



**ECONOMIC &
SOCIAL RIGHTS REPORT**

Baseline Information

1997-1998

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Preface

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

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

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

The Constitution calls on the state to “respect, protect, promote and fulfil the rights in the Bill of Rights.”³ It goes further, however, by establishing a mechanism for monitoring and assessing the realisation of the economic and social rights. Section 184(3) empowers the South African Human Rights Commission to require relevant organs of state to provide the Commission with measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.⁴

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

² *Ibid.*

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

⁴ Section 184(3) of the Constitution of the Republic of South Africa 1996

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

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

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

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

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

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

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

We are grateful for their participation and comments.

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

To them we say lekamoso!

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

N. Barney Pitjana
CHAIRPERSON
South African Human Rights Commission

List of Abbreviations

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

Legislation

Acts

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

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

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

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

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

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

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

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

Higher Education Act (Act No 101 of 1997)

Housing Act of 1997 (Act No 107 of 1997)

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

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

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

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

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

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

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

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

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

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

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

Introduction

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

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

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

The report has several objectives:

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

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

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

The Volumes are divided as follows:

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

Part 1: Overview of South African and International Norms

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

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

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

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

Economic and Social Trends

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

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

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

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

⁸ *Ibid*, at 5.

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

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

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

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

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

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

¹¹ World Bank, *Poverty* at 7.

¹² *Ibid.*

¹³ J May et al, *Poverty* at 29.

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

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

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

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

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

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

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

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

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

¹⁷ *Ibid.* Central Statistical Service at 20-22.

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

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

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

²¹ *Ibid.*

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

²³ RDP, *Children* 75.

contributes to considerable dissatisfaction and dysfunctional behaviour, including criminality and violence.²⁴

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

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

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

Promoting and Protecting Economic and Social Rights

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

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

²⁴ J May, *Poverty* at 237.

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

²⁶ Department of Housing. *Annual Report 1994* at 15.

²⁷ J May, *Poverty* at 139.

²⁸ Department of Housing *Annual Report 1995* 23-24.

²⁹ SA CONST., preamble.

³⁰ SA CONST, CH 2 at s 24.

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

1 Constitutional provisions

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

Housing⁴⁰

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

Health Care, Food, Water and Social Security⁴¹

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

³¹ *Ibid.*, SA CONST, ch 2 at s 25(5).

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

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

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

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

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

³⁷ *Ibid.*, SA CONST, ch 2 at s 8(1).

³⁹ *Ibid.*, SA CONST, ch 2 at s 8(2).

⁴⁰ *Ibid.*, SA CONST, ch 2 at s 26.

⁴¹ *Ibid.*, SA CONST, ch 2 at s 27.

Education ⁴²

- (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.⁴³

Environment ⁴⁴

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

⁴² *Ibid.*, SA CONST, ch 2 at s 29.

⁴³ This section also allows for the establishment of independent educational institutions.

⁴⁴ *Ibid.*, SA CONST, ch 2 at s 24.

Property ⁴⁵

- (5) *The state must take reasonable legislative and other measures, within its available resources, to foster conditions, which enable citizens to gain access to land on an equitable basis.*

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

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

Children's Rights ⁴⁶

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

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

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

2 Application and interpretation

2.1 Application

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

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

⁴⁶ *Ibid.*, SA CONST, ch 2 at s 28.

⁴⁷ The South African Cabinet has approved ratification of the ICESCR Covenant

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

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

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

2.2 Application

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

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

⁴⁹ CONST, ch 2 at s 36.

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

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

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

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

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

Significance of *respect, protect, promote and fulfil*

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

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

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

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

Significance of taking *reasonable legislative and other measures*

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

⁵⁴ *Ibid.*, SA CONST. at s 7.

⁵⁵ Maastricht Guidelines, Para. 6 (n 13) at 82.

⁵⁶ *Ibid.*, para. 7.

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

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

Significance of *progressive realisation*

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

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

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

Meaning of *within available resources*

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

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

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

⁵⁸ *Maastricht Guidelines* at para 21-24.

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

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

Minimum core-obligation

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

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

Specific provision: adequate housing

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

⁵⁹ *Ibid.* at para 25-28. *See also*, Maastricht Guidelines at para 10.

⁶⁰ *Committee on Economic*, at para 11.

⁶¹ *Ibid.*, para 10.

⁶² *Ibid.*, para 9.

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

⁶⁴ *Ibid.*, para 7.

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

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

3 Role of the South African Human Rights Commission

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

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

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

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

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

⁶⁵ *Ibid.*, para 8.

⁶⁶ SA CONST., ch 9 at s 181.

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

⁶⁸ SA CONST. ch 14 at s 184(3)..

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

⁷⁰ UN Centre for Human Rights Fact Sheet No. 16 at 3.

Part 2: Methodology

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

~ *Constitution, Section 184(3)*

Background

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

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

The workshop addressed the following themes:

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

Content and Nature of the Protocols

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

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

Each protocol was divided into nine sections requesting information on:

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

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

Analysis of Government Responses

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

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

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

⁷¹ See, Volume II for a copy of a protocol and an explanatory memorandum.

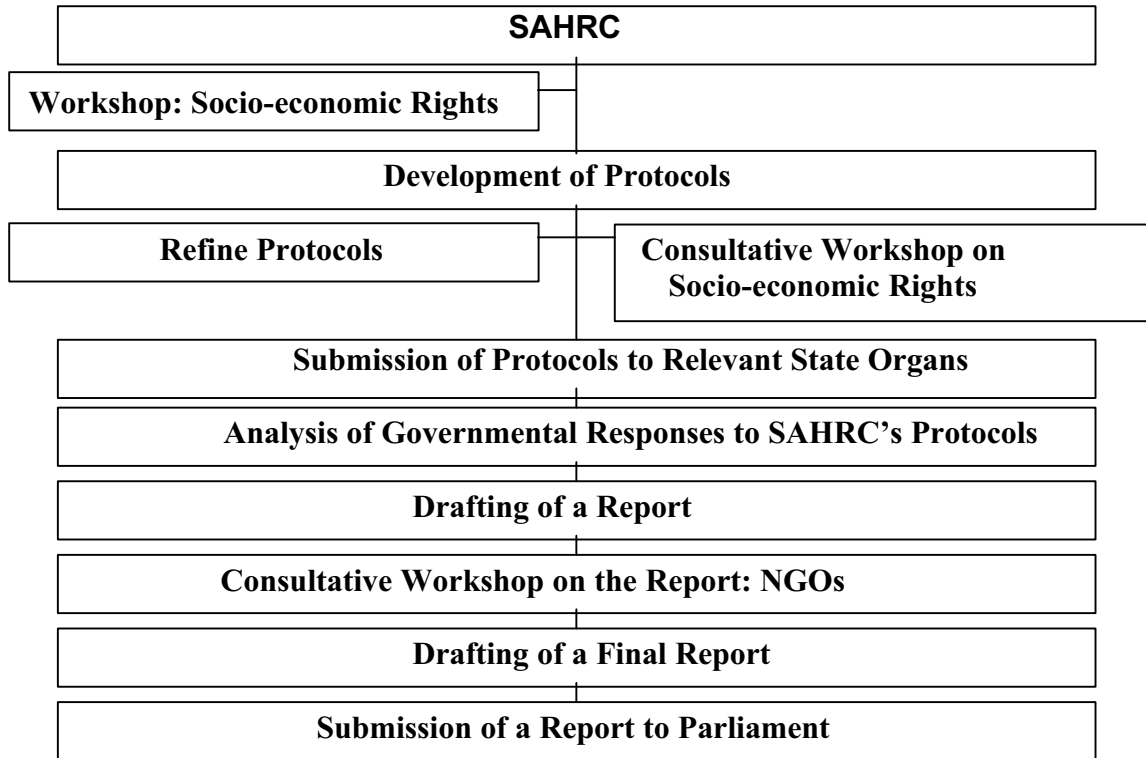
Supplementary Processes

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

⁷² See, Volume VI for a report on this campaign.

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

Monitoring and Assessing Economic and Social Rights



Part 3: Evaluation

Quantitative Analysis

1 Submission of protocols

The protocols prepared by the Commission were sent to relevant organs of state, at national, provincial and local levels of government in December 1997. The relevant organs of state had to respond to the protocols by 15 February 1998.⁷³

The Commission sent the protocols to the following government departments:

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

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

2 Responses to protocols

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

Table 1: National Government

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

Table 2: Provincial Governments

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

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

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

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

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

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

Qualitative Analysis

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

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

1 Housing

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

~ Constitution, Section 26

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

Departmental Overviews

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

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

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

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

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

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

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

National Department of Housing

Access

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

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

Progressive realisation

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

Evictions

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

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

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

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

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

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

- In deciding whether it is just and equitable to grant an order for eviction, the court must have regard to -
- (a) the circumstances under which the unlawful occupier occupied the land and erected the building or structure;
 - (b) the period the unlawful occupier and his or her family have resided on the land in question; and
 - (c) the availability to the unlawful occupier of suitable alternative accommodation or land

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

Policy and legislation

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

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

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

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

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

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

Provincial Governments

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

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

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

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

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

National Department of Housing

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

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

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

Vulnerable groups

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

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

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

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

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

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

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

National Department of Housing

Tenants rights

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

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

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

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

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

Provincial Governments

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

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

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

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

National Department of Housing

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

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

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

National Department of Correctional Services

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

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

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

Provincial Governments

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

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

National Department of Housing

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

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

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

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

⁸³ See, Department of Housing response. Volume III.

⁸⁴ See, Extension of Security of Tenure Act 3(1)(c)(iv).

⁸⁵ *Ibid.*

Provincial Governments

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

1.6 The Baseline provided for the Realisation of the Right

National Department of Housing

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

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

Provincial Governments

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

Local Governments

Greater Johannesburg Metropolitan Council (GJMC)

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

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

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

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

National Department of Housing

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

Provincial Government Departments

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

Local Governments

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

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

National Department of Housing

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

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

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

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

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

Provincial Governments

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

Local Governments

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

1.9 *Children's Rights to Shelter*

National Department of Housing

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

Provincial and local Governments

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

2 Health Care

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

~ *Constitution, Section 27*

Departmental overview

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

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

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

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

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

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

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

2.1 The Right of Access to Health Care Services

National Department of Health

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

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

National Department of Health

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

2.3 Children's Right to Basic Health Care

National Department of Health

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

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

National Department of Health

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

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

2.5 *Vulnerable Groups*

National Department of Health

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

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

Provincial Governments

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

⁸⁹ See, Response from the National Department of Health. Volume III.

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

Local government

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

3 Food Security

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

~ *Constitution, Section 27*

Departmental Overview

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

In addition, the Department Agriculture argued that:

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

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

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

3.1 The Right of Access to Sufficient Food

National Department of Agriculture

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

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

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

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

National Department of Agriculture

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

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

3.3 Vulnerable Groups

National Department of Agriculture

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

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

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

Provincial Governments

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

4 Water

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

~ *Constitution, Section 27*

Departmental Overview

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

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

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

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

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

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

National Department of Water Affairs and Forestry

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

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

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

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

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

National Department of Water Affairs and Forestry

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

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

4.3 *Duty to Promote and Fulfil the Right*

National Department of Water Affairs and Forestry

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

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

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

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

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

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

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

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

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

Provincial Governments

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

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

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

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

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

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

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

Local Government

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

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

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

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

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

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

National Department of Water Affairs and Forestry

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

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

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

Provincial and local government

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

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

National Department of Water Affairs and Forestry

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

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

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

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

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

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

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

⁹¹ See, Water Services Act of 1997 (Act no 108 of 1997).

⁹² See, Ibid.

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

Provincial Governments

No details of information systems at provincial level were provided.

Local Governments

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

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

National Department of Water Affairs and Forestry

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

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

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

Provincial Governments

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

Local Governments

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

5 Social Security

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

~ Constitution, Section 27

Departmental Overviews

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

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

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

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

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

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

5.1 *Understanding of its Constitutional Obligations*

National Department of Welfare

The right of access to social security

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

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

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

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

⁹³ SA CONST. ch 2 at s 27(1)(c)

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

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

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

The right of children to social services

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

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

Provincial Governments

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

Local Government

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

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

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

National Department of Welfare

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

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

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

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

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

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

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

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

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

Provincial and Local Governments

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

5.3 Information Systems to Monitor the Progressive Realisation of the Right

National Department of Welfare

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

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

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

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

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

Provincial and Local Governments

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

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

National Department of Welfare

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

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

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

Provincial and Local Governments

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

6 Education

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

~ Constitution, Section 29

Departmental Overview

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

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

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

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

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

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

6.1 Understanding by Relevant Organs of State of their Obligations

National Department of Education

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

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

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

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

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

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

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

National Department of Correctional Services

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

Provincial and Local Governments

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

⁹⁷ *Response to protocol by the Department of Education. Volume III.*

⁹⁸ *Ibid.*

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

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

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

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

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

6.2 *The Realisation of the Right*

National Department of Education

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

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

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

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

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

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

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

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

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

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

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

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

¹⁰³ *Ibid.*, Call for Comment at s 3.3

¹⁰⁴ *Ibid.*, Call for Comment at ss 4.1-4.2

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

National Department of Education

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

National Department of Correctional Services

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

Provincial and Local Governments

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

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

National Department of Education

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

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

National Department of Correctional Services

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

Provincial and Local Governments

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

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

National Department of Education

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

National Department of Correctional Services

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

Provincial and Local Governments

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

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

7 Environment

Everyone has the right –

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

~ Constitution, Section 24

Departmental Overview

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

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

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

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

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

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

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

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

7.1 Understanding of Constitutional Obligations

National Department of Environmental Affairs and Tourism

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

The duty to respect

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

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

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

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

The duty to protect

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

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

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

The duty to promote and fulfil

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

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

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

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

Not harmful to health or well-being

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

Sustainable

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

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

Justifiable economic and social development

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

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

¹⁰⁵ See, Response to protocol by the Department of Environmental Affairs. Volume III.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

affecting the availability of resources that future generations will depend on for survival.¹⁰⁸

People discriminated against in the past

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

7.2 Establishing Minimum Core Obligations for Environmental Rights

National Department of Environmental Affairs and Tourism

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

7.3 Information systems and information gathering

National Department of Environmental Affairs and Tourism

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

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

¹⁰⁸ *Ibid.*

7.4 Identification of Vulnerable Groups

National Department of Environmental Affairs and Tourism

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

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

7.5 Measures taken to Protect Environmental Rights

National Department of Environmental Affairs and Tourism

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

Structures and mechanisms

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

Future goals

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

Provincial Governments

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

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

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

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

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

Local Governments

Only the Greater Johannesburg Metropolitan Council submitted a report.

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

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

8 Finance

Departmental Overview

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

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

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

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

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

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

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

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

National Department of Finance

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

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

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

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

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

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

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

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

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

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

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

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

National Department of Finance

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

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

National Department of Finance

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

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

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

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

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

National Department of Finance

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

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

9 Land

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

~ Constitution, Section 25

Departmental Overview

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

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

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

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

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

National Department of Land Affairs

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

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

National Department of Land Affairs

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

9.3 Measure Taken to Address the Imbalances of the Past

National Department of Land Affairs

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

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

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

National Department of Land Affairs

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

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

National Department of Land Affairs

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

9.6 Access to Land on an Equitable Basis

National Department of Land Affairs

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

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

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

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

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

9.7 Vulnerable groups

National Department of Land Affairs

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

Provincial Departments

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

Part 4: Future Steps for Socio-Economic Development

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

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

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

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

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

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

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

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

Recommendations for the realisation of social and economic rights

1 Housing

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

2 Health

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

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

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

3 Water

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

4 Food security

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

5 Social security

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

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

6 Education

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

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

7 Environment

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

8 Finance

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

9 Land

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

Recommendations for Reporting on Social and Economic Rights

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

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

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

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

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