be reviewed and attention paid to special needs and vulnerable groups. The underlying notion of the household on which the housing policy is based should be reviewed. Housing policies must take diversity into account and need to be tailored to the needs of each individual, family and special needs group.
- (b) The Department of Human Settlements should adopt a comprehensive policy on special needs housing, as this has been long overdue with negative consequences for those with special needs seeking housing assistance. More consultation is needed for people with disabilities on their housing needs, considering the diversity of needs. The Department of Human Settlements and the Department of Social Development need to work together to ensure decent accommodation for people with special needs.
- (c) There is a particular need to restructure the rental housing policy for low-income groups, to guarantee security of tenure for tenants (including Backyarders).<sup>585</sup>
- (d) The review of the policy for provision of services to farm dwellers is urgent, and the modalities for delivery should be a priority area. The provincial departments should also focus on the issue of farm dwellers and their access to basic services and adequate housing.
- (e) Specific measures to address women's housing needs are necessary and should be based on a gendered analysis of housing policy. The Special Rapporteur drew particular attention to the need for the state to strengthen national legal and policy frameworks for protecting women's rights to adequate housing, and to

584 Huchzermeyer (note 569 above).

585 UNHRC (note 552 above).



provide avenues for redress where violations occur. He also drew attention to the need to bridge the gap between legal and policy recognition of women's right to adequate housing and its implementation.

- (f) A comprehensive housing development programme for women experiencing domestic violence should be developed and implemented speedily.
- (g) The Department of Human Settlements and the Department of Social Development need to work together to ensure decent accommodation for older persons.
- (h) The National Housing Code for discriminatory phrasing against asylum seekers and refugees should be reviewed.
- (i) The explicit inclusion of asylum seekers and refugees as a specific category of foreigners in existing and future housing and urban regeneration policies should be ensured.
- (j) The extension of housing assistance programmes to destitute refugees should be explored, following the example of the Department of Social Development in relation to social assistance grants for refugees.
- (k) It should be ensured that publicly funded homeless shelters do not discriminate against needy non-citizens.
- (l) Explicit consideration of non-citizens' rights along with citizens' rights should be included in any future measures to monitor and regulate private-rental housing provision.
- (m) Local government should follow the initiative of Johannesburg Metro Council in offering dedicated information services and possibly temporary housing arrangements for vulnerable migrants.

#### ***Public participation and access to information***

- (a) It is imperative for South Africa to improve reporting, and the standardisation and availability of data to enable the government and civil society to track the progress in reaching its targets and to assess the gaps in service delivery and programmes aimed at meeting the MDG.
- (b) A structured process of meaningful engagement of beneficiaries in housing projects, including the monitoring thereof, should be developed. This process should take note of the guidelines on meaningful consultation that have been highlighted in the Constitutional Court's jurisprudence (see, for instance, Olivia Road case). While it is acknowledged that public participation and consultation is time consuming and expensive, so are court cases and planning errors. The most damaging result of a lack of participation, however, is the deterioration of the relationship between the state and the poor.
- (c) More information on the Housing Demand Data base and the waiting list system needs to be conveyed at a community level.

#### ***From strategic planning to implementation***

##### *Inter-governmental planning and co-ordination*

- (a) The departments should intensify their efforts to ensure/strengthen cooperation/co-ordination between the national, provincial and local government in the provision of housing and land as well as basic services.
- (b) Issues of powers and functions of the various tiers of government, as defined in the White Paper on Housing, need to be reviewed to improve vertical integration and co-ordination. Housing for example is not specified as a municipal function. If this is addressed, co-ordination efforts will be unblocked.
- (c) A review of the conditional grant system is necessary to ensure that the money is allocated to integrated projects for sustainable human settlements. This will also address the issue of co-ordination. The Department of Human Settlements is intending to do this and it should be prioritised.
- (d) The departments should strengthen initiatives aimed at improving the capacity of municipalities to deliver integrated human settlements.
- (e) The DCGTA suggests the cross-subsidisation of municipalities where the utilisation of MIG cash flows should be assessed against the CIP of municipalities and approved accordingly.
- (f) The Housing Demand Data Base needs to be brought on line throughout the country and the relevant government authorities need to explain the transition from the waiting list process to people who are on the list.



### *Monitoring and evaluation*

- (a) It is imperative for South Africa to improve reporting and the standardisation and availability of data, to enable the government and civil society to track the progress in reaching its targets and to assess the gaps in service delivery and programmes aimed at meeting the MDG.
- (b) There is a need to collect and report on disaggregated data that takes account of special needs or vulnerable groups such as women, women survivors of domestic violence, orphaned children, and people living with and affected by HIV/AIDS. Disaggregation should also include urban/rural, race and geographical location.
- (c) There is a need to standardise terminology in reporting, such as the provision of housing opportunities, households, and families.
- (d) Critical to the effective realisation of women's housing rights is proper monitoring of women's access to housing. Gender indicators should be developed in this regard.
- (e) The indigent policy, which will relieve many older persons from the burden of rates and high water and electricity charges, is not uniformly implemented. Implementation therefore needs to be monitored and the negative and positive impacts of the policy uncovered and addressed.
- (f) The Department of Human Settlements should start reporting against the following indicators as they provide a holistic picture of the housing situation and are from the ICERC reporting requirements. Therefore they are aligned to international indicator sets. These are:
  - Number of homeless individuals and families (men, women, children, orphans, immigrants and people with disabilities).
  - Number of individuals and families currently inadequately housed and without ready access to basic amenities such as water, waste disposal, sanitation facilities, electricity, postal services etc. These include the number of people living in overcrowded, damp, structurally unsafe housing or in other conditions which affect health.
  - Number of persons currently classified as living in illegal settlements or housing.
  - The number of persons evicted within the last five years and the number of persons currently lacking legal protection against arbitrary eviction or any other kind of eviction.
  - The number of persons on waiting lists to obtain accommodation, the average length of time on the waiting list and measures taken to decrease such lists, as well as to assist those on such lists to find temporary housing.
  - The number of persons in different types of housing tenure by social or public housing, private rental sector, owner-occupiers, illegal sector and others.

# Chapter 11



*The right to education*



## CHAPTER 11: EDUCATION

### 11. INTRODUCTION

The progressive realisation of the right to education for the period 2006 to 2009 is reviewed in this chapter. It begins with an overview of South Africa's key international commitments and constitutional obligations. The legislation and policies which were adopted for the above mentioned period are then reviewed. It also analyses the government planning in terms of monitoring and evaluation and provides an analysis of national and provincial education budgets. South Africa's progress towards meeting the relevant MDG, targets and indicators is assessed. These include MDG 2: Achieve universal primary education; Target 3: Ensure that by 2015, children, everywhere, boys and girls alike, will be able to complete a full course of primary schooling; Indicators: net enrolment rate in primary education, proportion of pupils starting Grade one who reach Grade 7, literacy of 15–24 year olds. It also includes MDG 3: Promote gender equality and empower women; Target 4: Eliminate gender disparity in primary and secondary education preferably by 2005 and in all levels of education no later than 2015; Indicators: ratio of boys to girls in primary, secondary and tertiary education, ratio of illiterate females to males among 15–24 year olds.

In this chapter it is argued that although South Africa boasts high primary school enrolment statistics and gender parity on all levels of schooling, the achievement of the education MDG does not equate to the realisation of the right to education. The MDG targets are heavily weighted towards quantitative achievements and this neglects deeper insight into the realisation of the right in qualitative terms. This is explored further in the final section of the chapter where the 4 As (availability, accessibility, acceptability and adaptability) are used as a framework for analysing the content of the right to education. Economic and physical access to schooling remains a challenge for many poor children across the country, largely because policy implementation to improve access has not been consistent at a school level. Furthermore, large groups of vulnerable children are also unable to access education and therefore remain socially excluded. Poor school infrastructure is a central theme related to access. It has impacted on the physical access to education, and proper standards of 'availability' of proper functioning educational institutions have also not been established. The poor performance of learners and teachers in literacy and numeracy and the declining numbers of Grade 12 learners who are eligible for entrance to higher education provide evidence that sufficient standards of quality are not being met. The high drop-out rates of learners after Grade nine further indicate that there is insufficient support to ensure that learners stay in school. Finally, broad access to quality education which could improve the capabilities of young people to play a meaningful role in society is not being fulfilled. Given the high levels of poverty and inequality in the country, the ability of the system to enable the equitable sharing of opportunities is also not being met. In short, the constitutional requirements of equality are not being fulfilled. At the end of the chapter, recommendations for further action are provided.

#### 11.1. The meaning and content of the right

This section includes a review of international and South African legislation with particular focus on section 29 of the Constitution and the enabling legislation in respect of the right to education.

##### ***International legislation***

The following international and regional human rights laws and treaties provide guidelines around the right to education:

- Article 28 of the United Nations Convention on the Rights of the Child recognises the right of the child to education and obliges the state to 'make primary education compulsory and available free to all.'
- Article 11 (3) (a) of the African Charter on the Rights and Welfare of the Child claims that the State '*shall take all appropriate measures with a view to achieving the full realisation of this right and shall in particular ... provide free and compulsory basic education*'.
- General Comment No. 13 of the International Convention on Economic, Social and Cultural Rights (ICESCR) states that the exact standard of the right to basic education may vary according to the conditions in a particular country but education must have four features: availability, accessibility, acceptability and adaptability (the 4 As).<sup>586</sup> These features are useful when analysing the content of the right to basic education.

586 Khoza (note 26 above), 418.



- The Dakar Framework for Action: Education for All (EFA, 2000) was adopted by South Africa in 2000 and South Africa committed itself to achieve the goals and targets in EFA by the year 2015. The framework is helpful in setting out the purpose of a basic education, and in particular goal 6 thereof focuses specifically on the quality of education so that '*recognised and measurable learning outcomes are achieved by all, especially in literacy, numeracy and essential life skills*'.<sup>587</sup>

### **South African legislation**

Education rights are set out in section 29 of the Constitution.

- Section 29 (1) (a) states that everyone has the right to basic education, including adult basic education.
- Section 29 (1) (b) states that everyone has the right to further education which the state must make progressively available and accessible through reasonable measures.
- Section 29 (2) provides for the right everyone has to receive education in the official languages of their choice in public educational institutions where it is reasonably practicable.
- Section 29 (3) and (4) states that everyone has the right to maintain education institutions at their own expense and provides guidance around how this is to be carried out.
- Section 29 (1) (a) is an unqualified socio-economic right and section 29 (1) (b) is qualified. The unqualified nature of the basic right to education means that it is an immediately enforceable right and therefore, when reviewing it, the 'reasonableness test' is not appropriate.<sup>588</sup> In other words, it should have no limitation with regard to progressive realisation.<sup>589</sup> It has therefore been argued that, given that basic education is an absolute right, it requires prioritisation in terms of government spending over other socio-economic rights.<sup>590</sup>
- The White Paper on Education and Training (1996) defines basic education as one year of pre-school up to Grade 9. The South African Schools Act 84 of 1996 defines this phase of education as compulsory for all children between seven and 15 years. A reception year, Grade R, will become compulsory from 2010. It has been argued that the definition of basic education is too narrow, because learners who have completed Grade nine are not sufficiently equipped with the knowledge and skills to reach their full potential to live and work with dignity and improve the quality of their lives. Therefore the inclusion of secondary education in the right to basic education would lead to the access to the full enjoyment of the rights and to the freedom to choose a trade, occupation or profession (section 22 of the Constitution).<sup>591</sup>
- The main laws and principles that govern education are covered in the South African Schools Act of 1996 and the Education Policy Act 27 of 1996. Each province has also developed their own laws, policies and regulations based on national laws.

The following legislation and policies were adopted during the period of 2006 to 2009:

- The Policy Framework for Teacher Education and Development (2006) 'establishes guidelines for initial teacher education and continuing professional development'.<sup>592</sup>
- The Amended National Norms and Standards for School Funding (August 2006) introduced No-fee schools. The amended norms allow for the abolition of school fees at designated schools and the expansion of school fee exemptions to more parents. According to this act, schools are divided into five quintiles ranked from poorest (one) to least poor (five) and the funding allocation is based on this system.
- The Further Education and Training Colleges Act (2006) provides for the regulation of further education and training (FET); the establishment, governance and funding of FET colleges; and for the promotion of quality in the FET sector.
- The National Guidelines on School Uniforms was promulgated into policy (notice 173 of 2006). One of the objectives of the guidelines was to make uniforms more affordable and to encourage the adoption of school uniform policies to ensure that children are not discriminated against or otherwise excluded from school because of their inability to buy a uniform.<sup>593</sup>

587 Pendlebury, S. & Lake, L. (eds.) South African Child Gauge 2008/2009, (2009).

588 Khoza (note 26 above), 417.

589 Creamer (note 365 above).

590 LRC (note 107 above).

591 Ibid.

592 Pendlebury (note 604 above), 25.

593 ACESS. *National Guidelines on School Uniforms: An Assessment of the impact of The National Guidelines on School Uniforms Notice 173 Of 2006 on making school uniforms more affordable and improving access to schools*, (2007).



- The Education Laws Amendment Act (2007) was passed in order to redress inherited inequities in school infrastructure and to ensure the provision of an enabling physical, teaching and learning environment. In 2008, two policy papers related to the implementation of the above mentioned act were implemented: The National Policy for an Equitable Provision of an Enabling School Physical Teaching and Learning Environment and the National Minimum Norms and Standards for School Infrastructure (Norms and Standards). The National Policy sets out the requirement that national and provincial departments of education need to assess existing resources systematically, identify targets for investment and write developmental plans.<sup>594</sup>
- The Occupation Specific Dispensation (OSD) for teachers which was signed on 3 April 2008, increased general salaries, introduced a performance-based system of remuneration, and provided new career opportunities.

## 11.2. The relevant MDG, Targets and Indicators

Millennium Development Goal 2 (MDG 2) and Millennium Development Goal 3 (MDG 3) are relevant to education and these are listed below together with corresponding indicators and targets.

Goal 2: Achieve universal primary education	
Target	Indicators
Target 3: Ensure that by 2015, children, everywhere, boys and girls alike, will be able to complete a full course of primary schooling.	<ul style="list-style-type: none"><li>▪ Net enrollment rate in primary education</li><li>▪ Proportion of pupils starting Grade one who reach Grade 7</li><li>▪ Literacy of 15–24 year olds</li></ul>
Goal 3: Promote gender equality and empower women	
Target	Indicators
Target 4: Eliminate gender disparity in primary and secondary education preferably by 2005 and in all levels of education no later than 2015.	<ul style="list-style-type: none"><li>▪ Ratio of boys to girls in primary, secondary and tertiary education</li><li>▪ Ratio of illiterate females to males among 15–24 year olds</li></ul>

## 11.3. Main themes arising

This section provides a summary of the principal themes covered in this chapter.

### 11.3.1. Government's understanding of the progressive realisation of ESR

The right to education and its link to other rights is significant. As stated in the submission made by the Legal Resources Centre:

*"The denial of access to education is deemed a denial of the full enjoyment of other rights such as the right to dignity, the right to equality and the inter-related rights to food and health, all which enable an individual to develop his or her full potential to participate meaningfully in society."*<sup>595</sup>

As was outlined in the previous section, the state has promulgated the enabling legislation to the Constitution to give effect to the right to basic education and with the intent to establish an inclusive education system that is attentive to the learning conditions and outcomes. Key examples of this intent are *inter alia*, the abolition of corporal punishment, prohibition of discriminatory practices, codes of conduct, ethics for educators and learners and attention to the rights of children infected and affected by HIV/AIDS and those with special education needs. However, despite these comprehensive laws, many children do not enjoy these rights in practice and the reasons for this are explored in depth in this chapter. Furthermore, in the absence of '*clear norms and standards, many of the state's constitutional obligations remain loosely specified*'.<sup>596</sup>

594 Pendlebury (note 604 above), 13.

595 Veriava, F. & Coomans, F. The Right to Education. In: Brand, D. & Heyns, C. (eds.) *Socio-Economic Rights in South Africa*, (2005).

596 Pendlebury (note 604 above), 22.



### 11.3.2. Public participation

Maintaining a respect for and a culture of human rights is sustained by people's values, which are in turn shaped by the educational system as a primary form of socialisation. In addition, public debate is critical for securing meaningful access to education and therefore the active participation of citizens who 'understand the law and are willing to insist on their rights and mobilise when these are not forthcoming' is a necessary condition to the realisation of human rights.<sup>597</sup> For example, the new No-fee school system needs to be closely monitored on the ground by learners, parents and communities to ensure that no learner is denied access to a school simply because of economic circumstances. If the system does not improve access, it is incumbent on these groups to mobilise to correct the imbalance.<sup>598</sup>

The need for the participation of community stakeholders has also been identified as a means to address specific issues such as food security and the safety of learners in schools. This is because '*the communities, in which schools are located, strongly influence their development and vice versa*'.<sup>599</sup> Furthermore, this approach will ensure that the strategies chosen to address the problems will be relevant to local needs.

### 11.3.3. Social exclusion

Statistics reveal that South Africa has almost reached MDG 2 with a 98% net enrolment rate in primary education. Whilst this is impressive, economic and physical access to schooling remains a challenge for many poor children across the country, largely because policy implementation to improve access has not been consistent at a school level. For example, the introduction of No-fee schools and Exemption policies has the potential to guarantee access for poor and vulnerable children. However, the policy vision has not been achieved consistently for all poor learners and schools.<sup>600</sup> Furthermore, large groups of vulnerable children are also unable to access education, including children with disabilities, refugee and non-national children, children who are infected and affected by HIV/AIDS, orphans and children who head households. This is because the principle of non-discrimination and standards of adaptability to meet their special needs are not being applied.

Education laws cannot provide protection from all forms of discrimination, especially hidden discrimination.<sup>601</sup> Unfortunately, the MDG in respect of education do not overcome this chasm. For example, the targets in respect of MDG 3 offer a narrow, first stage definition of gender equity that leads to numerical parity but leaves out the more complex problems of gender justice, that is, whether girls and boys are able to benefit equally from schooling opportunities. The MDG also do not engage in more controversial questions, such as: what is owed as a matter of justice to girls? How much inequality is to be tolerated? How much redistribution or what forms of recognition of difference are consonant?<sup>602</sup>

### 11.3.4. Strategic planning to implementation

The relationship between the national and provincial structures impacts on the implementation of education policy and legislation. The national government has exclusive legislative responsibility for tertiary education, and concurrent responsibility with the provinces for all other levels of education. Whilst the national government works with provinces to formulate national policy, the provincial governments are responsible for the implementation of the nationally determined policy. This system has been criticised for its insufficient national-provincial alignment because provinces are not obliged to observe national priorities, particularly regarding the allocation of financial resources.<sup>603</sup>

Horizontal co-ordination and communication between the Department of Basic Education and other departments has also negatively affected the planning and implementation of key programmes in the past, such as the National School Nutrition Programme (NSNP) and the learner transport programme. Consequently, the impact on the learners' physical and economic access to education can be dire.

597 Ibid 23.

598 Khoza (note 26 above), 429.

599 Pendlebury (note 604 above), 52.

600 Giese, S., Hombakazi, Z., Koch, R. & Hall, K. *A study on the implementation and impact of the no-fee and exemption policies*, (2009).

601 Khoza (note 26 above), 418.

602 University of KwaZulu-Natal (UKZN) Faculty of Education, submission to the SAHRC, (2009).

603 DBSA. *Education Roadmap: Focus on Schooling System*, (2008).



Poor school infrastructure is a central theme related to access as it has impacted on physical access to education. Furthermore, proper standards of 'availability' of functioning educational institutions have also not been established. Although the release of the National Infrastructure Management System NEIMS report (2007) is a first positive step towards addressing this, the proper allocation of funding by the state to overcome these huge infrastructural backlogs remains to be seen. It is common cause that the lack of decent infrastructure infringes on children's right to education, and educational opportunities remain bound to historical patterns of inequality.<sup>604</sup> Besides blocking physical access it can also be argued that, according to their rights to equality (section 9) and human dignity (section 10) in the Bill of Rights, their equal entitlement to learn under conditions that respect, protect and promote the inherent human dignity of each child is not being protected.

Standards of acceptability are also not being met by current service delivery. The poor performance of learners and teachers in literacy and numeracy and the declining numbers of Grade 12 learners who are eligible for entrance to higher education provide evidence that sufficient standards of quality are not being met. The high drop-out rates of learners after Grade nine further indicate that there is insufficient support to ensure that learners stay in school.

This all means that acceptable, quality education which could improve the capabilities of young people to play a meaningful role in society is not being successfully delivered by the state. Given the high levels of poverty and inequality in the country, the ability of the system to enable the equitable sharing of opportunities is also not being met and, in short, the constitutional requirements of equality are not being fulfilled.

An overview of budgetary planning reveals that there has been a shift in expenditure on personnel and increased expenditure on non-personnel resources. For example, the budget item on infrastructural backlogs has grown substantially and is set to grow in the future. Whilst this will improve physical access to education, it does not guarantee that learners will have access to quality education. As Wildeman (2009) notes, '*domestic and international empirical research shows that both teaching and non-teaching inputs are important for good quality education*'.<sup>605</sup>

A solid monitoring and evaluation plan is central to good planning, and a number of systems and structures are currently being institutionalised in order to improve the monitoring and evaluation of schools and tracking of learners. However, human resource constraints have been highlighted as one of the main impediments to effective monitoring of schools, particularly at a district level. This refers to the number and consistency of visits to schools as well as the capacity of staff to gather information and monitor trends. In addition, there are concerns regarding the ability of the Department of Basic Education to provide reliable and accurate data which is necessary for assessing progress in implementation.

Overall, South Africa has a strong suite of policies to support meaningful access to education. However, as the OECD review team argued, although reform policies are of a high conceptual quality, 'change management' has failed and key aspects of policy reform have not reached schools and classrooms.<sup>606</sup> In other words, whilst the state has made a policy commitment to education, there is still a large gap between policy and implementation which calls into question its ability to progressively realise the right to education.

### Planning systems

The Department of Basic Education's planning systems are reviewed in this section, including its information gathering and monitoring systems as well as its budgetary planning and oversight.

604 Pendlebury (note 604 above), 13.

605 Pendlebury (note 604 above), 3.

606 Ibid 25.



### Information gathering and monitoring

The Department of Basic Education collects information at different levels of the education system with the use of different instruments and tools. The Education Management Information System (EMIS) tracks basic information about schools, ABET Centres and FET Colleges.<sup>607</sup> However, it has been noted by IDASA (2008) that “*although official enrolment data has improved, official publications are not yet up to the challenge of providing reliable and accurate data that can be used in assessing implementation progress*”.<sup>608</sup> However, a new system, The Learner Unit Record Information Tracking System (LURITS), has recently been initiated for collecting data on individual learners and educators. It will provide information in 2011 and will “*assist greatly in tracking, amongst others, the movement of learners and dropout from schools*”.<sup>609</sup>

Monitoring is done within provincial departments through a combination of efforts which include the directorate(s) involved in a programme together with the Directorate of Monitoring and Evaluation. According to the Education Laws Amendment Act (2007), performance measures are set for schools – with schools required to table annual performance plans with the School Governing Body (SGB) and the provincial Head of Department, and to prepare half-yearly progress reports.<sup>610</sup> At a district level, district officials regularly monitor policy compliance and school functionality. The Department of Basic Education has also appointed 87 Integrated Quality Management Systems (IQMS) moderators in August 2008 and they have already initiated the process of a school-based evaluation of teachers in over 2000 schools. The IQMS consists of three programmes aimed at enhancing and monitoring the performance of the education system. It includes Developmental Appraisal and Performance Measurement of teachers and Whole School Evaluations.

However, the effectiveness of monitoring at the district level was highlighted as a concern. In a study undertaken by ACESS into the monitoring and implementation of HIV/AIDS policies at schools, it was revealed that monitoring and evaluation is rarely systematic and effective and that “*school visits from the Department of Basic Education to assess the implementation of policies was reportedly infrequent and often sporadic*”. In particular, human resource constraints were identified as one of the major impediments to effective monitoring and evaluation at the district level.<sup>611</sup>

A District Development Support Programme (DDSP) EMIS Improvement Programme has been launched to develop local capacity to gather information and monitor trends. It is in use in the provincial education departments in Northern Cape, KZN, Limpopo and Eastern Cape.<sup>612</sup> Provincial Education Departments have also been encouraged to consider piloting a district/regional-based Education Management Information System (DEMIS) in order to collect information to inform local and regional management decisions. However, “*the Department recognises that for DEMIS to be used on a wider scale requires intensive training and support*”.<sup>613</sup>

In 2008, the Minister established a Ministerial Committee, The National Education Evaluation and Development Unit (NEEDU), to investigate how evaluation of schools and educators could be strengthened.<sup>614</sup>

In respect of the MDG, the monitoring thereof is augmented by an inclusion of the UNESCO’s 6 Education for All (EFA) goals where countries are ranked in terms of the Education Development Index (EDI), a composite index of the 4 quantifiable goals (UPE, gender parity, adult literacy, quality).<sup>615</sup> Furthermore, the Presidency published the following development indicators to monitor progress related to the following: educator: learner ratio, enrolment rates, gender parity index (GPI), matriculation pass rates, mathematics higher grade passes, adult literacy rate, and graduating science, engineering and technology students.<sup>616</sup> These will be reviewed at the end of this chapter.

607 Giese, S. & Koch, R. *A review of education policy to address the active and passive exclusion of HIV- and AIDS- affected learners*, (2008).

608 Wildeman, R. & Lefko, E. *Reviewing provincial education budgets 2004 to 2010*, IDASA research paper, (2008), 35.

609 Department of Basic Education, submission to the SAHRC, (2009).

610 Giese (note 624 above), 44.

611 Ibid.

612 Ibid 603.

613 Ibid.

614 Department of Basic Education (note 626 above).

615 Global Monitoring Report Team. *Education for All: Global Monitoring Report*, (2010). <<http://www.unesco.org/en/education/efareport/>>.

616 Department of Basic Education (note 626 above).



### Budgetary planning and oversight

In order for the budget to be credible it “must give effect to sound educational policies and promote meaningful access to education”.<sup>617</sup> National and provincial budgets are discussed below, including an outline of key shifts in spending over the past three years.

#### National Budget

The education sector receives just under 20% of the total government expenditure, a sum that amounted to R123 billion in the 2008 budget.<sup>618</sup> Education spending is therefore 5% of the GDP which is above the world average of approximately 4.3%.<sup>619</sup> However, it is below the oft quoted UNESCO benchmark of 6%.<sup>620</sup>

#### Final Appropriations and Expenditure from 2005/06 to 2007/08

Table 40: Final Appropriations and Actual Expenditure for 2005/06 and 2007/08<sup>621</sup>

Year	Final Appropriations R'000	Actual Expenditure R'000	Variance (under expenditure)
2005/06	12 913 190	12 420 081	493 109
2006/07	14 299 176	14 249 805	49 371
2007/08	16 386 752	16 241 326	145 426

One can see that the increase in the budget from 2005/06 to 2006/07 was 1 385 986, a 10.7% increase. However, once adjusted for inflation, the real increase is only 7.3%. The increase in expenditure for the same period is 1 829 724, a 14.7% increase. However, once adjusted for inflation the real increase in expenditure was 11.3%.

The annual growth from 2006/07 to 2007/08 is 2 087 576, a 14.5% increase, but once adjusted for inflation the real increase is only 9.8% for that period. The increase in expenditure for this period is 1 991 521, a 13.9% increase, but once adjusted for inflation, the real increase was 9.2%.

617 Pendlebury (note 604 above), 30.

618 Department of Basic Education (note 626 above).

619 UNESCO Institute for Statistics. *Global education spending concentrated in a handful of countries*, (2007), <[http://www.uis.unesco.org/template/pdf/EducGeneral/Factsheet07\\_No3\\_EN.pdf](http://www.uis.unesco.org/template/pdf/EducGeneral/Factsheet07_No3_EN.pdf)>.

620 Bloch, G. *Building Education Beyond Crisis*, (2009), 9.

621 Department of Basic Education, Annual Report 2007/08, (2008), 228-229.



Overall, this indicates that, whilst there has been an increase in annual growth of appropriations from 2005/06 to 2007/08, there has been a decrease in expenditure over the same period. Details regarding under expenditure for the periods of 2006/07 and 2007/08 are provided in Table 41 below.

**Table 41: Expenditure in the Department of Basic Education 2006/07 – 2007/08<sup>622</sup>**

<b>Under expenditure 2006/07</b>		
1. Administration	2 264	1.86%
2. Systems Planning and Monitoring	14 107	27.91%
3. General Education	13 051	5.41%
4. Further Education and Training	5 062	0.71%
5. Quality Promotion and Development	8 444	0.73%
6. Higher Education	3 814	0.03%
7. Auxiliary and Associated Services	49 371	4.43%
<b>TOTAL</b>	<b>49 371</b>	<b>0.35%</b>
<b>Under expenditure 2007/08</b>		
1. Administration	13 860	9.70%
2. Systems Planning and Monitoring	36 865	41.51%
3. General Education	16 572	6.01%
4. Further Education and Training	68 201	5.68%
5. Quality Promotion and Development	5 295	0.41%
6. Higher Education	3 289	0.02%
7. Auxiliary and Associated Services	1 389	2.04%
<b>TOTAL</b>	<b>145 426</b>	<b>-</b>

As one can see, the most notable area of under expenditure for both periods is Systems Planning and Monitoring. This raises concerns as to whether proper planning and monitoring is being undertaken in order to ensure the effective and efficient implementation of policy objectives.

#### **Provincial budgets**

A review of expenditure of provincial education budgets indicates that expenditure on teacher salaries and benefits is projected to decline from 83% of the total provincial education budget in 2004/05 to 76% in 2009/10. The savings will be used to spend in other areas, for example, on school buildings which will consume 7.2% of the total provincial education budget in 2009/10.<sup>623</sup>

622 Ibid 211.  
623 Wildeman (note 625 above), 30.



The table below provides information on the size of the consolidated provincial education budget for the period 2005/06 to 2010/11.<sup>624</sup>

**Table 42: Provincial education budgets (R'000), 2004/05–2010/11<sup>625</sup>**

Province	2007/08	2008/09	2009/10	2010/11	Real change between 2007/08–2008/09 (%)	Real av. Ann. Change between 2007/08–2010/11 (%)	Real av. Ann. Change between 2004/05–2010/11 (%)
Eastern Cape	14 505 263	17 810 197	18 881 136	20 238 193	15.6	6.4	5.7
Free State	5 677 502	6 598 569	7 169 708	7 748 108	9.4	5.4	4.4
Gauteng	14 649 391	16 629 082	18 461 601	19 882 314	6.9	5.2	6.9
KwaZulu-Natal	19 003 096	21 389 127	23 914 043	26 420 070	6.0	6.1	6.8
Limpopo	12 025 666	14 221 050	15 925 244	17 341 802	11.4	7.4	4.8
Mpumalanga	8 118 307	8 934 232	9 739 439	10 676 178	3.6	4.1	8.4
Northern Cape	2 286 860	2 601 238	2 902 401	3 159 825	7.1	5.9	9.1
North West	6 096 036	6 995 482	7 995 239	8 842 782	8.1	7.6	4.2
Western Cape	7 822 732	9 019 913	10 013 961	10 864 296	8.6	6.0	5.8
<b>Total</b>	<b>90 184 853</b>	<b>104 198 890</b>	<b>115 002 772</b>	<b>125 173 568</b>	<b>8.8</b>	<b>6.0</b>	<b>6.0</b>

In 2008, KZN had the largest allocation (R21.4 billion) and Northern Cape had the smallest allocation (R2.6 billion). Whilst the budget of the former will grow by 6.1% over the MTEF, the Northern Cape's budget is expected to increase by 5.9%. The province which is set to experience the largest real average growth rate is the Limpopo Province with an increase of R12 billion in 2007/08 to R17.3 billion in 2010/11. Mpumalanga will experience the smallest real average growth rate of 4.1% over the MTEF.<sup>626</sup>

#### ***Variations in expenditure between provinces***

An overview of the size of provincial education budgets is useful. However, it is important to consider the respective service delivery needs (enrolment rates) in each as this will provide greater insight into levels of equity amongst provinces.

**Table 43: Summary of key inequality measures in provincial education departments, 2004/05, 2005/06 and 2006/07<sup>627</sup>**

	National per learner average (Rands)	Coefficient of variation	Average per learner spending of poor provinces as factor of national average	Average per learner spending of rich provinces as factor of national average
2004/05	4.930	0.09	1.01	1.10
2005/06	5.453	0.11	1.01	1.10
2006/07	5.995	0.14	1.01	0.97

Note: The provinces defined as 'poor' are the Eastern Cape, Free State, KZN, Limpopo and Mpumalanga, while the 'rich' provinces are Gauteng, the Northern Cape and the Western Cape.

624 Note: Data for the 2007/08 to 2010/11 period are displayed for the ease of reading of the table, although the full period, namely 2004/05 to 2010/11, was used to calculate the six-year average in the final column.

625 Wildeman (note 625 above).

626 Ibid 30.

627 Ibid



An overview of variations in spending reveals that provincial inequalities have been reduced. The table above indicates that in 2004/05 and 2005/06, poor provinces were spending the same amount per learner as the national average, and richer provinces spent 10% more than the national average. However, in 2006/07, the joint average spending of rich provinces dropped significantly to 3% below the national per learner average.<sup>628</sup>

When considering these measures at face value, it appears that children have equal access to education across provinces. However, these measures do not capture the backlogs in education spending in each province and therefore 'promote a false picture of inter-provincial equality'. Furthermore, 'provinces have different ratios of personnel and non-personnel expenditure, which means that access issues must be thought of differently in, for example, the Western Cape and the Eastern Cape'.<sup>629</sup>

### **Composition of education spending**

In terms of the composition of education spending, the current budgetary framework has shifted towards a more moderate expenditure on personnel (teacher salaries) and increased expenditure on textbooks, school buildings and provision for school funding. In an analysis of provincial education allocations and expenditure, Wildeman noted that these shifts in budgetary spending away from teachers' salaries and towards a more 'balanced' expenditure framework have undoubtedly taken place.<sup>630</sup> However, questions have been raised regarding the 'usefulness of this framework, especially in view of an incomplete resource transformation process and recurring poor academic outcomes'.<sup>631</sup> These issues will be discussed in more detail further on in this chapter. Some of the most significant shifts in spending over the past three years are detailed below.

#### **Grade R**

Funding for early childhood education for five and six year old children (Grade R) has expanded considerably over the past three years and remains the fastest growing education programme in the provinces. The budget allocation is currently R850 million.<sup>632</sup> However, concern has been raised that the projected cost of R686 per child per year and the planned budgets hold significant quality risks.<sup>633</sup> This is largely because the current funding model relies on a low average educator cost based on School Governing Body (SGB) appointments, and it has been questioned whether such a strategy is compatible with improving quality in the long term.<sup>634</sup>

#### **Infrastructure**

In response to the infrastructural backlogs at schools, the NEIMS electronic and planning tool was put into operation. It provides the government with the ability to quantify and pinpoint infrastructural inadequacies at each of the 26 742 public schools across the country. Based on the NEIMS data, a capital investment plan is being developed which will be proposed to cabinet. NEIMS estimated that, "over and above the expected allocations from National Treasury over a period of ten years starting from 2010, an additional amount of R217 billion will be required to eradicate the backlog, as well as bring other schools up to minimum standard".<sup>635</sup>

#### **No-fee schools and school-fee exemptions**

In order to improve access to the poorest learners, the state has set aside R1 billion for no-fee schools and compensation for fee exemption for 2011/12 in order to cover the 60% of learners who will not be expected to pay school fees from 2010.<sup>636</sup> However, "funding allocations for no-fee schools vary both within and across provinces, raising concerns about the equitable implementation of the policy".<sup>637</sup> This will be discussed further on in the chapter.

628 Ibid 34.

629 Ibid 34.

630 Ibid 8.

631 Ibid.

632 Department of Basic Education (note 626 above).

633 DBSA (note 620 above).

634 Organisation for Economic Co-operation and Development. Reviews for National Policies for Education – South Africa, (2009), 2008(16), 49.

635 Department of Basic Education (note 626 above).

636 DBSA (note 620 above).

637 Wildeman (note 604 above), 32.



### **The National School Nutrition Programme**

The National School Nutrition Programme (NSNP) also targets poor learners in many primary and some secondary schools. However, funding for this programme has been inconsistent since 2000 and in 2006/07, an increase in FET grants led to a direct trade-off with the school nutrition grant, which decreased by almost 6% in the same year. Inconsistencies in funding have therefore compromised the delivery of school feeding programmes.<sup>638</sup> In terms of spending, it is reported that the NSN grant was transferred from the health sector in 2004 and that by 2007/08, provinces managed to spend 97% of their allocations. This suggests that the revised targeting lists, following the transfer from health to education, have been consolidated.<sup>639</sup>

### **Special needs**

In terms of inclusive education, which refers to both special needs schools and children with disabilities in mainstream schools, a significantly large sum of money was set aside in 2008 to fast-track the implementation of inclusive education policies. However, expenditure on Grade R and Further Education and Training (FET) has outpaced expenditure on special needs from the period of 2004/05 to 2009/10.<sup>640</sup>

### **Learning Teaching Support Materials (LTSM)**

Provinces spend nearly R1.5 billion per year on LTSM. However, considerable inefficiencies have been reported in the procurement of LTSM leading to a reported shortage of books in the classroom. The Department of Basic Education is planning for national procurement and production, and since 2008 Grade 10 to 12 textbooks have been procured through this centralised process.<sup>641</sup>

### **Higher Education**

In response to the serious financial problems experienced by a number of higher education institutions, state support has grown substantially in recent years. This funding is based on institutional redress and therefore not all universities benefitted equally. In order to expand access to higher education institutions, the state created the National Student Financial Aid Scheme (NSFAS). Currently one in four undergraduate students has a NSFAS loan. In 2008, the NSFAS allocation to universities was R1.8 billion.

## **11.4. Progress Made in Terms of the Relevant MDG**

The state's progress in terms of meeting MDG 2 and MDG 3 and the progress on indicators for each goal are discussed in this section.

### **Progress on indicators**

The first indicator for Target 3 is the net enrolment rate in primary education. According to the General Household Survey (GHS) conducted by Statistics South Africa in 2006, over 98% of seven to 13 year old children attended education institutions (Grade one to Grade 7) in 2006. The second indicator is the proportion of pupils starting Grade one who reach Grade 7. The completion rate is used as a proxy for 'survival rate' and according to the GHS, 98% of 18 year old children had completed Grade seven and above in 2006.<sup>642</sup>

*"[The] Cape and KwaZulu-Natal have all seen significant increases in attendance rates. In the Northern Cape, attendance increased by five percentage points, while attendance in KwaZulu-Natal increased by over three percentage points and attendance in the Eastern Cape by nearly two percentage points. In July 2007, four provinces had attendance rates that were slightly lower than the national average: Gauteng, Northern Cape, North West, and Western Cape each had rates of just below 96 per cent. Attendance rates among African (97 per cent) and Coloured (94 per cent) children remain lower than those for Indian (99 per cent) and White children (99 per cent). It is encouraging, however, that there has been a significant increase in attendance among African and Coloured children over the past five years."*<sup>643</sup>

While reception year (Grade R) is not yet compulsory, the Department of Basic Education aims to make Grade R available to all five year olds by 2010. The aim is to provide five and six year olds with the necessary pre-literacy,

638 Ibid.

639 Wildeman (note 625 above), 8.

640 Ibid 674

641 Department of Basic Education (note 626 above).

642 The Presidency (note 296 above).

643 Pendlebury (note 604 above), 83.



numeracy as well as life skills to cope with successful formal schooling. The coverage is currently 70%, and both the Western Cape and Gauteng Education Department submissions related that they have Early Childhood Development (ECD) strategies which focus on equipping ECD sites, training ECD practitioners and targeting funding towards implementation.

The third indicator is the literacy of 15–24 year olds. The GHS has found that the self-declared literacy rate for 15–24 year olds in 2006 was 96% and the functional literacy rate, based on achievement of up to Grade 7, was almost 90% in 2006. The overall percentage of 15–24 year olds that have never attended an education institution was 1% in 2006. The submission made by the Department of Basic Education indicated that illiteracy is being targeted at adults above 15 years old with the R6 billion Kha Ri Gude Campaign on illiteracy, which is expected to fast-track the achievement of halving illiteracy by 2015.

The indicator for Target 4 is the ratio of boys to girls in primary, secondary and tertiary education. At primary school level, the gender parity index (GPI) has remained consistently close to 1 from 1999 to 2006. This suggests that more boys than girls are enrolled at this level of schooling. At secondary school level, however, more girls than boys are enrolled, with the GPI being skewed in favour of girls from 1999 to 2006. At the tertiary level, gender distribution in respect of enrolment is also skewed in favour of girls, with the GPI remaining consistently greater from 2001 to 2006.<sup>644</sup>

The second indicator for this target is the ratio of illiterate females to males among 15–24 year olds. The gender parity for self-declared literacy as well as for functional literacy for 15–24 year olds has been achieved throughout the period 2002 to 2006. The GPI for illiteracy for the same age group has been less than 1 for the same period, indicating that more females than males have not attended an education institution.<sup>645</sup>

## **11.5. Findings concerning the progress made by the state in the progressive realisation of the right**

This section discusses the state's progress in the progressive realisation of the right to education and draws on the submissions, the hearings and secondary reports. ICESCR's 4 As, namely, accessibility, availability, acceptability and adaptability will be used as a framework within which to locate this discussion.

### **11.5.1. Accessibility**

Access to schooling is a necessary condition to achieve the right to education and should include economic access, physical access and the principle of non-discrimination. The discussion below covers some of the factors which continue to block children's access to school, and highlights some of the vulnerable groups of children who are currently excluded from the education system.

#### ***School fees***

In order to improve economic access to schooling, the Amended National Norms and Standards for School Funding (August 2006) and the Exemption of Parents from the Payment of School Fees Regulation (2006) were established.<sup>646</sup> The Ministry of Education reported that in 2009, 40% of learners attended quintile one and two schools where school fees were abolished. A new policy decision has been made to increase No-fee schools to include quintile three schools. This will cover a total of 7 million learners (60%) who will be in No-fee schools (64% of all schools).<sup>647</sup>

Policy measures to improve access to schooling have been described by children's sector organisations, represented by ACESS<sup>648</sup>, as harbouring the potential to guarantee the right to an education for many poor children in South Africa. However, concern has been raised that the potential is not being realised to the fullest possible extent. Evidence of this is based on research undertaken by ACESS into "*the implementation and impact of the No-fee and Exemption policies*". Findings of the study reveal that, despite the fact that "*no fee schools are in the main better off than they were prior to the new policies in terms of the funds they receive and the resources at*

644 The Presidency (note 296 above).

645 Ibid

646 Giese (note 617 above).

647 Department of Basic Education (note 626 above).

648 ACESS is an alliance of over 1 500 children's sector organisations committed to the realisation of children's rights to *inter alia*, education, as part of a comprehensive social security system as guaranteed by the South African constitution and various regional and international child rights' treaties.



*their disposal, the policy vision has not materialised consistently for all poor learners and schools".<sup>649</sup>* The reasons for this are because:

- The levels of administration, communication, monitoring, support and capacity building required for the effective implementation of the system are lacking, particularly in those schools with the greatest levels of poverty.
- The benchmark used to allow for the delivery of quality education and infrastructure is inadequate.
- Some provincial budgets are not sufficient to fund No-fee schools at the level equivalent to the adequacy benchmark.
- The ranking system which determines No-fee status is fundamentally flawed, because the key factor determining the status of the school is its physical location rather than the levels of poverty of the learners accommodated at the school.

The Legal Resources Centre has also highlighted inequities in the quintile system, claiming that "*it fails to acknowledge that the communities in quintile three or even quintile four are often only marginally less impoverished than those in the first two categories*".<sup>650</sup> The result of this is that the situation for many fee-paying schools has worsened.

### **School uniforms**

The cost of school uniforms also blocks economic access to schooling. National guidelines regarding school uniforms were promulgated into policy in 2006 in order to reduce learner exclusion from school based on an inability to buy a uniform. However, recent research undertaken by ACESS revealed that this policy does not make uniforms more affordable because many schools are not fulfilling their duties and obligations in terms of following the guidelines.<sup>651</sup>

### **Travelling distance**

The distance between school and home impacts on the physical access to education and research conducted by CASE revealed that in rural communities some children have to go outside their communities to attend primary school.<sup>652</sup> Added to this is the high transport costs and "*for children who do not have schools nearby, the cost, risk and effort of getting to school can influence decisions about school attendance*".<sup>653</sup> The 2006 Commission Report of the Public Hearing on the Right to Basic Education made a recommendation that poor learners who live far from their nearest school should receive state transport assistance to access education.<sup>654</sup>

The Department of Basic Education is expected to provide transport to those learners who have to walk further than three kilometres to school and this is based on provincial needs and budgets. Eight out of nine provinces have transport subsidy schemes and they work in partnership with the Department of Transport to provide learner transport. However, it was highlighted that the 'funding mechanisms' between the two departments impact negatively on the successful implementation of the learner transport programme. The Department of Basic Education is currently in the process of developing a national framework on learner transport.<sup>655</sup>

### **Food security**

Hunger and malnutrition is another obstacle to education. In January 2009, secondary schools in quintile one were incorporated into the NSNP. This will be extended to all primary and secondary learners in quintile two schools in 2010 and to quintile three schools in 2011.<sup>656</sup> However, there are still many learners who do not benefit from the programme. One reason is that the allocation of the scheme is based on the flawed quintile ranking system. Another is related to the lack of collaboration between the Department of Basic Education and other relevant departments (Trade and Industry, Agriculture and Health) in addressing food security. Learners in the Eastern Cape have been particularly affected because of the collapse of the NSPN in their province which is one of the provinces most affected by stunting rates in children.<sup>657</sup>

649 Giese (note 617 above).

650 LRC (note 107 above).

651 ACESS (610 above).

652 CASE (note 207 above).

653 Pendlebury (note 604 above), 84.

654 Khoza (note 26 above), 430.

655 Department of Basic Education (note 626 above).

656 Ibid 4.

657 LRC (note 107 above), 7.



The findings related to learner transport and the NSNP call into question standards of 'adaptability' of the education system because of its inability to meet the current needs of learners. Furthermore, the reasonableness of both interventions is also questioned as they are not balanced and flexible, they exclude people and they do not address the needs of the most vulnerable.

### **School safety**

Meaningful access to education can only be achieved if learners and educators are able to learn and teach in a safe environment free from all forms of violence. In 2006, the Commission conducted Public Hearings on School-based Violence. This followed the many complaints it received concerning this issue. The hearing identified the most prevalent forms of violence in schools as: bullying, gender-based violence, accidental violence, discrimination and violence, sexual assault or harassment, physical violence and psychological violence. Furthermore, it was found that a significant proportion of learners are under constant threat of violence at school. A number of factors contribute toward school-based violence and these include the effects of the immediate school environment on learners and the impact of the broader community issues on the school environment.<sup>658</sup>

An assessment of 'site security' conducted by the NEIMS Report (2007) found that 40.99% of public ordinary schools had no fencing or fencing in poor condition. It also found that only 5.65% of schools have a functional gate and fence together with access control.

Numerous programmes have been launched by both the government and non-governmental organisations to address violence in schools. However, no comprehensive strategy has been developed by the state to address this problem. One important point noted by the Commission is that the problem of violence in schools can only be addressed with the assistance and involvement of the communities in which they are located.<sup>659</sup> This is confirmed by Donald, Lazarus and Lolwana who suggested that "*the communities in which schools are located strongly influence their development and vice-versa and therefore dialogue between schools and community role-players can generate innovative strategies to meet children's needs*".<sup>660</sup> Two structures have been identified as key leaders in this process – school governing bodies (SGBs) and district-based support teams. In the case of the former, questions need to be raised as to whether SGBs in poorer communities are sufficiently empowered to take the lead on these types of issues. In the case of the latter, these intersectoral teams are the responsibility of the Department of Basic Education under Education White Paper six and, whilst they "*hold great promise in addressing barriers to education, the policy has yet to be translated into law, and be put into operation effectively*".<sup>661</sup>

### **Social Exclusion: Vulnerable groups**

Whilst the MDG indicators show that the net enrolment rate in primary education is over 98%, the reality is that many vulnerable groups of South African children do not have access and continue to be marginalised. This includes children with disabilities, children who are infected and affected by HIV/AIDS and non-national children.

### **Children with disabilities**

Epilepsy South Africa reported that some 300 000 disabled children are not in primary education and far more do not complete a full cycle of basic education.<sup>662</sup> The Disabled Children's Action Group (DICAG) stated that "*despite their constitutional right to basic education and provisions in the South African Schools Act, many children with disabilities who are of age to attend are presently out of school and continue to be discriminated against and denied opportunities to education.*"<sup>663</sup> The organisation highlighted numerous difficulties related to the implementation of inclusive education which are largely centred on funding and the capacity of schools and teachers to deliver.<sup>664</sup>

Neither the submission made by the Ministry of Education, nor the Provincial Department of Basic Education for the Western Cape made particular reference regarding access to education for children with disabilities. The submission made by the Provincial Department of Basic Education for Gauteng reported that over 4% of its budget

658 South African Human Rights Commission. Report of the Public Hearing on School-based Violence, (2006).

659 Ibid 32.

660 Pendlebury (604 above), 52.

661 Ibid.

662 Epilepsy South Africa, submission to the SAHRC, (2009).

663 Disabled Children's Action Group (DICAG), submission to the SAHRC, (2009).

664 Western Cape Cerebral Palsy Association, submission to the SAHRC, (2009).



is spent on special schools and that it is currently redesigning its services to fully implement the government's Inclusive Education Policy.<sup>665</sup>

### ***Children infected and affected by HIV/AIDS***

There are multiple factors which lead to the active and passive exclusion of learners who are infected and affected by HIV/AIDS. A study conducted by ACESS found four key barriers to education: HIV-related illness of learners, grief and trauma associated with illness and death of family/household members, increased domestic responsibility and risks of child labour, and HIV and AIDS-related stigma and discrimination. The study found that a number of policies and guidelines have been developed by the state to ensure access to education for all. However, much still needs to be done to ensure policy implementation.<sup>666</sup>

### ***Orphans and child-headed households***

The Community Survey conducted by Statistics South Africa in 2007 revealed that orphaned children – those who reported that either their mother or both parents were dead – accounted for 9% of the total number of children between seven and 15 years old. It also found that 32% of the children who are out of school have one or more parents who are dead.<sup>667</sup> Another finding of the survey was that there are currently 23 000 children between seven and 15 years old who are the head or acting heads of their households and 17% of these are out of school.

Whilst schools may not be able to reach all these children, they do offer a useful starting point for identifying vulnerable and socially excluded children and addressing their needs. As Rudolph (2009) stated, “*for many children, school is the only place where they have contact with adults they can talk to*”.<sup>668</sup>

### ***Non-national and refugee children***

Despite the fact that the Bill of Rights extends the right to education to 'everyone' living in South Africa, regardless of their nationality or legal status, refugee children, unaccompanied minors and children of documented and undocumented asylum seekers do not have equal access. The submission made by the Consortium for Refugees and Migrants (CoRMSA) reported that close to one third of school aged non-national children are currently not enrolled in schools due to an inability to pay fees, the costs of transport, uniforms and books, or explicit exclusion by school administrators. Furthermore, non-national children in schools report that they are regularly subjected to xenophobic comments by teachers or other students. Added to this is the ongoing reluctance of the Department of Basic Education to accept undocumented children.<sup>669</sup>

For these groups of vulnerable children, their physical and economic access to education is being blocked and the principle of non-discrimination is not being applied. Furthermore, standards of adaptability are also not being applied to their right to education because the lack of implementation of policies at a school level such as those related to Inclusive Education and HIV/AIDS means that the needs of *all* learners are not being met. It is also argued that, according to section 9 of the Bill of Rights, these children's right to equality within the education system, is not being upheld. section 9 “*sets the ethical standards for a democratic system of education in which every child - regardless of race, gender, culture, language and religion, ability or disability is equally entitled to learn*”.<sup>670</sup>

### ***Gender***

The MDG statistics suggest that, in numerical terms, South Africa has met the MDG 3 target of eliminating gender disparity in primary, secondary and tertiary education. However, the GPI is only an indicator of the presence of girls and boys at different levels of education. It is therefore not a full enough indicator of other dimensions of gender equality in education as it gives little indication of how girls and boys are treated in schools and the ways in which they are able to make use of their education.<sup>671</sup> For example, research studies conducted by the Gender, Education and Global Poverty Reduction Initiatives Project (GEGPRI) found that the ways in which gender parity

665 Gauteng Department of Basic Education, submission to SAHRC, (2009).

666 Giese (note 617 above).

667 Fleisch, B, Shindler, J & Perry, H. Children out of school: Evidence from the Community Survey, (2009), 44.

668 Pendlebury (note 604 above), 51.

669 CoRMSA (note 380 above).

670 Pendlebury (note 604 above), 20.

671 UKZN (note 619 above).



is interpreted by school communities tend to mask more thorough discussions of the nature of gender equality and forms of obligation with regard to taking this forward.

The lack of clear policy mechanisms to monitor aspects of gender in schools means that the MDG indicators for gender parity might be met, but opportunities are being missed for collaboration on developing a deeper insight into the meaning of gender equality and education through the work of the Department of Basic Education.<sup>672</sup>

In summation, the above discussion highlights the fact that the inequalities in the current education system are resulting in the exclusion of categories of vulnerable children from participating meaningfully in society. This calls into question the reasonableness of the measures taken by the state to progressively realise the right to education. Furthermore, there also appears to be little provision being made by the state to deal with the short, medium and long term needs of these young people who remain “severely marginalised and caught in a cycle in which lack of integration feeds unemployment”.<sup>673</sup>

#### **Access to higher education**

Accessing further and higher education continues to remain a challenge for young people. The Centre for Social Development in Africa (CDSA) at the University of Johannesburg reported that in 2008 only 20% of those who passed the matriculation examinations qualified for a university entrance. Furthermore, cuts in government spending at higher education institutions has meant that young people who do qualify for university are often unable to continue their education due to severe financial constraints and an inability to access financial support in the form of a scholarship. “Ever increasing costs of higher education therefore contribute to the cycle of poverty and inequality.”<sup>674</sup>

#### **11.5.2. Availability**

The Legal Resources Centre made the following statement in its submission:

*“It is not enough to say South Africa has succeeded in the MDG relating to education if the state considers that once the students get to school the goals have been reached. This is far from the case when some children still have nothing to sit on, or write with when they walk through the doors of the school”.*<sup>675</sup>

Standards of availability have been met when institutions and programmes are available in sufficient quantity to meet local needs. This also means that a range of resources are available at schools, including buildings, water and sanitation.<sup>676</sup>

#### **School infrastructure**

Whilst attendance at schools is better in urban areas, the quality of infrastructure and the level to which the schools are under-resourced in terms of textbooks, stationary and furniture still prevent children from completing a full course of primary education.<sup>677</sup> “Poor learning environments are linked to low levels of teacher morale, poor learner performance and high drop-out rates”<sup>678</sup> and according to the ICESCR’s standards of ‘availability’, the state has a duty to ensure that educational institutions are ‘functioning’. For example they should have sanitation and safe drinking water.

Backlogs and overcoming past under-investment in infrastructure is acknowledged by the Ministry of Education as ‘our greatest challenge’.<sup>679</sup> In 2007, the first NEIMS report on school infrastructure was released and presented to Parliament in 2008.<sup>680</sup> It reported that many schools do not have electricity, decent toilets and adequate teaching resources. Overcrowding is also commonplace and 80% of schools do not have libraries or science laboratories.

672 Ibid.

673 CASE (note 250 above).

674 Centre for Social Development in Africa (CDSA), submission to the SAHRC, (2009).

675 LRC (note 107 above).

676 Pendlebury (note 604 above), 87.

677 CASE (note 250 above).

678 Pendlebury (note 604 above), 13.

679 Department of Basic Education (note 626 above).

680 Ibid.



Access to safe drinking water ensures good health and the promotion of hygiene amongst children. As most children spend five days a week at school, it is essential that they have access to an adequate supply of potable water while at school. If they do not have access to water, their right to water is not being realised along with their right to health, as illness spreads rapidly in crowded conditions. It has also been noted that this could infringe on their right to basic nutrition because clean water is needed to prepare the nutritious drinks for the NSNP.<sup>681</sup>

The NEIMS report, conducted in 2006, showed that 89% of schools have access to clean water on or near site. Nearly all the schools in Western Cape, Northern Cape and Gauteng have water on or near site. However, a fifth of the schools in both the Eastern Cape and the Free State have no access to water on or near site.<sup>682</sup>

The Department of Basic Education reported that it has programmes to address the water and sanitation backlogs in schools from the equitable share and reported that the Department of Water Affairs and Forestry will provide water to 521 schools in 2008/09 and 1878 schools in 2009/10. It will provide sanitation to 423 schools in 2009 and to 935 schools in 2010.<sup>683</sup>

Whilst a budget plan is being developed and will be presented to Treasury, the Legal Resources Centre argued that funding will still have to, in a sense, be divided and prioritised not just in terms of what is provided for but to whom it is provided. Again this challenge is embedded in the Quintile Ranking system, which affects funding allocation.<sup>684</sup>

The lack of decent infrastructure infringes on a child's right to education, and educational opportunities remain bound to historical patterns of inequality.<sup>685</sup> Besides blocking physical access it can also be argued that, according to their rights to equality (section 9) and human dignity (section 10) in the Bill of Rights, their equal entitlement to learn, under conditions that respect, protect and promote the inherent human dignity of each child is not being protected.

### 11.5.3. Acceptability

According to ICESR, education programmes must be acceptable to learners and this includes the curricula and teaching methods. Furthermore, education needs to be relevant, culturally appropriate and of good quality.<sup>686</sup>

#### **Quality of Education**

Whilst the high enrolment rate (98%) into primary school education effectively translates into meeting the goal of achieving universal primary education, access to education cannot on its own lead to the progressive realisation of the right. Such realisation should have at its core the improvement of the capabilities of the rights holders to the extent that they can play a meaningful role in society. To that extent, the quality of schooling is imperative to the quality of skills in every aspect of socio-economic life and universal access to education becomes meaningless without sufficient standards of quality.<sup>687</sup>

It can therefore be argued that children should have '*meaningful access*' to education. In other words, "*When basic education is meaningful and adaptable, its content and teaching methods work together to foster generative learning that extends children's capacity to think for themselves and with others, and to apply what they have learnt in different contexts. In the process, basic education should also prepare young people for a productive role in society*".<sup>688</sup>

The Ministry of Education reported that considerable progress has been made in this area and stated that, according to the EDI, South Africa will reach the EFA goals by 2015.<sup>689</sup> According to the Presidency's education development indicators, the following achievements have been reached:

681 Pendlebury (note 604 above), 88.

682 Department of Basic Education. *National Educational Infrastructure Management System (NEIMS)*. (2007), 19.

683 Department of Basic Education (note 626 above).

684 LRC (note 107 above).

685 Pendlebury (note 604 above), 13.

686 Ibid 87.

687 SAHRC (note 2 above).

688 Pendlebury (note 604 above), 25.

689 Ministry of Education (note 626 above).



- The national Learner-Educator Ratios (LER) dropped from 34:1 in 1999, to 31.4:1 in 2007 in public ordinary schools.
- The Senior Certificate examinations pass rate increased from 48% in 1999 to 65% in 2007. Although there has been a drop from 73% in 2007, this was attributed to a rise in standards in the quality of exams relative to preparedness of learners to write these exams.
- The performance in producing higher grade passes in mathematics began to improve in 2002. However, the number of learners studying and passing mathematics remains too low.<sup>690</sup>

Whilst these statistics indicate an improvement in the quality of education, concerns abound in South Africa that increased access to education has come at the expense of quality, and these concerns are not without merit when examining the competencies both of learners in various grades and of teachers.

#### **Average literacy scores**

In 2007, the average literacy score in Grade three was 36%, but only 15% of children passed both numeracy and literacy. Developing literacy, which includes reading, writing and numeracy skills, is a central purpose of basic education.<sup>691</sup> However, as the above scores indicate, this purpose is not being fulfilled by the current system. ICESCR levels of 'acceptability' are therefore not being met because the aims of education are not being achieved through the current curricula and teaching methods.

#### **Senior Certificate results**

Senior Certificate results reveal that the pass rate has declined since 2004. In 2006, the official pass rate was 66.5% with only 16.2% achieving an endorsement. The Senior Certificate results in 2007 showed a further decline with a 65.3% pass rate and an endorsement rate of only 15.1%. In 2008, 38% of those who wrote the matriculation examination failed, and most of those who did pass, passed with very low grades making it difficult for them to access higher education and skills training.<sup>692</sup> The results per province revealed that in 2007, Gauteng and the Western Cape had the highest proportion of learners with a university entrance pass, with 19% and 25% respectively. Those with the lowest proportion of learners with a university entrance pass are Eastern Cape at 9% and Limpopo and Northern Cape Provinces with 12% each.

A further disaggregation of the pass rates per race group revealed that 60% of African learners who wrote the matriculation exam in 2007 passed and only 10.9% of them passed with an endorsement. A total of 98.4% of white learners passed the matriculation exam in the same year with 52% of these being with an endorsement.<sup>693</sup> These statistics provide some insight into the fact that education in South Africa is not providing the broad access to quality education that would enable the equitable sharing of opportunities. These are reflected by Graeme Bloch in the following statement regarding inequality in the education system: *"In short, the constitutional requirements for equality are not being met ... it only works for the small proportion of learners who are able to access the relevant quality institutions. For the massive majority, their poor-quality education keeps them marginalised and excluded from schools, universities and colleges that could significantly improve their lives".*<sup>694</sup>

#### **Performance in Mathematics**

With regard to performance in mathematics, approximately one out of 40 of the children who started school in 1995 passed mathematics on the higher grade in matric. A total of 93% of mathematics passes came from 21% of schools, indicating that high levels of inequality continue to persist amongst schools. Furthermore, poor mathematics results also limit the key economic skills needed by young people to enter careers such as engineering, and this adds to the skills shortage in the country which in turn places a binding constraint on growth and employment creation.<sup>695</sup>

690 Ibid.

691 Pendlebury (note 604 above), 25.

692 SAHRC (note 2 above), 23.

693 SAIRR. *South Africa Survey 2008/2009: Education*, (2009).

694 Bloch, G. Township and Rural Schools continue to be marginalised as inequality in the education system persists, Paper presented to the DBSA, Knowledge Week, <<http://www.dbsa.org/Mediaroom/Documents/DBSA%20education%20article.doc>>.

695 DBSA (note 620 above), 10.



### **Senior Certificate question papers**

Quality of education has also been compromised by a drop in standards of Senior Certificate question papers. Research conducted by Umalusi found that between 2001 and 2003 there was a significant drop in standards in question papers for six subjects. Given that the papers were 'easier', the academic and generic cognitive competencies of learners writing Senior Certificate examinations during this period were not tested. It is therefore uncertain what skills are associated with the attainment of a Senior Certificate, and many studies in South Africa have shown that many learners who enter institutions of higher learning do not have the academic, cognitive and personal competencies to cope with the pressure of higher education studies.<sup>696</sup>

### **Quality of teaching**

Whilst a large number of factors influence children's meaningful access to education, the quality of teaching has been cited as a central factor. A baseline study conducted in 2004 assessed the knowledge of a sample of Grade three teachers drawn from 24 primary schools selected at random. Literacy and mathematics tests (Grade six learner level) were administered. The average score on the language test for 23 teachers was 13 correct responses out of 24 items (55%). The majority of teachers scored between seven and 12 marks out of a possible 24 (29%–50%)<sup>697</sup> and these low scores confirm that children's right to quality education is not being fulfilled.

### **Learner-to-educator ratio**

The learner-to-educator (LER) ratio also contributes directly to the quality of schooling. The Department of Basic Education statistics indicate that there has been a continued decrease in the LER since 2004, with the average LER in public schools being 32.4 in 2007. However, these statistics mask the variation in the size of schools and classes with some educators having classes of 50 learners or more.<sup>698</sup> Furthermore, the NEIMS report (2007) found that 25% of classrooms were overcrowded with more than 45 learners per classroom.<sup>699</sup>

### **Curriculum**

The 'acceptability' of the curriculum is also central to achieving the right to education. Following the decision made by the ministerial committee tasked with reviewing Curriculum 2005, the Revised National Curriculum (RNC) was launched in 2004. Whilst it remains grounded in outcomes-based education (OBE) principles, a number of practical adaptations were made to make it more suitable to the South African schooling context. In 2007, the Department of Basic Education reported that the RNC has been introduced gradually over a number of years. Since 2004, almost 2 100 provincial officials and 200 000 Foundation and Intermediate Phase educators, as well as 75 000 Grade 10–12 educators across all provinces have been through an orientation programme in this regard. Despite these efforts, the OECD (2008) has made the following observation: "*While the ministerial committee's recommendations have helped ease the implementation of the curriculum, there is an ongoing concern that disparities in resources and educator preparedness make this modern, high knowledge, resource intense curriculum an inappropriate model in the South African context*".<sup>700</sup>

The problem is also exacerbated by the fact that most learners are not being taught in their home language, which makes it more difficult to engage with the curriculum.

### **Throughput rates of learners**

Even though the MDG target for completion of primary schooling is impressive, when looking at throughput rates, a different picture emerges. An analysis of attendance rates shows a 98% attendance rate amongst 14 year olds in 2007, which dropped to 95% of 15 year olds, 88% of 17 year olds and 59% of 19 year olds attending an educational institution.<sup>701</sup> Statistics cited by Moleke (2007) and Ramphela (2009) in the CDSA submission, revealed that currently between 50% and 70% of learners starting Grade one do not complete their schooling. It is reported that these young people will be unlikely to access jobs and as a result will increase the current

696 SAHRC (note 2 above), 24.

697 DBSA (note 620 above).

698 Pendlebury (note 604 above), 86.

699 Ibid.

700 OECD (note 651 above).

701 Pendlebury (note 604 above), 83.



unemployment and poverty levels.<sup>702</sup> For example, the submission by the Western Cape Education Department indicated that employment rates in the province amongst 15–24 year olds (many of whom were still studying during a proportion of the years in question) for the years 2007 and 2008 is just 29.3%.<sup>703</sup>

### **Department of Basic Education initiatives**

To address the issue of quality in education, a number of significant departmental initiatives have been prioritised. These include a focus on Dinaledi schools (a government/private sector partnership) that provides the basis for targeted improvements in mathematics and science outcomes. The QIDS-up (Quality Improvement and Development Strategy) programme ‘provides teacher and district support to 5000 low performing primary schools’ and ‘plans to train additional 6000 teachers over the next three years to address the current shortfalls, particularly in poor, rural schools’.<sup>704</sup> The Foundations for Learning Campaign was launched in 2008 which targets Grade R-6 learners in all schools and aims to increase literacy and numeracy skills to 50% by 2011.

However, critics have argued that, despite these policies, “*they have been unable to come together to create an effective critical mass*”.<sup>705</sup> This implies that, when applying the reasonableness criterion, these programme interventions may not be comprehensive enough to protect the right to quality education for all learners.

In response to the drop-out rate, the Minister established a Ministerial Committee on Learner Retention in 2007. It concluded that learner retention is high up to Grade nine but begins to decline from Grade 10 onwards. It proposed a number of recommendations to promote learner retention and the Department of Basic Education is considering a proposal to establish wider and more flexible pathways of learning for post-compulsory and post-school youth.<sup>706</sup>

The Department has also attempted to address some of the problems related to supporting young people to stay in school. The Further Education and Training Colleges Act (2006) requires that further education and training facilities are closely linked with communities so as to ensure better access for young people. The policy aims at supporting young people to stay in FET and has established learner support centres.<sup>707</sup> However, “*until we understand, and find solutions for, the various factors that push or pull ‘disadvantaged’ youth out of school, it is impossible to state that everyone’s right to further and even basic education has been realised*”.<sup>708</sup>

It is clear that South Africa must not only commit to the minimum standard of the MDG related to education ... rather, the state must commit itself to the realisation of the right to education, which by implication means the right not just to access school, but to be provided with a quality education.<sup>709</sup>

### **11.6. Recommendations**

Outlined below are the recommendations based on the key findings of this study.

#### **1. Planning systems**

Introduce a system of ‘poverty targeting’ as a service delivery strategy which is based on determining ‘who constitutes the prime recipients of redress’. Budget allocation for nutrition, transport and infrastructure must benefit those in dire need.<sup>710</sup>

#### **2. Definition of basic education**

Include a learner’s entire schooling career in the definition of ‘basic education’ which will be consistent with international trends.<sup>711</sup>

702 CSDA (note 691 above).

703 Western Cape Provincial Education Department, submission to the SAHRC, (2009).

704 Pendlebury (note 604 above), 28.

705 DBSA (note 620 above).

706 Department of Basic Education (note 626 above).

707 CASE (note 207 above).

708 Pendlebury (note 604 above)A De Lannoy and L Lake ‘Children’s access to education’2009, 83.

709 CSDA (note 691 above).

710 LRC (note 107 above).

711 Khoza (note 26 above). (ed). *Socio-Economic Rights In South Africa: Resource Book* (2nd Ed.), 2007, 420.



### 3. Economic and physical access to education

#### No-fee schools

The funding, implementation, monitoring and enforcement of the school funding policies should include the following actions:

- Improve administrative capacity and processes, especially for the poorest schools most reliant on the pro-poor policies.
- Improve communication between national, provincial, district and school levels with regards to the policies in question.
- Improve support and capacity building for the agencies responsible for implementing the policies so as to ensure effective implementation in a manner that is respectful of the rights of parents and their children.
- Improve monitoring and support for implementation of the policies.
- Revise the adequacy benchmark upwards based on a thorough and targeted assessment of what is factually necessary to deliver a quality education.
- Introduce better provincial financial planning and targeting to ensure adequate provincial budgets which are able to fully support all eligible no-fee schools in quintiles one, two and three.
- Introduce better provincial financial planning and targeting to ensure adequate learner allocations at all schools, based on their learner demographics, their ability to fundraise, their ability to levy school fees and all other relevant factors.
- Introduce an accessible and well publicised administratively and legally sound procedure for the re-ranking of deserving schools which would permit no-fee status, based on a proper and consultative assessment of all relevant sources of information, including the leadership at the school in question.
- Fund the exemption policy at a minimum level per exempt learner which is equivalent to the revised adequacy benchmark.<sup>712</sup>

#### School uniform guidelines

The national and provincial departments must develop concrete strategic plans which provide support to schools and governing bodies to enable them to implement the guidelines and they should include the following actions:

- Raise awareness and conduct training amongst schools, school governing bodies and parents about the guidelines and how to implement them.
- Amend the legal status of the guidelines so as to have the legal status of minimum norms and standards as opposed to being an unenforceable guideline document.
- Introduce a uniform subsidy to assist poor parents to buy uniforms.
- Provide parents with effective complaints and grievance procedures to report any contraventions of the guidelines and any related contraventions of their children's rights to education.<sup>713</sup>

#### School infrastructure

- Develop measures to ensure the equitable allocation of funding and provision of infrastructure between provinces and within provinces.

#### Learner transport

- Provide free or subsidised transport to learners who live further than three kilometres walking distance from schools.<sup>714</sup>

#### National School Nutrition Programme

- Provide nutrition programmes at all schools from Grade R, primary to secondary schools to realise the right to food of all children.<sup>715</sup>
- Give communities a greater stake in the delivery of healthy food which builds nutrition-conscious communities whose actions stretch far beyond the programme confines of the school nutrition programme.<sup>716</sup>

712 Giese (note 617 above).

713 ACESS (note 610 above), 11.

714 LRC (note 107 above), 12.

715 Ibid.

716 Ibid.



### *School safety*

The following recommendations are made which are in line with the Commission's 2006 Report on School-based Violence:

- The Department of Basic Education must develop a comprehensive, integrated strategy which focuses on making the school environment a safer place. This includes prevention strategies to ensure the physical safety of educators and learners and the provision of reporting mechanisms and care for victims.
- Provide training and support to educators to deal with violence.
- Advance a culture of peace through a curriculum of non-violence.
- Mobilise and promote the involvement of the entire school community in addressing the issue of violence, including learners, parents, families, caretakers, SGBs, NGOs and CBOs.
- Research and monitor trends of violence in South African schools.<sup>717</sup>

### **3. Principles of non-discrimination and inclusivity**

#### *Refugee and non-national learners*

- Revise the schedule relating to the Admission Policy for Ordinary Public Schools to reflect the right of children without South African birth certificates to access education.
- Ensure that all schools are trained to recognise the various forms of refugee and asylum documentation and be compelled to grant children access on the basis of these documents.
- Enhance capacity-building and training of all school staff members to address issues of xenophobia and to improve different groups of foreigners' access to education.<sup>718</sup>

#### *HIV/AIDS-infected and affected learners, orphans and children who head households*

- Improve awareness of HIV/AIDS related policies amongst school staff and SGBs through the distribution of information and training.
- Increase psycho-social support services to vulnerable learners in schools through Education District Based support teams, teams of counsellors and Learner Support Educators.
- Increase financial investment in care and support related activities to address barriers to education for vulnerable learners.
- Monitor policy implementation and evaluate the intended and unintended impact of policy on learners and schools.
- Strengthen and expand partnerships and collaboration between the Department of Basic Education, other departments and the NGO sector.<sup>719</sup>

717 SAHRC (note 675 above), 32-39.

718 CoRMSA (note 380 above, 8.

719 Giese (note 624 above), 118.



#### *Learners with disabilities*

- Evaluate the (lack of) progress made in the implementation of inclusive education, and address the issues of funding and capacity for implementation as a matter of urgency.
- Establish clear monitoring mechanisms (based on the UN Convention on Disability) to monitor the numbers of children with disabilities currently accessing education and the quality of education that they are receiving.<sup>720</sup>

#### **4. Gender equality in education**

- Formulate a clear gender policy which goes beyond the narrow confines of numerical considerations, and disseminate the policy to stakeholders at all levels of the system.
- Include a budget for the implementation of gender-based programmes at a district level which are aimed at providing girls and boys with a quality teaching and learning experience as well as building the capacity of teachers to incorporate gender meaningfully into their lessons.
- Put in place monitoring mechanisms so that qualitative achievements for gender equity can be measured and more complex manipulations of the quantitative data made.<sup>721</sup>

#### **5. Quality of education**

##### *General*

- Improve the quality of early childhood education and primary schools, including the ongoing 'Foundations for Learning' Campaign which focuses on literacy and numeracy.<sup>722</sup>
- Monitor quality education by assessing throughput rates, matriculation pass rates and grades at which young people are passing.<sup>723</sup>

##### *Through-put rates of learners*

- Continue, support, monitor and evaluate programmes to support learners at the FET level.<sup>724</sup>
- Extend the Child Support Grant to caregivers of children up to the age of 18 years, or until they have completed schooling.<sup>725</sup>

##### *Educators*

- Provide incentives such as bursaries and occupational specific dispensation to attract and retain teachers.
- Ensure pre- and in-service teacher education which prepares teachers to teach effectively in the different contexts of South African schools.
- Put support systems in place to ensure the quality and well-being of teaching staff.<sup>726</sup>

720 Lawyers for Human Rights, submission to the SAHRC (2009); DICAG (note 680 above).

721 UKZN (note 619 above), 8.

722 DBSA (note 620 above), 48.

723 CSDA (note 691 above).

724 Ibid.

725 Ibid.

726 Pendlebury (note 604 above), 29.

# Chapter 12



*General conclusions*



## CHAPTER 12: GENERAL CONCLUSIONS

This concludes the 7<sup>th</sup> report on Economic and Social Rights of the South African Human Rights Commission. The findings in this report are based on written and oral submissions that were made to the Commission in the first half of 2009 for the reporting period 2006 – June 2009. This report is written in partial fulfilment of the Commission's mandate to actively monitor the measures taken by the state towards the realisation of the rights contained in the Bill of Rights, concerning environment, water, food, social security, health, land, housing, and education.

The report also assessed the government's progress in terms of meeting the targets set in the Millennium Development Goals.

The 4 As were adopted as a framework for analysis of the progressive realisation of the right and these have been used in international discourse, particularly in the General Comments to the ICESCR, for interpreting the progressive realisation of the rights to housing, health and social security. However, because the 4 As and the interpretation of them is not standardised across each of the rights, it is difficult to draw general conclusions using them as a framework. General conclusions will thus be drawn on the principal themes that have emerged from the analysis of the period under review, and which reflect a rights-based framework.

### **Government's understanding of the progressive realisation of ESR, human rights and its constitutional obligations**

The state is working with mainly good intentions towards its constitutional obligations. However, it seems that often officials do not understand what it means to integrate rights-based approaches, and therefore revert back to hierarchical top-down decision making when faced with challenges from communities or civil society groups. In some cases, the do-no-harm principle is not applied, as in the case of informal settlement upgrading and resulting evictions of poor people to the urban periphery who are left in squalor in temporary relocation areas.

On the whole the government has comprehensive legislation, plans and policies which are an attempt to meet agreed upon targets in the realisation of rights, and there is evidence of the government's willingness to reflect on challenges that have occurred and to introduce corrective measures. However, although most of the legislation, policies and programmes of the government seem reasonable in conception, there are cases where legislation and policy is based on a flawed or incorrect paradigm. Examples of this are the one dimensional paradigms on which the housing and land policies are premised.

Flexibility is not a recognised strength of government bureaucracies, and rigidities in the system can lead to the denial of rights, such as the need to have identity documents to gain access to social security grants. On the other hand, too much flexibility could cause chaos, thus the need for balance to be introduced where inflexible processes are severely hampering the attainment of rights.

There is also a need to balance the private and public interests, and in the case of land and the environment, the private interests seem to be winning, especially when one considers mining rights and the market based policy for land reform. This is also often true for environmental protection where private land-owners and commercial interests are favoured over the public interest. This is exacerbated by corruption.

The positive attitude of the state towards progressive realisation is not always apparent. Of concern is that much of the progress towards the realisation of rights has come about as a result of litigation, which indicates that the state is not responsive enough to progressive realisation and adopts a defensive and autocratic response to pressure from civil society groups. There are also worrying tendencies where arms of the state have attempted to introduce new legislation, for example, the eradication of Slums Act in KZN and the introduction of amendments to the PIE Act, which were not adopted by the Legislature. Both of these are examples of attempts by the state to increase their power to deliver on set targets irrespective of whether the lives of the poorest were made worse. The fact that neither of these changes came to pass is a good indication that the balance of power between the arms of the state works at times in favour of human rights.

The analysis of government expenditure in most of these sectors shows a high degree of budget spending, and many of the submissions made by departments called for higher budget allocations, such as the Department of Health to manage HIV/AIDS medication and the Department of Housing to build more houses.



## **Inadequate Public participation**

Access to information in order to either inform advocacy or to inform people about the progress of their specific cases, for example in respect of land claims, is a problem raised in all the chapters. Public participation in decision making, which is a cornerstone of participatory democracy and of a rights-based approach, has been predominantly described as pseudo participation, and without access to information as a basic minimum for meaningful participation, it will remain so. Critically, without access to key information, it is difficult to ascertain whether government programmes are reasonable.

Participatory mechanisms are said to favour those with access to resources and information and there are instances where people or social movements are marginalised or harassed if they protest against the government. This creates a climate of fear which is not conducive to citizen involvement as it is the bedrock of participatory democracy.

## **Social exclusion**

In each of the hearings, examples were raised of significant segments of society that remain excluded from government programmes and these include; farm dwellers who are planned for in municipal delivery of services; people who need anti-retroviral medication but the government cannot afford to supply it all; children who are excluded from the social welfare system; non-nationals who do not have access to the same rights as South African citizens or who are denied rights due to administrative inefficiencies at the Department of Home Affairs; women in traditional areas who, due to the customary land traditions and the power given to traditional leaders in the legislation are denied access to land; people with disabilities and other special needs due to either a lack of special needs policy or the failure to implement such policies.

The pace of service delivery is simply too slow, and projections are not that positive. While programmes are put in place to bring services to the people, the most vulnerable are denied their most basic rights, such as the right to food, tenure security and adequate shelter.

## **From strategic planning to implementation**

Clearly, the South African government has set ambitious goals and targets for itself, for instance the eradication of slums by 2014, yet it is clear from the progress to date that these targets are neither realistic nor reasonable. Furthermore, chasing these targets can be at the expense of quality, as in the case of education and the mediocre matriculation pass rate. The target of 30% for the redistribution of white owned farm land has been termed the holy grail of land reform. What is missing is long term planning with reasonable targets, based on reliable information, which can map a way forward and against which progress can be measured. The state has recognised the need for longer term planning, and in many instances the data is currently being gathered to be able to make informed decisions, for example, the Informal Settlement Atlas. The call for a road map is particularly strong from the social security sector, but could be equally applied in other sectors.

The government has many systems for planning with a well formulated planning cycle linked into the budgeting process and the MTEF. Quality data is essential for good planning. There is a fundamental problem with the quality of data provided by Statistics South Africa and, as a result, key statistics are contested such as child mortality in health, and planning is predicated on poor or absent data.

The quality of planning is also influenced by the assumptions which are made about the nature of the problem to be solved or the external factors which need to be considered when designing programmes. The findings also highlight that the underlying assumptions about solutions to certain problems are often untested and may be incorrect as they may not address the root causes of the problems which lie in the policies themselves. As a result minor modifications are made to policies or plans but the outcomes do not change such as in the case of land reform moving from SLAG to LRAD. A lack of quality monitoring and evaluation data inhibits drawing conclusions about the relationships between outputs, processes and outcomes of government programmes. At times, the outcomes themselves are not clearly articulated, as in land reform.



Two major crises in this period have tested the government's ability to respond to crises and emergencies. Firstly, the xenophobic attacks have shown that the state is ill prepared to deal with a national emergency and to enact the emergency housing code. Secondly, the floods in KZN proved that even though conditional grants were made to provinces to deal with the housing crisis that emerged, the response was not quick enough.

There are significant problems in vertical and horizontal co-ordination within and between government departments. Some of these problems are located structurally in the allocation of responsibilities to the three tiers of government; others are due to factors of organisational culture and protocols which govern communication within government. Even where the allocation of roles and responsibilities to the three tiers of government is clear, it is not always sufficient, and municipalities find themselves with responsibilities which they see as unfunded mandates and for which they are ill prepared to deliver. In terms of infrastructure provision and housing, the Department of Cooperative Governance and Traditional Affairs highlighted problems with the vertical allocation of responsibilities which, if they are addressed, will improve cooperation and co-ordination.

In this period it seems that national government departments are slowly coming to terms with their facilitative role in terms of policy and programme implementation at a provincial and local level. Factors that affect the capability of the government to effectively facilitate the rights highlighted in these hearings were predominantly capacity challenges (including vacancies and skills), budget restrictions, and in some cases uncaring attitudes towards the most vulnerable.

The effectiveness of many government programmes is wanting, for example, the Land Resettlement programme is only 49% effective at best, and there are many other examples of ineffective implementation of programmes.

On the whole, even if South Africa is able to report favourably on some of the MDG, such as education enrolment ratios, the focus on these quantitative targets masks hidden discrimination and qualitative problems that are best assessed using indicators for measuring progressive realisation.

# Annexures



*General conclusions*



## Annexures

### General Submissions

- Submission to the South African Human Rights Commission: The Millennium Development Goals/Human Rights submitted by the **Limpopo Provincial Government**.
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- Average Achievement in the Mathematics Content Areas (Chapter 3). By Timss & Pirls International Study Center, Lynch School Of Education, Boston College.
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## Terms of reference

### SOUTH AFRICAN HUMAN RIGHTS COMMISSION

#### TERMS OF REFERENCE

#### PUBLIC HEARINGS ON MILLENNIUM DEVELOPMENT GOALS AND THE REALISATION OF ECONOMIC AND SOCIAL RIGHTS IN SOUTH AFRICA

##### 1. Public Hearings Announcement

- 1.1 The South African Human Rights Commission ("the Commission") hereby announces its intention to hold public hearings on "The Millennium Development Goals and the realisation of economic and social rights in South Africa" on **08 – 12 June 2009** at its Head Office located at **Human Rights House**, Johannesburg.
- 1.2 The Commission calls for written submissions covering the period from **April 2006 to March 2009** from relevant national and provincial government departments within these Terms of Reference as set out in paragraph 3 below. This includes those national and provincial government departments which the Commission will specifically address under separate cover and those not addressed specifically but which may express interest.
- 1.3 The Commission further calls for written submissions from the public and interested parties including institutions within these Terms of Reference as set out in paragraph 3 below.
- 1.4 The deadline for receipt of submissions by the Commission is **12 May 2009**, subject to paragraph 4 below.
- 1.5 A series of one day public hearings will be held focusing on each of the following human rights respectively:
  - 1.5.1 Environment, Water and Food (08 June 2009);
  - 1.5.2 Social Security (09 June 2009);
  - 1.5.3 Health (10 June 2009);
  - 1.5.4 Land and Housing (11 June 2009);
  - 1.5.5 Education (12 June 2009);
- 1.6 The Commission refers specifically to the rights stated in paragraph 1.5 above and entrenched in the Constitution of the Republic of South Africa Act, 108 of 1996 ("the Constitution") as follows:

##### “24 Environment

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.

##### 25 Property

- (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
- (2) Property may be expropriated only in terms of law of general application-
  - (a) for a public purpose or in the public interest; and
  - (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
- (3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including-
  - (a) the current use of the property;



- (b) the history of the acquisition and use of the property;
  - (c) the market value of the property;
  - (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
  - (e) the purpose of the expropriation.
- (4) For the purposes of this section-
- (a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and
  - (b) property is not limited to land.
- (5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.
- (6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.
- (7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.
- (8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36 (1).
- (9) Parliament must enact the legislation referred to in subsection (6).

## **26 Housing**

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

## **27 Health care, food, water and social security**

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

## **28 Children**

- (1) Every child has the right –
  - (b) To family care or parental care, or to appropriate alternative care when removed from the family environment;
  - (c) to basic nutrition, shelter, basic health care services and social services;
  - (d) to be protected from maltreatment, neglect, abuse or degradation; ...
- (2) A child's best interests are of paramount importance in every matter concerning the child.
- (3) In this section "child" means a person under the age of 18 years.

## **29 Education**

- (1) Everyone has the right –
  - (a) to a basic education, including adult basic education; and



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

1.7 The Commission's citation of the Millennium Development Goals refers to the following: In the Millennium Declaration, 189 member states of the United Nations signed and reaffirmed the commitment of the international community to eradicate poverty. The Declaration is a consolidation of eight interconnected development goals and constitute a set of agreed and measurable targets and quantifiable indicators. These are as follows:

- 1.7.1 Eradicate extreme poverty and hunger;
- 1.7.2 Achieve universal primary education;
- 1.7.3 Promote gender equality and empower women;
- 1.7.4 Reduce child mortality;
- 1.7.5 Improve mental health;
- 1.7.6 Combat HIV and AIDS, Malaria and other diseases;
- 1.7.7 Ensure environmental sustainability; and
- 1.7.8 Develop a global partnership for development.

1.8 The role of public hearings within the broader mandate of the Commission is significant. In applying a rights based approach, people become part of the process; they are active participants; and the process itself becomes a tool for empowerment. This aims to close the gap between human rights as entrenched in the Constitution and lived experiences.

In order for this to become a reality, the public hearings process itself should be as accessible as possible. Inclusivity is a core principle in ensuring the effectiveness of the process and the legitimacy and validity of any outcome.

This process should also be located within the broader public participation provisions of the Constitution, which are important components of any democratic process. These include public participation in policy making, law making and service delivery through, for example: involvement in and access to the National Assembly (section 59), provincial legislatures (section 118) and the general principle governing public administration that "[p]eople's needs must be responded to and the public must be encouraged to participate in policy-making" (section 195 (1) (e)).

Regard should also be had to the right of access to information entrenched in section 32 of the Constitution. The relevant enabling legislation is the Promotion of Access to Information Act, 2 of 2000. Apart from the objective of increased public participation, the legislation drives the aspirant objectives of transparency and increased accountability and integrates principles of sound corporate governance in both the public and private sector.

1.9 Further details are set out in paragraph 3 below concerning the Terms of Reference and paragraph 4 containing the Rules and Procedures.



## 2. Mandate and Powers of the Commission and Obligations of Organs of State

- 2.1 In terms of section 184 (1) of the Constitution, the Commission is mandated to: “(a) promote respect for human rights and a culture of human rights; (b) Promote the protection, development and attainment of human rights; and (c) monitor and assess the observance of human rights in the Republic.”
- 2.2 The Commission has a specific mandate in terms of section 184 (3) of the Constitution to monitor and assess the realisation of economic and social rights. section 184 (3) provides that each year the 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 of the Constitution concerning housing, health care, food, water, social security, education and the environment.
- 2.3 In referring to the Chapter 9 institutions established to support constitutional democracy, section 181 (3) of the Constitution requires that “[o]ther organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions.”
- 2.4 Section 4 (1) and (2) of the South African Human Rights Commission Act, 54 of 1994 (“the Commission’s Act”), states that:
- “(2) No organ of state and no member or employee of an organ of state nor any other person shall interfere with, hinder or obstruct the Commission, any member thereof or a person appointed under section 5 (1) or 16 (1) or (6) in the exercise or performance of its, his or her powers, duties and functions.
- (3) All organs of state shall afford the Commission such assistance as may be reasonably required for the protection of the independence, impartiality and dignity of the Commission.”

Furthermore, section 7 (2) of the Commission’s Act provides that “[a]ll organs of state shall afford the Commission such assistance as may be reasonably required for the effective exercising of its powers and performance of its duties and functions.”

Finally, the Act states in section 18 that a person who:

- “(i) fails to afford the Commission the necessary assistance referred to in section 4 (3) or 7 (2); ...

shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding six months.”

## 3. Terms of Reference

- 3.1 The Commission monitors and assesses the observance of human rights not only to comply with the dictates of the Constitution but also to achieve specific objectives, namely:
- 3.1.1 To determine the extent to which the organs of the State have respected, protected, promoted and fulfilled human rights;
- 3.1.2 To determine the reasonableness of measures including legislation, by-laws, policies and programmes adopted by organs of the State to ensure the realization of human rights in the country; and
- 3.1.3 To make recommendations that will ensure the protection, development and attainment of human rights.
- 3.2 The Commission has drafted a working document which is be available online at <http://www.sahrc.org.za> and will be attached to specifically directed requests to relevant national and provincial government departments. It is requested that interested parties access this working document to further inform their written submissions.
- 3.3 The purpose of the abovementioned working document is to critically assess the progress in respect of the realisation of economic and social rights in the context of South Africa’s commitment to meeting the Millennium Development Goals. The discussion also tentatively addresses what should be done to change the momentum from quantitative assessments to a qualitative improvement in the lives of human rights beneficiaries.



3.3 It is requested that all submissions be guided by the following two principles and respond to the questions raised:

3.3.1 Providing an assessment of the progress the state has made in the realisation of economic and social rights, not only from a point of access or a quantitative assessment, but in terms of qualitative improvement; and

3.3.2 Providing an understanding of the content of the obligation placed on the state to achieve the “progressive realisation” of economic and social rights. This should be illustrated by reference to policies and plans aimed at achieving

this objective and specifically demonstrated by reference to their practical implementation.

3.4 It is requested that in considering these two guiding principles that submissions respond to the following specific questions in relation to the relevant right/s:

3.4.1 What progress has been made by the state in achieving the Millennium Development Goals and in the realisation of economic and social rights;

3.4.2 What is the relevant legislative and policy framework;

3.4.3 Explain the processes of budgetary analysis, planning and expenditure;

3.4.4 Explain information gathering and monitoring systems utilised;

3.4.5 Discuss specific challenges experienced in achieving the Millennium Development Goals and in the realisation of economic and social rights; and

3.4.6 Discuss specific recommendations aimed at effectively responding to the challenges raised in 3.4.5 above.

3.5 It is requested that submissions cover the period from April 2006 to March 2009.

#### **4. Rules and Procedures**

4.1 The public hearings will be conducted in terms of the rules of procedure set out below and not in terms of the rules of procedure promulgated in terms of section 9 (6) of the Commission’s Act. These public hearings are not an investigation and inquiry carried out in terms of section 184 (2) of the Constitution as read with section 9 of the Commission’s Act. These public hearings are carried out in furtherance of the Commission’s specific mandate as stated in sections 184 (1) and 184 (3) of the Constitution.

4.2 The Commission calls for submissions from the relevant national and provincial government departments on the matters referred to in the Terms of Reference of these public hearings as set out in paragraph 3 above.

4.3 The Commission further calls for submissions from the public and interested parties including institutions, organisations and individuals on any matters referred to in the Terms of Reference of these public hearings as set out in paragraph 3 above.

4.4 The submissions must be submitted by e-mail, facsimile, hand delivered or posted to the address and contact details stated below in paragraph 5.

4.5 Submissions must be in writing and must disclose the name, address and other contact details of the person or institution making the submission. Anonymous submissions will not be entertained.

4.6 The Commission may publish all submissions.

4.7 The closing date for submissions is 12 May 2009. However, the Head of the Research, Documentation and Policy Analysis Programme may at her / his discretion consider late submissions.

4.8 The Commission may invite specific individuals, organisations, institutions and any other parties to make documentary and / or oral submissions to the public hearings.

4.9 Panels nominated specifically for each day of the public hearings by the Chairperson or CEO of the Commission will facilitate the public hearings process. The Chairperson or CEO of the Commission or a person designated by the Chairperson or CEO will chair each panel.

4.10 At the conclusion of the public hearings the Commission will finalise its report in terms of section 184 (3) of the Constitution. This report will be made public.



## 5. Contact Details

Submissions should be addressed to Mrs Rashida Kalake and may be posted, faxed emailed or hand delivered to the Commission as follows:

**Postal Address**  
**Private Bag X2700**  
**Houghton**  
**2041**  
**Parktown**  
**Johannesburg, 2198**

**Physical Address**  
**The Human Rights House**  
**Princess of Wales Terrace**  
**Cnr St. Andrews and York Streets**

**Per e-mail:** [rkalake@sahrc.org.za](mailto:rkalake@sahrc.org.za)  
**Per facsimile:** 086 635 2331

For further information regarding submissions and/or the hearings, kindly contact Mrs Rashida Kalake on:

**Tel:** (011) 484 8300 Ext. 2005

**Fax:** 086 635 2331

**Email:** [rkalake@sahrc.org.za](mailto:rkalake@sahrc.org.za)



## List of written submissions

<b>Submissions from Organisations</b>	
1	Compassion in World Farming / Humane Education Trust
2	Department of Tourism, Environment and Conservation (Northern Cape)
3	groundWork / Friends of the Earth South Africa
4	KwaZulu-Natal Subsistence Fishers Forum
5	South Durban Community Environmental Alliance
6	Animal Rights Africa
7	Centre for Applied Legal Studies
8	Legal Resources Centre
9	Department of Agriculture, Conservation and Environment (Gauteng)
10	University of Witwatersrand (Environment, Water & Food)
11	Department of Environmental Affairs and Development Planning (Western Cape)
12	The Federation for a Sustainable Environment
13	Department of Water and Environmental Affairs
14	Black Sash, Community Agency for Social Enquiry, National Welfare Forum, Studies in Poverty and Inequality Institute
15	Department of Social Environment (Western Cape)
16	Department of Health (National)
17	University of Cape Town: Department of Psychiatry and Mental Health
18	Department of Health (Western Cape)
19	South African National NGO Coalition
20	CANSA
21	University of Witwatersrand: Department of Architecture and Planning
22	Department of Local Government and Housing: Western Cape
23	Women on Farms Project
24	Department of Human Settlements (Mpumalanga)
25	National Department of Human Settlements
26	Black Association of the Agricultural Sector
27	Presentation by Department of Rural Development and Land Reform by Adv. Mngwengwe
28	Centre of Social Development in Africa
29	Department of Basic Education (National)
30	Department of Basic Education (Western Cape)
31	University of KwaZulu-Natal: Faculty of Education
32	Institute for Zero Waste
33	Department of Provincial and Local Government



34	AIDS Legal Network, Reproductive Health and HIV Research Unit, Steve Biko Centre for Bioethics, Sex Worker Education and Advocacy Taskforce
35	Consortium for Refugees and Migrants in South Africa
36	Disabled Children's Action Group
37	University of Western Cape / Belhar Community Health Forum
38	Cerebral Palsy Association
39	Legal Resources Centre
40	Statistics South Africa
41	Community Agency for Social Enquiry
42	Epilepsy South Africa
43	Office of the Premier (Western Cape)
44	Department of Mining
45	Limpopo Provincial Government



## List of Organisations Invited to Present

National Government Departments	Attended
Water and Environmental Affairs	Yes
Mining	Yes
Social Development	No
Statistics South Africa	Yes
Health	Yes
Human Settlements	Yes
Rural Development and Land Reform	Yes
Cooperative Governance and Traditional Affairs	Yes
Basic Education	Yes
Provincial Departments	
Gauteng Department of Agriculture, Conservation & Environment	Yes
Western Cape - DSD	Yes
Western Cape - Health	Yes
Western Cape - Housing	Yes
Western Cape - Education	Yes
Civil Society Organisations	
Centre for Applied Legal Studies	Yes
South Durban Community Environmental Alliance	Yes
groundWork	Yes
Legal Resources Centre	Yes
Black Sash	Yes
Studies in Poverty and Inequality Institute	Yes
Consortium for Refugees and Migrants in South Africa	Yes
Steve Biko Centre for Bioethics	Yes
University of Cape Town Department of Psychiatry & Mental Health	Yes
Epilepsy South Africa	Yes
Sangoco	Yes
University of Witwatersrand: Department of Architecture & Planning	Yes
University of KwaZulu-Natal: Faculty of Education	Yes
Disabled Children's Action Group	Yes
Centre of Social Development in Africa	Yes
Community Agency for Social Enquiry	Yes
Black Association of the Agricultural Sector	Yes



Public hearing programmes  
Environment, Water and Food

SOUTH AFRICAN HUMAN RIGHTS COMMISSION

**PUBLIC HEARINGS ON MILLENNIUM DEVELOPMENT GOALS AND THE REALISATION OF  
ECONOMIC AND SOCIAL RIGHTS IN SOUTH AFRICA**

**PROGRAMME: ENVIRONMENT, WATER AND FOOD**

<i>Date:</i>	08 June 2009
<i>Venue:</i>	6 <sup>th</sup> Floor, Training Centre, Human Rights House
<i>Facilitator:</i>	<i>Ms Christine Jesseman, Head of Programme: Research, Documentation and Policy Analysis, SAHRC</i>
<b>08:30 – 09:30</b>	<b>Registration and Tea</b>
09:30 – 09:45	Welcome and Opening Remarks: Dr Jody Kollapen, Chairperson, SAHRC
09:45 – 10:05	Mr Helgard Muller (Chief Director: Water Services) and Ms Tamie Mpotulo (Chief Director: National Sanitation Programme Unit): National Department of Water and Environmental Affairs
10:05 – 10:25	Questions from the Panel
10:25 – 10:45	Adv Pieter Alberts (Head of Legal Services) and Ms Stephinah Madau (Acting Chief Director: Mineral Policy): National Department of Mining
10:45 – 11:05	Questions from the Panel
<b>11:05 – 11:20</b>	<b>Tea</b>
11:20 – 11:40	Public engagement
11:40 – 11:55	Ms Jackie Dugard: Centre for Applied Legal Studies
11:55 – 12:10	Mr Desmond D'Sa: South Durban Community Environmental Alliance
12:10 – 12:25	Mr Bobby Peek: groundWork
12:25 – 12:40	Ms Naseema Fakir & Dr Koos Pretorius: Legal Resources Centre
12:40 – 13:00	Questions from the Panel
13:00 – 13:20	Public engagement
<b>13:20 – 14:20</b>	<b>Lunch</b>
14:20 – 14:50	Mr Pirate Ncube (Chief Director: Sustainable Use of the Environment) and Mr Letebele Sebitloane (Chief Director: Agriculture): Gauteng Department of Agriculture, Conservation and Environment
14:50 – 15:10	Questions from the Panel
15:10 – 15:30	Public engagement
15:30 – 15:40	Summary and Closure: Dr Jody Kollapen, Chairperson, SAHRC



**Social Security**  
**SOUTH AFRICAN HUMAN RIGHTS COMMISSION**

**PUBLIC HEARINGS ON MILLENNIUM DEVELOPMENT GOALS AND THE REALISATION OF  
ECONOMIC AND SOCIAL RIGHTS IN SOUTH AFRICA**

**PROGRAMME: SOCIAL SECURITY**

<i>Date:</i>	09 June 2009	
<i>Venue:</i>	<i>6<sup>th</sup> Floor, Training Centre, Human Rights House</i>	
<i>Facilitator:</i>	**	
<b>08:30 – 09:30</b>	<b><i>Registration and Tea</i></b>	
09:30 – 09:45	Welcome and Opening Remarks	
09:45 – 10:05	National Department of Social Development	
10:05 – 10:25	Questions from the Panel	
10:25 – 10:45	Statistics South Africa	
10:45 – 11:05	Questions from the Panel	
<b>11:05 – 11:20</b>	<b><i>Tea</i></b>	
11:20 – 11:45	Public engagement	
11:45 – 12:30	Civil society presentations:	Black Sash
		Studies in Poverty and Inequality Institute
		Consortium for Refugees and Migrants in South Africa
12:30 – 12:50	Questions from the Panel	
12:50 – 13:15	Public engagement	
<b>13:15 – 14:15</b>	<b><i>Lunch</i></b>	
14:15 – 14:45	Western Cape Department of Social Development	
14:45 – 15:05	Questions from the Panel	
15:05 – 15:30	Public engagement	
15:30 – 15:40	Summary and Closure	



## Health

### SOUTH AFRICAN HUMAN RIGHTS COMMISSION

#### PUBLIC HEARINGS ON MILLENNIUM DEVELOPMENT GOALS AND THE REALISATION OF ECONOMIC AND SOCIAL RIGHTS IN SOUTH AFRICA

##### PROGRAMME: HEALTH

<i>Date:</i>	10 June 2009
<i>Venue:</i>	6 <sup>th</sup> Floor, Training Centre, Human Rights House
<i>Facilitator:</i>	Ms Simmi Pillay, National Coordinator: Disability, SAHRC
<b>08:30 – 09:30</b>	<b>Registration and Tea</b>
09:30 – 09:45	Welcome and Opening Remarks: Dr Zonke Majodina, Deputy-Chairperson, SAHRC
09:45 – 10:15	Dr KS Chetty (Deputy Director-General): National Department of Health
10:15 – 10:35	Questions from the Panel
10:35 – 11:00	Public engagement
<b>11:00 – 11:15</b>	<b>Tea</b>
11:15 – 11:30	Ms Marlise Richter: Steve Biko Centre for Bioethics
11:30 – 11:45	Ms Sarah Skeen and Dr. Crick Lund: Dept of Psychiatry & Mental Health, UCT
11:45 – 12:00	Ms Damaris Fritz: Sangoco
12:15 – 12:30	Ms Marina Clarke: Epilepsy South Africa
12:30 – 13:10	Questions from the Panel and the Public
<b>13:10 – 14:10</b>	<b>Lunch</b>
14:10 – 14:30	Prof Keith Househam (Superintendent-General): Western Cape Department of Health
14:30 – 15:00	Questions from the Panel
15:00 – 15:30	Public engagement
15:30 – 15:40	Summary and Closure: Dr Zonke Majodina, Deputy-Chairperson, SAHRC



**Land and Housing**  
**SOUTH AFRICAN HUMAN RIGHTS COMMISSION**

**PUBLIC HEARINGS ON MILLENNIUM DEVELOPMENT GOALS AND THE REALISATION OF  
ECONOMIC AND SOCIAL RIGHTS IN SOUTH AFRICA**

**PROGRAMME: LAND AND HOUSING**

<b>Date:</b>	11 June 2009
<b>Venue:</b>	6 <sup>th</sup> Floor, Training Centre, Human Rights House
<b>Facilitator:</b>	<i>Ms Christine Jesseman, Head of Programme: Research, Documentation and Policy Analysis, SAHRC</i>
<b>08:30 – 09:30</b>	<b>Registration and Tea</b>
09:30 – 09:45	Welcome and Opening Remarks: Dr Leon Wessels, Commissioner, SAHRC
09:45 – 10:00	Mr Martin Maphisa (Deputy Director-General), Adv Jan Tladi (Chief Director), Mr Litha Jolobe (Chief Director: Transformation): National Department of Human Settlements
10:00 – 10:15	Questions from the Panel
10:15 – 10:30	Mr Yusuf Patel (Deputy Director-General): National Department of Cooperative Governance and Traditional Affairs
10:30 – 10:45	Questions from the Panel
10:45 – 11:00	Adv Vela Mngwengwe: Department of Rural Development and Land Reform
11:00 – 11:15	Questions from Panel
<b>11:15 – 11:30</b>	<b>Tea</b>
11:30 – 12:15	Public engagement
12:15 – 12:30	Ms Marie Huchzermeyer: Department of Architecture & Planning, WITS
12:30 – 12:45	Mr Mohamed Motala: Community Agency for Social Enquiry
12:45 – 13:00	Mr Nosey Pieterse: Black Association of the Agricultural Sector
13:00 – 13:15	Questions from the Panel
<b>13:15 – 14:15</b>	<b>Lunch</b>
14:15 – 14:45	Public Engagement
14:45 – 15:00	Ms Charlene Pretorius (Deputy Director: Project Performance Assessment): Western Cape Department of Housing
15:00 – 15:15	Questions from the Panel
14:15 – 15:35	Public engagement
15:35 – 15:45	Summary and Closure: Dr Pregs Govender, Commissioner, SAHRC



**Education**  
**SOUTH AFRICAN HUMAN RIGHTS COMMISSION**

**PUBLIC HEARINGS ON MILLENNIUM DEVELOPMENT GOALS AND THE REALISATION OF  
ECONOMIC AND SOCIAL RIGHTS IN SOUTH AFRICA**

**PROGRAMME: EDUCATION**

<i>Date:</i>	12 June 2009
<i>Venue:</i>	6 <sup>th</sup> Floor, Training Centre, Human Rights House
<i>Facilitator:</i>	Ms Christine Jesseman, Head of Programme: Research, Documentation and Policy Analysis, SAHRC
<b>08:30 – 09:30</b>	<b>Registration and Tea</b>
09:30 – 09:45	Welcome and Opening Remarks
09:45 – 10:15	Mr FY Patel (Deputy Director-General: System Planning and Monitoring): National Department of Basic Education
10:15 – 10:40	Questions from the Panel
10:40 – 11:00	Public engagement
<b>11:00 – 11:15</b>	<b>Tea</b>
11:15 – 11:30	Ms Jenni Karlsson: Faculty of Education, UKZN
11:30 – 11:45	Ms Sandra Ambrose: Disabled Children's Action Group
11:45 – 12:00	Ms Lauren Graham: Centre of Social Development in Africa
12:00 – 12:30	Questions from the Panel
12:30 – 13:00	Public engagement
<b>13:00 – 14:00</b>	<b>Lunch</b>
14:00 – 14:20	Mr Ron Swartz (Superintendant-General): Western Cape Department of Basic Education
14:20 – 14:50	Questions from the Panel
14:50 – 15:20	Public engagement
15:20 – 15:30	Summary and Closure



## (Footnotes)

- 1 Pre-audit outcomes
- 2 South Africa has no official poverty line (a fact of significant debate at the hearings). For the purposes of addressing this indicator this report uses a figure of R365 per month in 2007 constant Rand terms.
- 3 All statistics have been rounded off. Shaded areas indicate the unavailability of data.
- 4 UNICEF. *The State of the World's Children*, (2008).
- 5 Child (up to five years of age) mortality rate as expressed per 1 000 births.
- 6 Countdown to 2015 Core Group. *Countdown to 2015 for maternal, newborn, and child survival: the 2008 report on tracking coverage of interventions*. The Lancet. 2008. 371: 1247-58.
- 7 Infants (up to one year old) mortality rate as expressed per 1 000 births.
- 8 The World Health Organisation, <<http://www.who.org/>>.
- 9 Presidency of South Africa (note 296 above).
- 10 Health Systems Trust, health statistics, <[www.hst.org.za/healthstats/31/data](http://www.hst.org.za/healthstats/31/data)>.
- 11 Actuarial Society of South Africa website: <<http://www.assa.co.za/>>.
- 12 Statistics South Africa (note 292 above).
- 13 Ibid.
- 14 Ibid.
- 15 Department of Health (note 273 above).
- 16 National Department of Health. *The National HIV and Syphilis Sero-Prevalence Survey 2007*, (2008).
- 17 Ranked from lowest to highest prevalence rate according to 2008 statistics. Those provinces showing a decline are colour coded blue.
- 18 It is interesting to note that in the submission from the Western Cape Department of Human Settlements, this figure is made up of new houses and serviced plots, but is reported as new houses on the website.



## Notes





## Notes





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