

# **THE RIGHT OF ACCESS TO ADEQUATE HOUSING**

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**5th Economic and Social Rights Report Series  
2002/2003 Financial Year**

South African Human Rights Commission

21 June 2004

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## **ACKNOWLEDGEMENTS**

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### **Second draft language and style editing**

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### **Final layout and content editing**

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## INTRODUCTORY SECTION

The aim of the *Introductory Section* is to provide an outline of the common analytical framework used in the reports, briefly discuss the political and economic context of the year under review, and provide an integrated summary of the key findings and recommendations of all eight reports in the series. Details of the report production process are also included at the end of this introduction.

The 5<sup>th</sup> Economic and Social Rights Report follows a more user friendly format than previous reports. There are now separately bound, less bulky, reports on Land, Water, Environment, Food, Health, Social Security, Education and Housing. Each report has an executive summary to facilitate access to the main findings and recommendations. Issues that connect one right to another are highlighted in the body of each report to emphasise the interrelatedness and interdependence of the rights in the Bill of Rights of the Constitution of the Republic of South Africa Act 108 of 1996 (simply referred to as the Constitution throughout the reports).

### A) Analytical Structure and Framework

Each report in this series follows a basic structure:

1. **Introduction:** a discussion of the meaning and content of the right with reference to the Constitution, case law and relevant international human rights instruments.
2. **Progress in the realisation of the right:** a factual description of measures instituted by government during the period under review and their impact, especially on vulnerable groups.
3. **Challenges for the realisation of the right:** a description of key challenges that hamper the realisation of the right, and in some cases, government's response to these challenges.
4. **Critique of measures instituted:** a consideration of some of the shortcomings of the measures instituted by government.
5. **Recommendations:** a set of recommendations that may encourage progressive realisation of the right as expeditiously as possible.<sup>1</sup>

Each report consolidates information from various sources including: relevant government protocol responses, government Annual Reports and Strategic Plans, the Intergovernmental Fiscal Review, as well as research funded by government, international donors or other agencies.

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<sup>1</sup> Some reports in the series end with a conclusion.

All reports employ the standard of reasonableness as laid down in the *Grootboom*<sup>2</sup> and *TAC*<sup>3</sup> judgements of the Constitutional Court, in conjunction with relevant international human rights instruments.

The constitutional provisions pertaining to socio-economic rights require the State to “take reasonable legislative and other measures within its available resources, to achieve the progressive realisation of [these rights]”.<sup>4</sup> This requirement, read with the provision on the obligation of the State to “respect<sup>5</sup>, protect<sup>6</sup>, promote<sup>7</sup> and fulfil<sup>8</sup> the rights in the Bill of rights” in section 7(2) of the Constitution ensures an effective guarantee of socio-economic rights in South Africa. The judicial enforcement of these rights by the courts and the constitutional mandate of the South African Human Rights Commission to monitor and assess the observance of the rights by the State<sup>9</sup> and non-State entities also contribute to the effectiveness of the constitutional guarantee of these rights.

The Constitutional Court has played a significant role in ensuring the effective guarantee of socio-economic rights in our country. On the obligation of the State, Judge Yacoob held in the *Grootboom* case:

*The State is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing.*<sup>10</sup>

On the effective guarantee of basic necessities of life for the poor, Judge Yacoob further said:

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

3 Minister of Health and Others v Treatment Action Campaign and Others (1) 2002 (10) BCLR 1033 (CC)

4 See sections 26(2), 27(2) and 29(2) of the Constitution.

5 Respect is a negative obligation, which requires the State to refrain from denying or limiting equal access for all persons to the enjoyment of the rights. This also means that the State should abstain from carrying out, sponsoring or tolerating any practice, policy or legal measure which violates the integrity of the individual or which in any way interferes or limits his/her right to pursue the enjoyment of the rights in the Bill of Rights.

6 The obligation to protect places a positive obligation on the State to prevent the violation of any individual's rights by a third party.

7 The obligation to promote places a positive obligation on the State to create a conducive atmosphere in which people can exercise their rights and freedoms by promoting awareness of their rights through public education.

8 The duty to fulfil places a positive obligation on the State to institute active measures that enable each individual to access entitlements to the right and which cannot be secured through exclusively personal efforts. State parties are also obliged to provide a specific right when an individual or group is unable, for reasons beyond their control, to realise the right themselves by the means at their disposal. e.g. people in disaster situations or those in dire need.

9 See sections 184(1) and (3) of the Constitution.

10 Government of the Republic of South Africa and Others v Grootboom and Others 2000(11) BCLR 1169 (CC) [24]

*This case shows the desperation of hundreds of thousands of people living in deplorable conditions throughout the country. The Constitution obliges the State to act positively to ameliorate these conditions. The obligation is to provide access to housing, health-care, sufficient food and water, and social security to those unable to support themselves and their dependants. The State must also foster conditions to enable citizens to gain access to land on an equitable basis. Those in need have a corresponding right to demand that this be done.<sup>11</sup>*

On the role of the courts in ensuring that the State fulfils its role in giving effect to these rights and thus ensuring that there is an effective guarantee of these rights, Judge Yaccob said:

*I am conscious that it is an extremely difficult task for the State to meet these obligations in the conditions that prevail in our country. This is recognised by the Constitution which expressly provides that the State is not obliged to go beyond available resources or to realise these rights immediately. I stress however, that despite all these qualifications, these are rights, and the Constitution obliges the State to give effect to them. This is an obligation that Courts can, and in appropriate circumstances, must enforce.<sup>12</sup>*

A similar position was taken by the Constitutional Court in another seminal judgment, *Minister of Health and Others v Treatment Action Campaign and Others*, where the Court held:

*The state is obliged to take reasonable measures progressively to eliminate or reduce the large areas of severe deprivation that afflicts our society. The courts will guarantee that the democratic processes are protected so as to ensure accountability, responsiveness and openness, as the Constitution requires in section 1. As the Bill of Rights indicates, their function in respect of socio-economic rights is directed towards ensuring that legislative and other measures taken by the state are reasonable.<sup>13</sup>*

In outlining the role of the courts, the Court also stated:

*The primary duty of courts is to the Constitution and the law...Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to do so.<sup>14</sup>*

While there might be some criticism directed at the Constitutional Court pertaining to the determination of when there are no available resources for the State to fulfil its obligation pertaining to socio-economic rights, the courts, particularly the Constitutional Court, have and will continue to play an important role in ensuring that the provisions in the Bill of Rights are effectively guaranteed for our people.

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<sup>11</sup> Ibid., [93]

<sup>12</sup> Ibid., [94]

<sup>13</sup> *Minister of Health and Others v Treatment Action Campaign and Others* (1) 2002 (10) BCLR 1033 (CC) [36]

<sup>14</sup> Ibid., [99]



## **B) The Political and Economic Context of the Year Under Review**

The period under review, 1 April 2002 to 31 March 2003, followed the 11 September 2001 attacks and a 24% depreciation of the South African currency (Rand) near the end of 2001. Consumer Price Inflation, especially for goods and services bought predominantly by the poor, increased sharply to the highest level since 1994. Concerns were signalled to the Competition Commission about the impact of import parity pricing in several sectors of the economy, most notably in food production, processing and retailing as well as metals and engineering. Interest rates were raised in an attempt to curb inflation, with a subsequent dampening effect on the rate of economic growth in the latter part of the financial year. According to the Reserve Bank Quarterly Bulletin for March 2003, economic growth stood at a robust 3% in 2002.

As a result of prudent fiscal management, the government introduced a more expansionary Budget in February 2002. Total government expenditure increased from R262,6 billion in 2001/2002 to R291,8 billion in 2002/2003. Overall, the budget directed more resources towards reducing poverty and vulnerability, improving education and training, developing skills amongst the youth, building and enhancing physical infrastructure and basic municipal services, as well as making communities safer places to live, work and play.

It is also important to note that the February 2003 Budget provided for significantly greater expenditure than the previous year. Total expenditure was R331,7 billion for 2003/2004. The additional allocations accommodated substantial policy changes for all three spheres of government and also provided for *higher than anticipated inflation in 2002*.

By the end of the reporting period in March 2003, the Rand had appreciated by 18%. This created concern about the job losses that could arise out of an increase in import competition. Therefore, during the period under review, the goals of progressively realising economic and social rights took place in the context of significant macro-economic volatility, inflation and an expanding government budget.

## **C) Key Interrelationships Amongst Economic and Social Rights**

### *The Right to Land*

The State was responsible for achieving progressive realisation of the right to land during the reporting period. The Commission demonstrates that there was a year on year improvement in land delivery performance by the State, especially through the Land Restitution and Land Redistribution sub-programmes. Improvements in rural tenure reform were less noticeable.

Between 2000 and 2001 there were 12 094 settled Restitution claims, while in February 2002 there were approximately 32 000 settled claims. By March 2003, there were 36 488 settled claims recorded. Although the majority of these claims were in the urban areas, settled rural claims show a substantial increase. The people working on the Land Redistribution for Agricultural Development sub-programme delivered 103 682 ha against a target of 81 555 ha for the year under review. Whereas the Department had targeted to benefit 3 601 people, the programme ended up benefiting 6 170. Concerning

tenure reform, the State initially delivered 30 000 ha of land through 201 projects. Beyond that, the State is working towards bringing the Extension of Security of Tenure Act (ESTA) and Labour Tenants Act (LTA) together in the Consolidated ESTA/Labour Tenants Bill.

Throughout the report, the Commission reflects on the demand, voiced by landless people and others, that the pace of land redress is too slow and inattentive to vulnerable groups. The report recommends accelerating land reform to meet its new targets by relieving budgetary constraints and the associated problems of personnel shortages, lack of quality training and understandable communication; land acquisition; and improvements in monitoring and evaluation.

The Commission would also like to highlight that it was informed by the Department of Land Affairs that it was impossible to represent the racial and gender composition of land purchase transactions and repossessions, according to the size and value of land parcels.

### *The Right to Education*

The right to education is analysed as a continuum of three bands of schooling- General Education and Training, Further Education and Training and Higher Education and Training. The State instituted measures to respect, protect, promote and fulfil the right to General Education and Training, and in the Commission's overall assessment, it succeeded in achieving progressive realisation of this right.

The Department of Education succeeded in ensuring that all targeted Early Childhood Development sites for children between the ages of five and six were operating. However, the Department acknowledges the challenge, which has budgetary implications, that only 13% of all children have access to the programme. In the context of a substantial increase in the rate of student enrolment in primary schools between 1994 and 2001, the National Department focused on further increasing access to General Education and Training through reviewing public school financing and the system of school fee exemptions. The report highlights the shortcoming that some schools and Provincial Departments of Education failed to make parents aware of the school fee exemption.

While progress was made in eliminating instances where learners are forced to receive education in environments that are not conducive to teaching and learning, the report emphasises that more needs to be done to address infrastructure backlogs, especially when it comes to water and sanitation. The Department also made progress in developing a redistribution model for personnel and operating expenditure that would achieve equality of teaching quality and equality of learning outcomes in the schooling system from 2003/2004 onwards. All stakeholders in education, including the SAHRC need to explore and come up with a definition of quality basic education which could be measurable and relatively easy to monitor.

Conditions in farm schools were identified as hinderance to progress in the realisation of the right to General Education and Training. The issue of street-children also has to be given some serious attention by all the relevant stakeholders. Amongst other recommendations to further observance of the right to General Education and Training,

the report calls for better-published medium term strategies and improved spending on Adult Basic Education and Training. In the 2001 Census, 4,5 million people aged 20 years and older did not have a formal education and 4 million people had primary schooling only.

Most of the developments in the Further Education and Training band met the Constitutional requirement to respect, protect, promote and fulfil the right. *Dinaledi*, the programme that seeks to improve participation and performance of learners from historically disadvantaged backgrounds in Mathematics, Science and Technology (MST), reportedly surpassed its target of 10% of students enrolling for MST in its first two years of implementation. The development of Recognition of Prior Learning (RPL) is another development that contributes to the realisation of the right to Further Education and Training. RPL recognises non-formal and/or non-academic education. RPL also stands to maximise learning opportunities for those without formal and/or academic qualifications to acquire formal qualifications in Further Education and Training institutions, which must all be registered with the State.

Areas where the State fell short of its obligations to progressively realise the right to Further Education and Training include: insufficient public education on school fee exemptions and insufficient Learner Support Materials and/or their late delivery. The report also highlights that participation rates in education by girl learners were being negatively affected by girls' involvement in income generating activities.

While Higher Education and Training is not explicitly recognised as a right in the Constitution, it obviously depends on the learning outcomes achieved in General and Further Education and Training. Here, there seems to be room for improvement as the average graduation rate for university and technikon students is 15%; less than half the ideal average of 33%.

Key challenges associated with the Higher Education and Training band include assisting potential students with subject selection choices and career guidance at school and university level, as well as lowering the high costs of accessing higher education and applying to different tertiary institutions. The report recommends ensuring that admission requirements to tertiary institutions are transparent and fair, promoting indigenous languages as academic/scientific/legal languages, mobilising funds for bridging courses and improving access for mature and post-graduate students, including part time students.

### *The Right to Water*

Ever since 2001 and the introduction of Regulations Relating to Compulsory National Standards and Measures to Conserve Water, the State instituted a national measure to fulfil the right to water by supplying 6000 litres of free, clean water, per household per month, otherwise known as Free Basic Water.

During the reporting period, approximately 1,6 million people gained access to improved piped water supplies through Department of Water Affairs and Forestry's Community Water Supply and Sanitation Programme. Approximately 65 thousand toilets facilities were constructed during the reporting period under the same programme, but it should be noted that these figures exclude the large number of

sanitation facilities that were delivered as part of the State's housing programmes. Less than 530 000 households also benefited from water and sanitation projects through the Department of Provincial and Local Government's Consolidated Municipal Infrastructure Programme. Although the above indicates that the roll-out of water and sanitation infrastructure is proceeding towards the Department's medium delivery targets, the report raises concerns about the level of dysfunctional infrastructure and projects, especially in rural areas.

At the end of the reporting period in March 2003, access to Free Basic Water by poor people stood at 38% or approximately 12,2 million people. Access to Free Basic Water by non-poor households stood at close to 100% or approximately 14,2 million people. A large number of poor people (19,6 million) were still to receive their Free Basic Water allocation. Where Free Basic Water was not available, the average cost of 6 kilolitres (kl) was approximately R13 per month. The price for 6kl of life-line supply was highest in Limpopo province at approximately R19 per month. Gauteng and KwaZulu-Natal also had comparatively high average charges for life-line supplies where Free Basic Water services were not operational.

In order to remove these glaring inequities in Free Basic Water provision, the report calls for an urgent revision of the pricing system to include a significantly greater level cross-subsidisation from high volume water users to low volume users in the 0-6 kl range. More support and funding is required to assist municipalities with capacity problems in implementing Free Basic Water. During droughts, local governments should ensure that Free Basic Water supplies for domestic users are assured and that a situation cannot develop where agricultural, mining and industrial users are allocated large volumes of water at similar prices to low-volume users.

The report describes some aspects of the devolution of domestic water quality monitoring and testing from Provincial Departments of Health to local municipalities and calls for rapidly providing sufficient funds for water quality monitoring to prevent serious disease outbreaks and illness.

The report recommends that the Department of Water Affairs and Forestry (DWAf) should take a leading role in making sure that farm dwellers, residents near commercial farms and poor households in rural and urban areas access clean water and proper sanitation services. DWAf should also ensure that it develops and implements a plan to address the specific problems of water access experienced by people living with HIV/AIDS.

The report suggests that monitoring bodies should be created at local level to effectively monitor the implementation of policies and laws aimed at fulfilling the right of access to water. The report warns that monitoring will only be effective if monitoring bodies from local, regional and national spheres work together. Where possible and when possible, the Free Basic Water allocation should be increased to cater for higher levels of domestic water consumption. A 50kl water allocation per household per month would bring South Africa's Free Basic Water allocation into the 'low level of health concern' range defined by the World Health Organisation.

## *The Right to Health Care*

The report on the right to health care focuses on key developments in three key health programmes of the State (Health Service Delivery, Strategic Health Programmes and Administration). Although the policy and legislative measures developed in the fiscal year under review can be said to be “reasonable” in their conception, there remain large gaps in implementing them in a manner such that all the provinces, urban and rural peoples, rich and the poor have equal access to the same high quality of care.

The three most important, and universally acknowledged, indicators to measure the health status of a nation are Life Expectancy at Birth, the Maternal Mortality Ratio, and the Infant Mortality Rate. Life expectancy has fallen from 56 years in 1996 to 52,5 in 2002 and is projected to fall to 47 by 2005. The infant mortality rate has increased from 45 in 1998 to 59 in 2002. This means that more children under the age of one died in 2002 as compared to 1998. The under five-mortality rate has risen from 61 in 1998 to 100 in 2002. Similarly, the maternal mortality ratio shows a steady increase since 1998 and is estimated to be 150 per 100 000 live births. The National Department of Health, as well as independent researchers, have concluded that this is due to HIV/AIDS related deaths.

The single most important challenge that government faces is the one posed by the AIDS pandemic and the high incidence of opportunistic diseases such as tuberculosis. It is estimated that about one tenth of the population of the population is infected with the HI virus i.e. close to 5 million people. The number of AIDS orphans is estimated to be one million. In a landmark case instituted by Treatment Action Campaign against the Minister of Health, the Constitutional Court, in 2002 confirmed the finding of the High Court that government’s policy to limit Nevirapine to research and training sites was in “breach of the States obligations under section 27(2) read with 27(1)(a) of the Constitution.” The report recommends that the Comprehensive National Aids Plan should be rolled out effectively in all the provinces so as to meet targets and timelines in order to substantially reduce new infections and to prolong the lives of those already infected.

In spite of the fact that policies and programmes directed at improving the health status of the country have been put in place such as the Integrated Management of Childhood Illnesses, the AIDS pandemic continues to be the single most cause of death in South Africa. This has placed an enormous strain on an already overburdened health system and undermines the efforts made by the State. This is compounded by the fact that the other economic and social rights, which contribute substantially to the health status of a nation, are also not fully enjoyed by the vast majority of poor South Africans due to the huge backlogs inherited from the past. Inadequate housing, poor sanitation, overcrowding, lack of clean drinking water, lack of efficiently run social services, insufficient nutrition and health education exacerbate the diseases of poverty. Moreover, a household that is affected by AIDS contributes to depleting the financial resources available to the family, thereby increasing the level of poverty.

government developed legislative and other measures to comply with its constitutional obligations in terms of section 7(2) of the Constitution. However, despite national policies and programmes, which, in the main comply with international standards and targets, the health care system has not been able to successfully deliver quality health

care on an equitable basis in all the provinces. Provinces do not spend the same amount per capita on health care delivery, and there is a serious lack of managerial capacity in the health system. The biggest challenge facing the efficient running of the health system is training managers to operationalise efficient systems especially for running clinics and hospitals where many problems have been identified. Efficient management systems in conjunction with effective engagement with labour should be operationalised with immediate effect in the public health sector so as to ensure that hospitals and clinics run well.

The report also recommends that there is a need to increase efforts in promoting preventative health measures by the State as well as by non-state actors. Programmes and policies should also be put in place to address the needs of the poor and vulnerable members of society, including a National Health Insurance System. Inequities in the health system such as intra- and inter-provincial health expenditures, access to clinics and hospitals, number of doctors, specialists, and nursing staff need to be addressed so as to give meaning to the constitutional right to universal and equal access to everyone. Finally, Departments of Health are strongly advised to improve their monitoring, evaluating, and reporting systems

### *The Right to Social Security*

The Constitution provides that everyone has a right to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance. The number of social assistance beneficiaries increased dramatically by 966 311 people from April 2002 to the end of March 2003, mostly as a result of increased registration for Child Support Grants for children up to the age of seven. By the end of March 2003, 5,6 million people were beneficiaries of social assistance, which mostly comprised of child support grants (2,5 million people), old age pensions (2 million people), disability grants (897 050 people) and foster care grants (133 309 people). The most rapid increases in uptake of social grants took place in Gauteng, Free State, KwaZulu-Natal, Mpumalanga and Limpopo. Take up rates were considerably lower in the Northern Cape, North-West, Eastern Cape and Western Cape.

Most provincial departments indicated that the allocated budget was not enough and that numbers of grant beneficiaries were constantly increasing, resulting in overspending for social security. However, the delivery of social services has not been efficient in some parts of the country as a result of administrative problems, lack of documentation as barriers to accessing grants, poor conditions at pay points, as well as corruption and maladministration.

As a result of rapid inflation in the cost of basic goods bought by the poor, in 2002/2003, the State moved swiftly to implement above inflation related increases in social grants. The old-age pension was increased by R20 to R640, the child-support grant increased by R10 to R140, the grant in aid increased from R120 to R130, the foster-care grant from R450 to R460, and the care dependency grant from R620 to R640.

The National and Provincial Departments of Social Development spent 90% of the R49 million allocated to the HIV/AIDS (home based/community based care) programme. The Home/Community Based Care programmes, through the collaborative work of

government, non-governmental organisations, including faith-based organisations, and communities have benefited 29 612 children orphaned or vulnerable to HIV/AIDS by the end of March 2003. The programme reached 75 000 children orphaned or vulnerable owing to HIV/AIDS since its inception in 2000.

The State also instituted new measures to further the right to social security, including disability assessment panels, a social relief of distress policy and the implementation of the National Food Emergency Scheme/Programme. Figures of the number of households that were assisted with food parcels in the pilot phase of the National Food Emergency Programme from December 2002 to the end of March 2003 range from 60 089 to 149 779.

The social security system at present does not cater for everyone and not everyone in need of social assistance is afforded such assistance. This is especially so for children in child headed households and children who live in the streets who sometimes engage in exploitative forms of labour. Some parents also fail to provide and take care of their children and put strains on the maintenance and social assistance systems.

The report recommends that the Department of Labour should take the International Labour Organisation's Decent Work for All Strategy forward in South Africa. It is also recommended that the relevant organs of State achieve better regulation of the insurance, health and maintenance systems. Particular attention should be paid to the coverage of old age pensions for workers in non-formal employment. The Department of Social Development is encouraged to continue fostering collaboration with all stakeholders, such as other government departments, Faith Based Organisations and Non-Governmental Organisations. The Basic Income Grant should continue to be considered as a viable option for addressing poverty in the country, especially amongst people of working age. The proposal to extend social assistance to all children in need (up to the age of 18), should also be kept alive.

### *The Right to Food*

The report concludes that many people, and children in particular, had their right to food violated during the reporting period as they lost access to affordable food due to high prices and/or unreasonable plans devised and supervised by government. During the reporting period, 101 152 children were admitted to hospital with severe malnutrition and it was not possible for the Commission to state how many children died of malnutrition. However, it is alarming that case fatality rates for severe malnutrition in two under-resourced hospitals in the Eastern Cape ranged from 21% to 38%.

The report finds the National Department of Health's targets for reducing malnutrition to be unreasonable in their conception because the targets for 2000 and 2005 were virtually identical. The report also finds two elements of the Primary School Nutrition Programme to be unreasonable in their conception.

The first issue concerns the reduced allocation of resources to the programme in 2002/2003 as compared to 2001/2002. In 2001/2002 the total cost of the school food "meal" ranged from approximately 99 cents to R2.10. In 2002/2003, the maximum budgeted resource available per targeted learner per day was less than 67 cents. This is

clearly an unreasonable set of parameters for the programme to be improved to meet the higher standards set by Cabinet.

The second element of the programme that was unreasonable was the reduction in the targeted number of children who should benefit from the programme. In the context of increasing numbers of children enrolled in schools, the Primary School Nutrition Programme did reach 4,5 million children in grades R to 7, however this was 151 615 children less than the year before. The drop in the number of learners who were reached is connected with government reducing its target from 5,4 million learners in 2001/2002 to 4,9 million learners in 2002/2003 as well as rapid increases in the cost of food procured for the programme. A three month gap in the implementation of the programme in the Eastern Cape also reduced access to the programme.

Non-State actors appear to have fallen short in their observance of their positive obligations to fulfil the right to food. As one example, the Yiyo Lena sifted maize relief programme introduced by a group of companies is alleged to have sold relief maize packs at a 20% discount, despite that fact that the companies announced that the programme would entail a 50% discount.

High basic food prices during the reporting period, were partly attributable to inadequate safeguards on the South African Futures Exchange, where maize prices are formed. High prices for maize were passed on to low-income consumers, who could ill afford such dramatic basic food price increases for such a sustained period of time. The potential for market manipulation should have been prevented by the Johannesburg Securities Exchange when allegations of abuse were first signalled in 2002. The report identifies that there are weaknesses in the State's observance of its obligation to protect against fraud, unethical behaviour in trade and contractual relations.

There were some signs of improvement in the State's delivery of production support to emerging farmers and people who grow their own food. For example, the Comprehensive Farmer Support Package was instituted during the reporting period to assist land reform beneficiaries. However, it was implemented in some provinces only.

The LandCare programme, which is one of the major production support programmes from the National Department of Agriculture, was heavily underspent at 65% of the total conditional grant to provinces. There is also a significant gap in production support for rural restitution beneficiaries.

It was found that very few Provincial Department's of Agriculture were operating well funded programmes designed specifically to provide grants or revolving loans to support increased access by small scale and emergent farmers to production and/or marketing related infrastructure. Production support materials and learning support materials that are relevant to resource to poor farmers in water scarce areas were also not readily available.

On the whole, the report determines that the State absorbed the heavy burden of duty to achieve the progressive realisation of the right to food as expeditiously as possible, within its available resources. However, there was a crucial weakness in the measures to protect the right to food from being violated by non-State actors or third parties that need not be repeated in future.



The report suggests that there is a need for greater care in the preparation of strategic and financial planning targets so that they inspire civil society to marshal their resources in support of the progressive realisation of the right. The report recommends: public education to raise awareness of malnutrition, rolling out the Integrated Food Security Strategy at a provincial level, improving food safety, achieving better regulation of the food industry through State procurement, accelerating agrarian reform, and communication policy and legislative developments more effectively. Finally, the report supports the call for government, labour, community and business representatives to negotiate an agreement at the National Economic Development and Labour Council (NEDLAC) to ensure the right to food and quality job creation in the food industry.

### *The Right of Access to Adequate Housing*

In order to fill some gaps in the housing policy framework, the State identified medium density housing, rental housing, social housing and emergency housing as the key policy priorities for 2002/2003. Emergency, medium density, rental and social housing are part and parcel of addressing inequalities in access to transport and the legacy of racial segregation. The Emergency Housing Policy Framework was conceptualised as a result of the *Grootboom* judgment and aims to assist groups of people that are deemed to have urgent housing problems, owing to circumstances beyond their control (e.g. disasters, evictions or threatened evictions, demolitions or imminent displacement or immediate threats to life, health and safety). The report highlights that it was not clear whether the Emergency Housing Policy should also cover people living in informal settlements, because they are living in intolerable circumstances. Social Housing projects demonstrate that socially, environmentally and sunshine conscious design principles can make a difference to the quality of State subsidised housing.

The State reported on measures to protect the right to housing in the form of the Prevention of Illegal Eviction from Occupation of Land Amendment Bill and the commencement of the Home Loan and Mortgage Disclosure Act 63 of 2000. With a view towards curbing discriminatory practices, the Act compels financial institutions to disclose information in their financial statements on home loan patterns according to categories of persons and geographic areas (both of which may be prescribed). The Community Reinvestment Bill confirmed the State's intention to increase private sector investment in the lower end of the housing market. The report highlights that the State was also attending to some aspects of the Housing Act 107 of 1997, as amended, in order to ensure that the Act, and its implementation, did not violate an individual's right to property in terms of the Constitution.

In terms of on-going policies and programmes, in 2002/2003, the State reported 203 288 houses completed or under construction, whilst the State approved 519 498 subsidies to households with a joint monthly income less than or equal to R3 500, or R1 500 if the house was built under the apartheid system. By the end of 2002/2003, the State reported that over 1,4 million houses had been delivered since 1994, whilst the number of families without houses (i.e. dwellings in backyards, informal dwellings, backyard dwellings in shared properties and caravans/tents) was reflected as 2 399 825- from the 2001 Census. The State also increased the subsidy amounts for the housing programme to keep pace with inflation and maintain the well-known quality and size of housing. Sixty-three projects were also completed as part of the Human Settlement Redevelopment Programme in order to correct imbalances and dysfunctionalities in

existing settlements that cannot be funded through the housing subsidy scheme (e.g. sports facilities, business hives, labour exchanges, cemeteries, parks and ablution blocks).

There was under expenditure on housing delivery amongst many provincial departments responsible for housing. Reporting on the constraints associated with underspending was not complete, but included the following in some cases: failure to secure suitably located land, delays in tender adjudication, municipalities failing to submit business plans, delays in the National Department approving projects, weaknesses and staff shortages at municipal level, incompetence, corruption, political intervention and nepotism, slow delivery associated with the People's Housing Process and delays at the Deeds Office.

Comparing performance in relation to targets was a problem in that provincial information was reported in the format of the number of units completed *or* under construction. Nevertheless, Gauteng and Limpopo provinces stand out as the only provinces to show a reduction in units, whether complete or under construction, from 2001/02 to 2002/03. The Gauteng Department of Housing reported delivering 59% of the target in the incremental housing programme and 39% of the target in the Social Housing programme. A Customer Support Service in the province acknowledged 83 714 queries and responded to a further 11 774 by letter.

According to the National Department of Housing, in 2002/2003, 6 469 houses did not conform to the Department's construction and safety standards. The National Home Builders Registration Council's (NHBRC) Warranty Scheme was instituted to provide assurance to beneficiaries that houses built and financed through the housing subsidy scheme are of an adequate quality. After trying to resolve disputes about the quality of construction, a housing subsidy beneficiary can forward complaints to the NHBRC. However, the report highlights that public education is required to empower consumers to identify quality problems and make use of the complaint procedures of the NHBRC. The Mpumalanga Department of Housing also reported that building works inspectors from provincial government and local government monitored the work of contractors.

The report makes one urgent recommendation, namely: to establish the dedicated fund for acquiring well-located land for low-cost housing. Other recommendations include reducing policy incoherence and institutional fragmentation, improving monitoring and evaluation, interpreting the Peoples' Housing Process as a route for strengthening culturally adequate housing, creating an informed and supportive environment for whistleblowing, and ensuring effective participation in the delivery of housing. Specific attention is drawn to the plight of farmworkers and vulnerable groups, especially HIV/AIDS orphans and People with Special Needs.

### *The Right to a Healthy Environment*

Section 24 of the Constitution establishes the right to environment in order to ensure the health and well-being of present and future generations. At its core, the right to environment aims to grant this benefit to everyone in South Africa, not just to the few. Although, translating this vision of the benefit of environmental health into reality has become increasingly complicated, ensuring that there are no violations of this right is as urgent as any violation of other rights in the Bill of Rights.

Analysts of data from South Africa's Global Atmosphere Watch station at Cape Point contend that continued emissions of greenhouse gases are cause for concern. Like many countries, South Africa is sensitive to global climate change and there are also occasions, especially in major urban areas, when more localised air pollution becomes a health threat.

By way of illustration, the Johannesburg *State of the Environment Report 2003* indicates that “while in many parts of Johannesburg, air quality is within acceptable standards, approximately 20% of the City, particularly dense settlements and lower income townships, experience severe air pollution, with ambient air pollution levels exceeding acceptable guidelines by approximately 20-30% particularly during winter when temperature inversions prevent emissions from dispersing.” The report goes further to state that “levels of particulate matter in certain townships can exceed the World Health Organisation standards by as much as 250% in winter.”

Progress in the realisation of the right to environment could not be very well monitored and observed by the Commission during the year under review because annual progress reports in terms of section 11 of the National Environmental Management Act 107 of 1998, were inaccessible at the time of writing. These progress reports should contain detailed information on the implementation of measures instituted to ensure the right to environment.

Nevertheless, the Commission did observe the growing influence of the Committee for Environmental Co-ordination through an interpretation of its review, and subsequent consolidation, of Environmental Implementation Plans and Environmental Management Plans submitted by relevant organs of State. These reports contain the planned and *aligned* outputs of national and provincial departments with an impact on, or management function over, aspects of the right to environment. The Commission also recognises that some Environmental Co-ordinating Committees were established at the provincial sphere, also for the purposes of alignment and co-operative governance.

Progress has been made, through the courts and other avenues, towards realising the procedural aspects of the right to environment (access to information, participation in decision-making processes, redress and remedy). The report includes several examples of objections and court applications lodged by Non-Governmental Organisations, with a view towards safeguarding environmental health in low-income areas. Despite these opportunities to access information and participate in decision making, some remedies for old violations could not be realised without concerted action on the part of the State. One example, is the case of workers with mercury poisoning, which first occurred many years ago. In March 2003, Thor Chemicals was served with a R60 million toxic chemical clean-up directive by the State.

On the substantive issue of waste management and pollution control, what was reported by government to the Commission fell short of what was expected in terms of the strategic objectives of the policy and strategy for pollution and waste management. The report highlights that there is still no clear understanding among the different mandate holders for this function of what they are required to do and as a result, implementation was not as effective as it could be. Having said this, there were positive developments during the period under review, including the introduction of waste buy-back centres

which address brown issues and could assist in strengthening the bargaining power of the very low income people who do the hard work of collection.

On the issue of Air Quality, the report acknowledges that progress was made in the Southern Industrial Basin through the focused action of the State and Community Based Organisations (CBOs) in linking asthma in school children to emissions, however there is an urgent need for national legislation to institute mechanisms and standards to effectively protect against pollution that threatens health and well-being, possibly including pollutant release and transfer registers.

Several new control measures were introduced to manage water pollution, including the second draft of the National Water Quality Management Framework Policy and the Waste Discharge Charge System. The Working for Water programme succeeded in protecting and preventing against water loss due to alien invasive plant species, however it was not clear how much of this work focused unfairly on commercial farmlands and not on areas inhabited by vulnerable sections of the population.

Most of the work by the State on inland as well as marine and coastal biodiversity and conservation was reasonable in as far as it related to tourism and the economic development of the country.

The report highlights that the challenges facing South Africa in terms of the right to a healthy environment include: allocating sufficient resources for progressive realisation of the right for the benefit of vulnerable groups; educating and training communities; ensuring that proper implementation systems are in place; ensuring effective co-operative governance; operating proper monitoring and evaluation systems.

The report recommends that while most policies and laws are in place or about to be instituted, there should be a quantum shift in focus towards implementation of measures to further the right to environment for vulnerable groups in a more decentralised way. Provincial government and local government should be resourced to concentrate their energies on implementation, in association with community based organisations that have already developed innovations to further the right, sometimes in the face of extreme resource scarcity.

The State has made valuable contributions to promoting the right to environment through for example, the “Bontle ke Batho” or the clean schools, wards and towns campaign; however, organs of State could do more to ensure that their own internal operations reflect implementation of the right to environment. For example, the Council for Scientific and Industrial Research (CSIR) implemented International Standards Organisation 14001 standards for handling and disposing of its own hazardous waste. This initiative by an organ of State seems to have afforded the CSIR the opportunity to gain some capacity and insight, which could be applied to other relevant contexts in the public or private sector within the South Africa.

The report also recommends that monitoring and evaluation systems need to be simplified where possible and improved. Annual progress reports in pursuit of targets and plans laid down in Environmental Implementation Plans and Environmental Management Plans should include a focus on the substantive aspects of the realisation of the right for vulnerable groups. The contents of the reports should also be widely

communicated so as to avoid conflict and encourage effective participation. The Committee for Environmental Co-ordination could also be complemented by the National Environmental Advisory Forum (NEAF) envisaged in the National Environmental Management Act 107 of 1998. This provision to encourage participation should be effected without delay.

#### **D) Protocols and the Report Production Process**

The production process for this report began with the SAHRC sending questionnaires, which are called protocols, to various organs of State for their comment in May 2003. The Commission then took some time to revise the protocols, which were resent to all relevant organs of State for comment and suggestions in June 2003. The response from relevant organs of State was not satisfactory; with the Department of Housing (Gauteng Province), the Department of Land Affairs and the Department of Water Affairs and Forestry being the only organs of State to respond. However, the Commission acknowledges that further work is required, in the next reporting cycle, to ensure that the protocols are improved for all spheres of government and parastatals.

The final protocols were sent to various organs of state (national and provincial government, parastatals, metropolitan and local councils) in July 2003, as mandated by section 184(3) of the Constitution. In future, the Commission will pay more attention to smaller municipalities by focusing field research on the implementation of programmes and projects at a local level.

The first deadline for the release of this Report was in December 2003. However, the Commission had major problems in getting timeous responses from organs of State and as a result, the Commission took a decision to subpoena several departments and postpone the release of the Report until sufficient information had been received (see summarised list overleaf).

SPHERE	INSTITUTION	DATE RESPONSE RECEIVED
2 - Provinces	GAU Social Services and Population Development	August 21, 2003
1 - National	NATIONAL Labour	August 29, 2003
2 - Provinces	EC Health	August 29, 2003
2 - Provinces	WC Agriculture	August 29, 2003
2 - Provinces	LIMPOPO Agriculture and Environmental Affairs	August 31, 2003
2 - Provinces	FS Health	September 1, 2003
2 - Provinces	NW Health	September 1, 2003
2 - Provinces	WC Social Services	September 1, 2003
2 - Provinces	EC Education and Training	September 5, 2003
2 - Provinces	GAU Health	September 5, 2003
2 - Provinces	KZN Agriculture and Environmental Affairs	September 9, 2003
4 -Parastatals	PARASTATAL Rand Water	September 9, 2003
2 - Provinces	KZN Traditional and Local Government	September 10, 2003
2 - Provinces	MP Local Govt and Traffic	September 10, 2003
2 - Provinces	NW Education	September 10, 2003
1 - National	NATIONAL Land Affairs	September 12, 2003
2 - Provinces	FS Social Welfare	September 12, 2003
2 - Provinces	GAU Housing	September 12, 2003
2 - Provinces	NC Health	September 12, 2003
2 - Provinces	NC Social Services and Population Development	September 12, 2003
1 - National	NATIONAL Agriculture	September 15, 2003
1 - National	NATIONAL Water Affairs and Forestry	September 15, 2003
2 - Provinces	EC Agriculture and Land Affairs	September 15, 2003
2 - Provinces	FS Education	September 15, 2003
2 - Provinces	GAU Education	September 15, 2003
2 - Provinces	MP Housing and Land Administration	September 15, 2003
2 - Provinces	WC Education	September 15, 2003
2 - Provinces	WC Environmental Affairs and Development Planning	September 15, 2003
2 - Provinces	WC Health	September 15, 2003
2 - Provinces	WC Housing	September 15, 2003
2 - Provinces	NC Agriculture Conservation and Environment	September 15, 2003
2 - Provinces	KZN Health	September 16, 2003
1 - National	NATIONAL Education	September 18, 2003
2 - Provinces	MP Health	September 18, 2003
2 - Provinces	NW Agriculture, Conservation and Environment	September 23, 2003
2 - Provinces	MP Social Services and Population Development	September 25, 2003
3 -Metropolitan Councils	METRO Greater Tswane Metropolitan Council	October 2, 2003
3 -Metropolitan Councils	METRO Nelson Mandela Metro Council	October 2, 2003
1 - National	NATIONAL Correctional Services	October 3, 2003
1 - National	NATIONAL Social Development	October 3, 2003
2 - Provinces	LIMPOPO Health and Welfare	October 3, 2003
2 - Provinces	EC Social Development	October 3, 2003
1 - National	NATIONAL Health	October 10, 2003
2 - Provinces	GAU Agriculture, Conservation, Environment and Land Affairs	October 10, 2003
4 -Parastatals	PARASTATAL Medicines Controls Council	October 10, 2003
2 - Provinces	FS Local Govt and Housing	October 29, 2003
1 - National	NATIONAL Housing	October 30, 2003
1 - National	NATIONAL Provincial and Local Government	October 30, 2003
1 - National	NATIONAL Environmental Affairs and Tourism	October 31, 2003
4 -Parastatals	PARASTATAL Agriculture Research Council	October 31, 2003
1 - National	NATIONAL Minerals and Energy Affairs	November 3, 2003
2 - Provinces	KZN Education and Culture	November 3, 2003
2 - Provinces	EC Housing, Local Government and Traditional Affairs	November 4, 2003
2 - Provinces	GAU Development Planning and Local Government	November 4, 2003
2 - Provinces	LIMPOPO Education	November 4, 2003
2 - Provinces	MP Agriculture, Conservation and the Environment	November 4, 2003
2 - Provinces	NC Local Govt and Housing	November 4, 2003
2 - Provinces	WC Planning and Local Govt	November 4, 2003
4 -Parastatals	PARASTATAL National Education Financial Aid Scheme	November 4, 2003
2 - Provinces	NW Developmental Local Government and Housing	November 5, 2003
3 -Metropolitan Councils	METRO Eastrand Metropolitan Council	November 5, 2003
4 -Parastatals	PARASTATAL Umngeni Water	November 5, 2003
3 -Metropolitan Councils	METRO Cape Town Metro Council	November 6, 2003
4 -Parastatals	PARASTATAL Medical Research Council	November 6, 2003
2 - Provinces	FS Agriculture	November 7, 2003
2 - Provinces	KZN Welfare and Pensions	November 7, 2003
2 - Provinces	LIMPOPO Local Govt and Housing	November 7, 2003
2 - Provinces	MP Education	November 7, 2003
2 - Provinces	NC Education	November 7, 2003
4 -Parastatals	PARASTATAL National Housing Finance Corporation	November 7, 2003
2 - Provinces	KZN Housing	November 14, 2003
3 -Metropolitan Councils	METRO eThekweni Metropolitan Council	November 17, 2003
4 -Parastatals	PARASTATAL Landbank*	November 17, 2003
4 -Parastatals	PARASTATAL Council for Scientific and Industrial Council*	November 18, 2003
2 - Provinces	FS Environmental, Tourism and Economic Affairs	November 19, 2003
3 -Metropolitan Councils	METRO Greater Johannesburg Metropolitan Council	December 17, 2003
2 - Provinces	NW Social Services**	

----- First deadline

----- Extended deadline

----- Subpoena hearings begin

----- Subpoena hearings end

\* Extension granted as a result of communication problems

\*\* No subpoena served, a letter explains the breakdown in communication

Most organs of State submitted their reports before they were meant to appear at a subpoena hearing. However, the North West Department of Social Services, Arts, Culture and Sport did not provide a response to the Commission as a result of problems with network cabling and the resignation of the personal assistant to the Acting HoD. The Department submits that it was not out of irresponsibility and deliberate disregard of the law that the Commission did not receive a report from the Department.

In order to improve the quality of the information, analysis and recommendations in the reports and to forge closer and better working relationships with government and non-governmental entities, a set of draft reports were released for comment to government and civil society before a National Input Workshop on 27-28 January 2004. Comments made at the workshop, and in writing, have been considered by each report writer.

A set of second draft reports were then made available to the Director General of the relevant national department in February 2003 to correct any remaining problems with factual information. Responses were received from the following departments: Water Affairs and Forestry, Minerals and Energy, Provincial and Local Government, Health, Social Development, Education, Land Affairs, and Housing. The final reports were also reviewed intensively within the Commission before being published.

## **E) Conclusion**

One of the concerns acknowledged by the Commission about the monitoring process so far is that it still relies heavily on reports from government.

Furthermore, even though the Bill of Rights applies vertically and horizontally and binds State entities and non-State entities, the Commission has some capacity problems in extending its mandate to non-State entities, especially big corporations.

In the next reporting cycle, the Commission will place more emphasis on conducting its own primary research in addition to improving on the existing protocols for each right and making better use of annual report information as soon as it becomes available.

## ACRONYMS

<b>CC</b>	Constitutional Court
<b>CESCR</b>	Committee on Economic Social and Cultural Rights
<b>COSATU</b>	Congress of South African Trade Unions
<b>ECDH</b>	Eastern Cape Department of Housing
<b>ESR</b>	Economic and Social Rights
<b>ESTA</b>	Extension of Land Tenure Act
<b>FSDH</b>	Free State Department of Housing
<b>GDH</b>	Gauteng Department of Housing
<b>Habitat Agenda</b>	United Nations Declaration on Human Settlements
<b>HLAMDA</b>	Home Loan and Mortgage Disclosure Act
<b>HSRP</b>	Human Settlement Redevelopment Programme
<b>ICESCR</b>	International Covenant on Economic Social and Cultural Rights
<b>KZNDH</b>	KwaZulu Natal Department of Housing
<b>LTA</b>	Land Tenure Act
<b>MDH</b>	Mpumalanga Department of Housing
<b>MTEF</b>	Medium-Term Expenditure Framework
<b>NDH</b>	National Department of Housing
<b>NHBRC</b>	National Home Builders Registration Council
<b>NWDH</b>	North West Department of Housing
<b>PHP</b>	Peoples Housing Process
<b>PIE</b>	Prevention of Illegal Evictions from and Unlawful Occupation of Land Act No 19 of 1998
<b>PSN</b>	People with Special Needs
<b>RDP</b>	Reconstruction and Development Programme
<b>SAHRC</b>	South African Human Rights Commission
<b>SCA</b>	Supreme Court of Appeal
<b>TAC</b>	Treatment Action Campaign
<b>USN</b>	Urban Sector Network
<b>WDH</b>	Western Cape Department of Housing





## **EXECUTIVE SUMMARY - THE RIGHT OF ACCESS TO ADEQUATE HOUSING**

### **Constitutional Obligations**

The Constitution provides for the right of access to adequate housing for everyone, including children and prisoners. Section 26 (2) puts an obligation on the State to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. Section 26 (3) prohibits evictions from, and demolitions of, people's homes without an order of court, made after considering all relevant circumstances.

An interpretation of the standard of reasonableness from the South African landmark case *Government of Republic of South Africa and Others v Grootboom and Others* is considered. The essence of the Constitutional Court judgment in this case is that, where the state is required to progressively realise any socio economic rights, both its policies and implementation measures, must be reasonable.

An additional requirement of transparency is also provided from the *TAC* case which calls for a concerted, coordinated and co-operative national effort, in which government, in each of the three spheres, and the panoply of resources and skills of civil societies are marshalled, inspired and led. The Housing Act of 1997 provides housing objectives.

The South African Government has also committed its self to the Habitat Agenda of ensuring adequate shelter for all and making sustainable human settlement safer, healthier and more liveable, equitable and productive. The international instruments that are used in the report to assess progressive realisation of the right include the International Covenant on Economic, Social and Cultural Rights (ICESCR), which states elements to be met when defining "adequate housing".

When the State came into power in 1994, it inherited a huge housing backlog, which remains a challenge in the year 2002/2003. In order to address the backlog, the State committed itself to build one million houses during its first term of office. By the year 1998/1999, about 721 813 houses were under construction or had already been completed. This was made possible by an estimated amount of R11,2 billion that was spent on housing between the 1994 –1999 year period. By the end of 2002/2003 the state had spent about R24,2 billion on the delivery of over 1,4 million houses. This and other instituted measures reflect as a response to the housing needs in South Africa and in compliance to the Constitution of the Republic of South Africa, in particular section 26 and section 7(2).

Notwithstanding the delivery of over a million houses, the housing situation for those living in conditions of poverty in the country serves as evidence that

April 2002 – March 2003

South Africa still has a long way to go. In each financial year, the state allocates some money in order to deal with such challenges. For the year under review, the Department of Housing received an amount of more than R4,2 Billion and also instituted various legislative and programmatic measures. The provincial budgetary allocation and other measures were carried out accordingly in order to increase delivery.

### **Progress in the realisation of the right of access to adequate housing**

Most of the Departments involved in housing delivery focussed on the implementation of the already existing measures.

#### *Respect*

The report highlights that the State was attending to sections 10A and 10B of the Housing Act 107 of 1997, as amended, in order to ensure that the Act, and its implementation, did not violate an individual's right to property in terms of the Constitution.

#### *Protect*

The State reported on measures to protect the right to housing in the form of the Prevention of Illegal Eviction from and Occupation of Land Amendment Bill and the commencement of the Home Loan and Mortgage Disclosure Act 63 of 2000. The Prevention of Illegal Eviction from and Unlawful Occupation of Land Amendment Bill is a good response from the Housing ministry as it seeks to address an "unintended consequence" of the principal Act and therefore has the potential to reconcile the right not to be arbitrarily evicted and the Government's obligation to promote the rental housing sector.

The commencement of the Home Loan and Mortgage Disclosure Act 63 of 2000 is with a view towards curbing discriminatory practices. The Act compels financial institutions to disclose information in their financial statements on home loan patterns according to categories of persons and geographic areas (both of which may be prescribed). The Community Reinvestment Bill confirmed the State's intention to increase private sector investment in the lower end of the housing market.

#### *Promote*

According to the National Department of Housing, in 2002/2003, 6 469 houses did not conform to the Department's construction and safety standards. The National Home Builders Registration Council's (NHBRC) Warranty Scheme was instituted to provide assurance to beneficiaries that houses built and financed through the housing subsidy scheme are of an adequate quality. After trying to resolve disputes about the quality of construction, a housing subsidy beneficiary can forward complaints to the NHBRC. However, the report

highlights that public education is required to empower consumers to identify quality problems and make use of the complaint procedures of the NHBRC.

### *Fulfil*

In order to fill some gaps in the housing policy framework, the State identified medium density housing, rental housing, social housing and emergency housing as the key policy priorities for 2002/2003. Emergency, medium density, rental and social housing are part and parcel of addressing inequalities in access to transport and the legacy of racial segregation. The Emergency Housing Policy Framework was conceptualised as a result of the *Grootboom* judgment and aims to assist groups of people that are deemed to have urgent housing problems, owing to circumstances beyond their control (e.g. disasters, evictions or threatened evictions, demolitions or imminent displacement or immediate threats to life, health and safety). The report highlights that it was not clear whether the Emergency Housing Policy should also cover people living in informal settlements, because they are living in intolerable circumstances. Social Housing projects demonstrate that socially, environmentally and sunshine conscious design principles can make a difference to the quality of State subsidised housing.

In terms of on-going policies and programmes, in 2002/2003, the State reported 203 288 houses completed or under construction, whilst the State approved 519 498 subsidies to households with a joint monthly income less than or equal to R3 500, or R1 500 if the house was built under the apartheid system. By the end of 2002/2003, the State reported that over 1,4 million houses had been delivered since 1994, whilst the number of families without houses (i.e. dwellings in backyards, informal dwellings, backyard dwellings in shared properties and caravans/tents) was reflected as 2 399 825- from the 2001 Census. The State also increased the subsidy amounts for the housing programme to keep pace with inflation and maintain the well-known quality and size of housing. Sixty-three projects were also completed as part of the Human Settlement Redevelopment Programme in order to correct imbalances and dysfunctions in existing settlements that cannot be funded through the housing subsidy scheme (e.g. sports facilities, business hives, labour exchanges, cemeteries, parks and ablution blocks).

There was under expenditure on housing delivery amongst many provincial departments responsible for housing. Reporting on the constraints associated with underspending was not complete, but included the following in some cases: failure to secure suitably located land, delays in tender adjudication, municipalities failing to submit business plans, delays in the National Department approving projects, weaknesses and staff shortages at municipal level, incompetence, corruption, political intervention and nepotism, slow delivery associated with the People's Housing Process and delays at the Deeds Office.

Comparing performance in relation to targets was a problem in that provincial information was reported in the format of the number of units completed or under construction. Nevertheless, Gauteng and Limpopo provinces stand out as the only provinces to show a reduction in units, whether complete or under construction, from 2001/02 to 2002/03. The Gauteng Department of Housing reported delivering 59% of the target in the incremental housing programme and 39% of the target in the Social Housing programme. A Customer Support Service in the province acknowledged 83 714 queries and responded to a further 11 774 by letter.

### *Overall Assessment*

In its conclusion, the report acknowledges the efforts by the Housing Department. However, based on a number of challenges mentioned in the report for the year under review which, *inter alia*, include poor quality of houses, segmentation between various departments involved, lack of a comprehensive and coordinated response to the housing crisis for vulnerable groups, such as HIV Aids victims; lack of capacity at the municipality level, which has not been dealt with; an inability to spend budget votes; lack of adequate information from the departments when they report to the Human Rights Commission; it concludes that it is difficult to infer that there has been indeed a progressive realisation of the right to access to “adequate housing” as required by the Constitution. The report concludes that the Department of Housing is moving in the right direction and the more than 1.4 million houses built by the end of March 2003 should be acknowledged as a strong foundation, which the department can build on.

Challenges that were encountered during the year under review are discussed briefly. The report agrees that most of the challenges are common to most provincial departments. This is followed by the researcher’s critique of all the measures. This section balances the information from the above sections based on independent research and information received from the departments. The question of the reasonableness of the measures is dealt with in more detail. The overall picture, which stands out in this section is that most of the measures by the departments do not meet the required standards.

### **Recommendations**

The report makes one urgent recommendation, namely: to establish the dedicated fund for acquiring well-located land for low-cost housing. Other recommendations include reducing policy incoherence and institutional fragmentation, improving monitoring and evaluation, interpreting the Peoples' Housing Process as a route for strengthening culturally adequate housing, creating an informed and supportive environment for whistleblowing, and ensuring effective participation in the delivery of housing. Specific attention is drawn to the plight of farmworkers and vulnerable groups, especially HIV/AIDS orphans and People with Special Needs.

## 1. INTRODUCTION

### 1.1 Constitutional Obligations

The Constitution provides for the right of access to adequate housing for everyone, including children<sup>1</sup> and prisoners.<sup>2</sup> Section 26 (2) puts an obligation on the State to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. Section 26 (3) prohibits evictions from and demolitions of people's homes without an order of court made after considering all relevant circumstances.

South Africa has also developed its own jurisprudence pertaining to the definition of reasonableness of measures adopted by the State to realise the right of access to adequate housing. The Constitutional Court in *Government of RSA v Grootboom*, confirmed that housing means a lot more than just brick and mortar.<sup>3</sup> In this regard the court said that access to adequate housing requires:

*available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these, including the building of the house itself. For a person to have access to adequate housing all of these conditions need to be met: there must be land, there must be services, and there must be a dwelling. Access to land for the purpose of housing is therefore included in the right of access to adequate housing in section 26. A right of access to adequate housing also suggests that it is not only the State who is responsible for the provision of houses, but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing. The State must create the conditions for access to adequate housing for people at all economic levels of our society. State policy dealing with housing must therefore take account of different economic levels in our society.*<sup>4</sup>

Developments in the South African jurisprudence on socio-economic rights are also marked by the rejection of the “minimum core obligation” imposed on the State when realising socio-economic rights. When the Constitutional Court rejected the minimum core obligation in the *Grootboom* and *Treatment Action Campaign (TAC)* cases, it developed its standard of assessment of the standard of reasonableness.

The essence of the Constitutional Court's judgement in the *Grootboom* case is that where the State is required to realise a socio-economic right progressively, both government policy and other measures taken to implement that policy must be “reasonable”.

The following is the standard of reasonableness for assessing compliance with the State's positive duties.<sup>5</sup>

- The measures must be coherent, comprehensive, co-ordinated and directed towards the progressive realisation of the right and ensuring that public money is better spent. These must show proper co-operation between the different spheres of government (paragraph 41, 68).

- The measures “must be capable of facilitating the realisation of the right” (para 41).
- Mere legislation is not enough, policies and programmes must be reasonable “both in their conception and their implementation” (para 42).
- Considering housing problems in their social, economic and historical context, the programme must be “balanced and flexible and make appropriate provision for attention to housing crises and to short, medium and long term needs”. A reasonable programme cannot exclude “a significant segment of society”. Conditions do not remain static and therefore the programme will require continuous review (para 43).
- The programme must include a component that responds to the urgent needs of those in desperate situations. Thus the State must “plan, budget and monitor the fulfilment of immediate needs and the management of crises ... This must ensure that a significant number of desperate people in need are afforded relief, though not all of them need to receive it immediately” (para 68).

This standard was also reviewed in the *TAC* case to include an element of transparency.<sup>6</sup>

*The magnitude of HIV/AIDS challenge facing the country calls for a concerted, co-ordinated and co-operative national effort in which government in each of its three spheres and the panoply of resources and skills of civil society are marshalled, inspired and led. This can be achieved only if there is proper communication.*

In order for it to be implemented optimally, a programme must be made known effectively to all concerned. For each measure to meet the Constitutional requirement of reasonableness, its contents must be made known appropriately (*TAC* para 123).

Importantly for this review, the South African government has committed to housing objectives which all the existing national housing programmes have to be based on, and which section 1 of the Housing Act, 107 of 1997 and the National Housing Code define as:

- the establishment and maintenance of habitable, stable and sustainable public and private residential environments to ensure viable households and communities in areas, allowing convenient access to economic opportunities, and to health, educational and social amenities.
- All citizens and permanent residents of the Republic shall, on a progressive basis, have access to:
  - permanent residential structures with secure tenure, ensuring internal and external privacy, and providing adequate protection against the elements; and

- potable water, adequate sanitary facilities and domestic energy supply.<sup>7</sup>

## 1.2 International instruments

In addition, the right to adequate housing is recognised in several international instruments<sup>8</sup>, which have paid considerable attention to the meaning of “adequate housing” and the duty of the State to realise this right. Article 11 (1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) (herein referred to as the covenant) places a duty on State parties to “progressively” recognise or realise, “within its available resources”, the right of everybody to “adequate housing”. The Committee on Economic, Social and Cultural Rights stipulates key elements necessary for a meaningful enjoyment of this right.<sup>9</sup> These include:

- security of tenure;
- availability of services, materials, facilities and infrastructure;
- affordable housing;
- habitable housing;
- accessible housing;
- location; and
- culturally adequate housing.

In line with other international instruments, South Africa’s housing policies are based on the United Nations Declaration on Human Settlements (Habitat Agenda). According to the Declaration, governments commit themselves to:

- ensuring adequate shelter for all and making sustainable human settlements safer, healthier and more liveable, equitable and productive;
- recognising the particular needs of women, children and youth for safe, healthy and secure living conditions;
- intensifying efforts to eradicate poverty and discrimination, promoting and protecting human rights and fundamental freedoms for all, and providing for basic needs, such as education, nutrition and life-span health care services, and adequate shelter for all;
- improving the living conditions in human settlements in ways that are consonant with local needs and realities, and ensuring full and equal participation of all women and men and the effective participation of youth in political, economic and social life;
- promoting full accessibility for people with disabilities, as well as gender equality in policies, programmes and projects for shelter and sustainable human settlement development; and



- making these commitments with particular reference to the more than one billion people living in absolute poverty and the members of vulnerable and disadvantaged groups identified in the Habitat Agenda.<sup>10</sup>

These are necessary commitments and conditions that have to be taken into account when assessing legal obligations to satisfy the right of access to adequate housing. The covenant is not yet a binding instrument for South Africa, since although the country has signed it, it still needs to ratify it. It is, however, used as a tool for guidance in this report.

## **2. PROGRESS IN THE REALISATION OF THE RIGHT**

### **2.1 New Policies and Programme Measures**

#### ***2.1.1 National Department of Housing***

In her presentation to the Portfolio committee in May 2002, the Minister of Housing explained the Ministerial and Departmental priorities for 2002 as defined in the National Housing Policy and Strategy.<sup>11</sup>

##### **2.1.1.1 Medium Density Housing**

This initiative responds to changes in the housing environment and redirects government's programmes towards a more needs-based response aimed at improving quality and promoting socially and economically integrated human settlements. It aims to promote higher residential densities in existing urban areas. It also looks at the identification and development of well-located State-owned land for medium density housing. It aims to focus on the integration of subsidies for medium density projects, improved access to socio-economic opportunities, and identifying and developing well-located State-owned land where public transport and appropriate employment are accessible. It will also contribute to inner city regeneration and the optimal utilisation of existing infrastructure

##### **2.1.1.2 Rental Housing Policy Framework**

This policy framework aims to provide access to rental housing for low- and middle-income groups who wish to live in temporary tenure arrangements and perhaps access individual subsidies in alternative locations. Because the starter-housing programme benefits mostly the low-income group, this might be misunderstood to imply that middle-income earners have been somewhat overlooked. Low-income and some middle-income groups do not qualify for credit extended by banks to build houses and they earn slightly more than the criterion for qualifying for a housing subsidy. In addition to this, not everybody wants to own a freestanding house. Some people, mainly because of work commitments and marital status, cannot afford to put up at one place for the rest of their lives. This policy has the potential to address these problems.

According to the former Minister of Housing, the following three challenges face this programme:

- Reducing and curtailing large financial deficits incurred on State rental stock;
- Contributing to city integration, urban renewal and restructuring; and
- Prioritising the mobilisation of the full spectrum of non-government investment and management of rental accommodations.

The rental policy clearly caters for people who have a regular income. This is due to the required operational expenses of rental units. For this reason, vulnerable groups with no source of income will not be able to qualify for it. This concern has also been raised by the UN HABITAT study on Rental Housing.<sup>12</sup> Making reference to Tribunal and Carr Gardens of Johannesburg, the study states that:

*Certainly the first two projects to have been built in Johannesburg (Tribunal Gardens and Carr Gardens) do not cater for the really poor. In addition, the Johannesburg housing Company is hardly a typical social housing foundation in so far as it was established with a R40 million capital grant from the European Union.*

*None of the various schemes that form part of the central Johannesburg project really fit the original outlines laid down at the Job summit.*

*The trouble comes when the project is handed over and the housing association has to cope with all the problems with very low rents.*

*There appears to be no way the South African poor can afford good quality, inner-city accommodation. The Foundations cannot square the circle.*

*Rental housing in South Africa is still small. It is an essential option for the urban poor; however, these are challenges that have to be dealt with in order for it to serve its intended purposes.*

### 2.1.1.3 Social Housing

The National Department has embarked on a social housing policy development programme that supports medium density rental housing. Social housing is aimed at improving quality of life and the integration of communities by providing affordable, high-standard, subsidised housing that will regenerate the area where the housing stock is located. This process is said to be managed by viable and sustainable, independent housing institutions that encourage the participation of residents in managing their own communities. Social housing policy's objective is to ensure viable and sustainable housing institutions to develop, administer and hold rental housing stock, aimed at low-

to-middle income families with earnings of between R1 500 and R7 500 per month.

During the year under review, the NDH aimed to finalise social housing policy and legislation. A specific goal is to establish 30 social housing institutions over five years and to develop 50 000 social housing units. About 351 units were developed to the tune of R300 million in New Town, Johannesburg, during the year under review. This is said to be contributing to the revival of the cultural precinct and the regeneration of the inner city of Johannesburg. About 318 units were built in the Shayamoya in KwaZulu-Natal.

Social housing has the advantage of creating different kinds of ownerships,<sup>13</sup> including:

- **Housing co-operatives:** in co-operatives, residents have shared ownership.
- **Rental:** the institution owns the stock over a long period of time.
- **Instalment sale, sectional title, rent to buy:** sooner or later ownership shifts from institution to the resident-owner.

Although social housing has the potential to improve quality of life for poor people, research by Urban Sector Network (USN) shows that there are a number of shortcomings to be dealt with by social housing before constructing more structures.<sup>14</sup>

The negative outcomes of current social housing include:<sup>15</sup>

- lack of space for key amenities such as laundry, parking and refuse;
- poorly considered water and electric meters that are prone to damage;
- large amounts of decay in the fabric of the buildings (peeling plaster, broken or missing geysers and damp in the walls of the units);
- poor collections and huge arrears;
- little participation of the beneficiaries in planning;
- poor lighting which contributes to a lack of safety and security;
- concerns about unit design and unit size; and
- lack of community and social space (safe play areas for children, adequate and appropriate washing lines, etc).

Positive outcomes include:

the design of the co-operatives (Shayamoya in particular) which takes into account some basic green design principles (environmental sustainability) namely:

- north orientation;
- air ventilation through the housing units;
- covered veranda space providing suitable outdoor living spaces;  
and
- good location, minimising tenants' transport costs.
- capacity building for beneficiaries in order for them to run the co-operatives, although the challenge to train them remains.

The main problem seems to be with the collection of rent and arrears. Reasons for the non-payment of rent included administrative failures.<sup>16</sup> Social housing policy will have to take cognisance of the inability to pay because of HIV/AIDS and unemployment. In Shayamoya the report states that by October 2002, there was almost 100% non-payment.<sup>17</sup> The reasons for the non-payment include the fact that tenants lose their jobs and some get very ill and die AIDS-related deaths. The failure to collect monthly rentals has serious implications for the sustainability of social housing.

Only Shayamoya appears to provide some access for elderly or disabled people on ground floor units. It is, however, not clear what forms of disabilities were catered for and how accessible these units were. The use of stairs only could be a problem for the aged and disabled.<sup>18</sup> They also need to have access to other floors in order to interact with other tenants, if the objective of social housing is to encourage different communities to mix and not discriminate. There does not appear to have been a conscious effort to cater for people with special needs, and those earning less than R1 500 were not accommodated.

The USN, together with other organisations, has come up with a list of what social housing should do. This includes getting government subsidies to build housing for families with little money. It is in fact not clear what "little money" means as far as this element is concerned. Social housing should also be cheap enough so that people can pay for it at the start and in the future.<sup>19</sup> So far social housing has been reported to cater for people who earn more than R1 500. This is a significant segment of the society, which should not be excluded. A reasonable programme cannot exclude a significant segment of society.<sup>20</sup>

There is no doubt that the initial objective is innovative. Social housing provides those who can afford rentals at a comparatively low price. Some residents appear to take great pride in the internal quality of their units, and many improvements such as kitchen units and fittings have been made.

However, looking at the negative outcomes above, it must be noted that the objectives of improving quality of life for all and the integration of communities have not yet been realised. Providing the first floor for the elderly and disabled only in Shayamoya does not amount to integration yet, because this is just grouping a less able and disabled community together. This means that the programme still has to grapple with a number of issues in order to be balanced and flexible and eventually meet the constitutional requirement of reasonableness.

#### 2.1.1.4 Emergency Housing Policy

The Minister acknowledged that this had been conceptualised as a result of the *Grootboom* precedent and recent floods. It was approved in the 2003/2004 financial year. Essentially, the main objective of this policy is to provide temporary assistance in the form of secure access to land and/or basic municipal engineering services and/or shelter in a wide range of situations of exceptionally urgent housing need through the allocation of grants to municipalities instead of housing subsidies to individuals.<sup>21</sup> Allocation of grants to the municipality is a way forward towards improving co-operation and co-ordination between the levels of government. However, it has been acknowledged that many municipalities do not have capacity to institute measures initiated by national government. This programme does not indicate how it intends to deal with this challenge before allocating grants to municipalities. The failure to do this will mean non-compliance with requirements of a coherent, comprehensive, co-ordinated policy directed towards progressive realisation. It will also fail to ensure that public money is better spent as required by the judgement.

According to the Department, an urgent housing situation exists when the Director-General of the National Department of Housing or his/her nominee deems that a group of people, owing to situations beyond their control:

- has become homeless as a result of declared disasters caused by natural or extraordinary occurrences such as floods, strong winds, severe rainstorms and/or hail, snow, devastating fires, earthquakes and/or sinkholes or large disastrous industrial incidents, where assistance is required after the initial remedial measures have been taken in terms of the Disaster Management Act 57 of 2002 by the municipality or provincial government to alleviate the immediate crisis situation;
- has become homeless as a result of a disaster which is not declared but destitution is caused by similar occurrences;
- lives in dangerous conditions such as being situated below the hundred-year flood line or on land which is dolomitic, undermined at shallow depth, or prone to sinkholes and who in the opinion of the Director General or her/his nominee requires urgent assistance;
- lives in the way of engineering services or proposed services such as those for water, sewerage, power, roads or railways, or in reserves established for any such purposes and who in the opinion of the Director General or her/his nominee requires urgent assistance;
- is evicted or threatened with imminent eviction from land or from unsafe buildings, or situations where in the opinion of the Director General or her/his nominee, pro-active steps ought to be taken to forestall such consequences;

- whose homes are demolished or threatened with imminent demolition, or situations where in the opinion of the Director General or her/his nominee, proactive steps ought to be taken to forestall such consequences;
- is displaced or threatened with imminent displacement as a result of a state of civil conflict or unrest, or situations where in the opinion of the Director General or her/his nominee, pro-active steps ought to be taken to forestall such consequences; or
- lives in conditions which in the opinion of the Director General or her/his nominee pose immediate threats to life, health and safety and require urgent assistance and is in a situation of exceptional urgent housing need, which can in the opinion of the Director General or his/her nominee, be reasonably addressed only in terms of this programme.

This policy is yet to be implemented, so the impact cannot be pronounced upon. It is, however, worth noting that the sustainability of this programme might be an issue, as the grant does not cover refuse removals, operations, maintenance and management of the development. The temporary nature of the programme presupposes a programme that will adequately help the situation at that moment. In this regard, if the sustainability of this programme is questionable, paragraphs 41 and 43 of *Grootboom* must be taken into consideration.

There is no doubt that the current housing situation in parts of South Africa needs urgent attention. There are people in desperate need who appear to be excluded from the programme's definition of "emergency circumstances". The Department has already mentioned that this programme was conceptualised as a direct response to *Grootboom*. A background to the judgement of the court is therefore appropriate.

When Yacoob J handed down the judgement, he stated that the central thrust of the housing development policy (Housing Act 107 of 1997) was on the need for housing development as defined in the Act.<sup>22</sup> The Act made no express provision to facilitate access to temporary relief for people who had no access to land, no roof over their heads, living in intolerable conditions and in crisis because of natural disasters such as floods, fires, or because their homes are under threat of demolition.<sup>23</sup> Section 26 of the Constitution requires that any measure by government must be reasonable and in order to determine whether the national programme falls within this definition, one must consider whether a national housing programme that leaves out the immediate improvement of the circumstances of those in crisis can meet the test of reasonableness.<sup>24</sup> The absence of this component may have been accepted if the nationwide housing programme resulted in affordable houses for most people within a reasonably short time.<sup>25</sup> However, it was not the case. As a result, the immediate crisis was accordingly not met. This consequently resulted in pressure on existing settlements and land invasions by those in desperate need.

The conditions explained in the court judgement are similar to those observed by the Commission in several parts of the country, especially in informal settlements. Indeed, the scale of the housing problem in South Africa suggests that affordable houses for most of those in desperate need cannot be delivered within a reasonable period of time. If, therefore, this programme does not cater for this group defined in para 52 in *Grootboom*, “the desperate will be consigned to their fate for the foreseeable future unless some temporary measures exist as an integral part of the nationwide housing programme”.<sup>26</sup> The Commission is aware of the fact that the suggestion that emergency accommodation should also cover people living in informal settlements, as they are “living in intolerable situations”, is arguable. If this argument is legally valid, the State must consider it, for the failure to consider the argument will render the programme unreasonable.

#### 2.1.1.5 National Home Builders Registration Council’s Warranty Scheme to the Housing Subsidy Scheme Financed Houses (NHBRC)

The main object of the NHBRC Warranty Scheme is, *inter alia*, to provide protection to housing consumers in respect of the failure of home builders to comply with their obligations in terms of the Housing Consumers Protection Measures Act No. 95 of 1998. Prior to April 2002, the NHBRC Warranty Scheme did not apply to houses developed through government’s housing subsidies. The Act provides for a mechanism by which the Minister may decide when the said warranty scheme shall apply to houses financed through the Housing Subsidy Scheme. It also provides for improved structural quality in the interest of housing consumers and the home building industry. Housing consumers can now forward complaints to the NHBRC if there are defects in their subsidised housing units and the builder is registered with the NHBRC. But consumers and home builders must try to resolve their differences in a reasonable manner if possible, before referring them to the NHBRC.

The NHBRC has a complaints procedure that aims to:<sup>27</sup>

- assist the housing consumer by ensuring that home builders meet their obligations under the Act;
- assess applications made by housing consumers seeking assistance from the NHBRC for the rectification of the major structural defects; and
- detect contraventions of the Act requiring disciplinary action or prosecution.

The NHBRC deals with the following three types of complaints:

- Three months’ non-compliance period;<sup>28</sup>
- One year roof leak;<sup>29</sup> and
- Five years’ major structural defects period.<sup>30</sup>

The Council is well placed to protect the right of access to adequate housing, but it still needs to empower the consumers so that they understand and know what constitutes a defective structure. This includes the creation of simplified booklets on the obligations and standards that should be met by home builders.

#### 2.1.1.6 Human Settlement Redevelopment Programme (HSRP)

This programme was instituted in the 1999/2000 financial year. It is aimed at assisting in improving the quality of human settlement through the identification and correction of imbalances and dysfunctions in such human settlements. The programme largely funds projects and activities that cannot be funded through formal, established government programmes.

According to the Department, in the financial year 2002/2003, the HSRP funded 63 projects in the nine provinces. This adding to the R105 999 991 worth of projects within previously disadvantaged human settlements identified as dysfunctional.

The programme has impacted on the physical, environmental, social and economic lives of the communities.

##### *2.1.1.6.1 Physical*

The HSRP assists with the development of infrastructure (social and engineering) as well as the upgrading of neighbourhood environments that enhances the daily lives of communities and contributes to their safety, security and access to minimum levels of services.

In Klipplaat (Ikwezi Municipality), the programme assisted the municipality to upgrade the sanitation system through the use of local labour. Through the upgrading of Altrek sports facility (Alexandra) and the construction of a labour exchange building within Imizamo Yethu informal settlement (Houtbay) the programme facilitates the construction and/or upgrading of essential community facilities where these are absent or in a dilapidated state.

##### *2.1.1.6.2 Social and Economic Perspective*

A number of projects, which have the potential to affect the income generation abilities of households directly, are funded through this programme. Examples of such projects include the construction of Mbekweni business hive and the upgrading of the informal business area in Piketberg (Bergrivier Municipality).

##### *2.1.1.6.3 Environmental*

The programme has provided funding for the upgrading of cemeteries and the development of ablution facilities in public open spaces as well as the development of parks within Alexandra.

##### *2.1.1.6.4 Tenure/Ownership Problems*



April 2002 – March 2003

The HSRP is funding the resolution of land ownership rights in Khayelitsha – Site C in respect of 3 468 sites/erven that are currently doubly occupied.

#### 2.1.1.7 Adjustment of the Quantum of the Subsidy Amount to Keep Up with Inflation and Maintain the Quality of the Products

The year under review witnessed an increase in housing subsidy amounts. Table 1 illustrates the new amounts:

**Table 1: Increase in the Subsidy Amount 2002/2003**

<i>Income Category</i>	<i>Previous Subsidy</i>	<i>New Subsidy</i>
R0 to R1 500	R 16 000	R 20 300
R1 501 to R2 500	R 10 000	R 12 700
R 2 501 to R3 500	R 5 500	R 7 000
Old aged, disabled and indigent	R 16 000	R 22 800
Consolidation sub: up to R1 500	R 8 500	R 10 900
Consolidation sub: Old aged, disabled and indigent	R 8 500	R 13 400

*Source: National Department of Housing Protocol*

In line with the increase of the quantum above, the disabled variation amounts were increased, as follows:

**Table 2: Disabled Variation Amount 2002/2003**

<i>Disabled Category</i>	<i>Purpose of Variation</i>	<i>Existing Amount</i>	<i>Increased Amount</i>
A, B and C [Walking]	Access to house – 12m <sup>2</sup> of paving and ramp at doorway	R720	R868
A, B and C [Walking]	Kick plates to doors	R300	R362
A, B and C [Walking]	Grab rails and lever action taps in the bathroom [enlargement of the area can be done at the expense of the rest of the house]	R1 100	R1 327
D [Hearing]	Visual door bell indicator	R700	R844

*Source: National Department of Housing Protocol*

The increase in these subsidies has potential to improve the quality of houses for the beneficiaries.

#### 2.1.2 Provincial Departments of Housing

The provincial departments have implemented some of the programmes that do not flow from the national department. Those that have already been discussed at national level will not be discussed under the provinces. Measures implemented differ from province to province. Only three provincial departments complied with section 184(3) of the Constitution. These were the Gauteng Department of Housing (GDH), the Western Cape Department of

Housing (WDH) and the Mpumalanga Department of Housing (MDH). All the other provincial departments failed to meet the deadline for submission. Even though their responses were received late, the measures they took are discussed in this report.

Most of the departments focused on the implementation of existing programmes.<sup>31</sup> These included:

- rural housing subsidy;
- project-linked subsidy;
- consolidation subsidy;
- institutional subsidy;
- relocation subsidy;
- integrated serviced land subsidy;
- hostel upgrading programme;
- people's housing process;
- rapid land release programme;
- social housing programme;
- disaster intervention programme; and
- right-sizing subsidy.

#### 2.1.2.1 Gauteng Department of Housing

The strategic direction of the Gauteng Department of Housing (GDH) for 2002/2003 focused on four primary delivery thrusts. These were not new policy and programme measures.

##### *2.1.2.1.1 Incremental Housing*

The objective for this programme is to ensure:

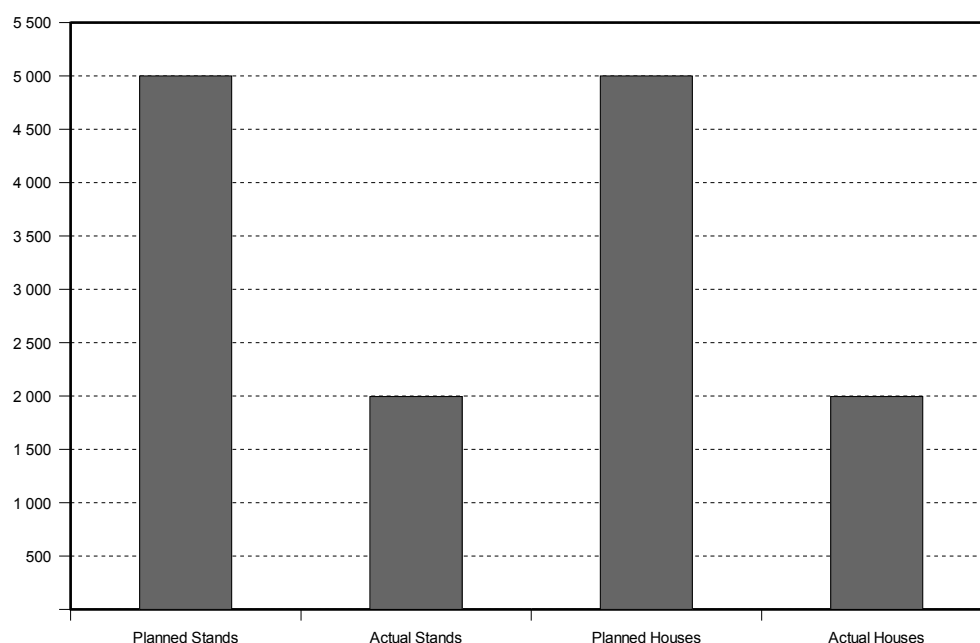
- the rapid release of land for housing development;
- the provision of essential services like water and sanitation to thousands of people in townships and informal settlements;
- that thousands of households are provided immediately with security of tenure, thus reducing and eradicating informal settlements and squatting; and
- that community-based equity and energy and saving schemes are harnessed and encouraged.

The incremental housing programme has underperformed by 59%, only 17 009 houses were built, against a target of 28 817. The Department spent R1 169

million.<sup>32</sup> The under-expenditure resulted because of a number of reasons. For instance, suitable land is essential for incremental housing but the Department only identifies land and develops that land by installing services; another project/programme then takes over. In most cases suitable land is difficult to find yet the departments involved are not working together in solving the problem. The underperformance of the Department demonstrates a lack of planning by it and the other departments involved. Given the housing backlog for Gauteng and the fact that it has the largest concentration of informal settlements, there is considerable pressure for this programme to deliver.

#### 2.1.2.1.2 Social Housing

Social housing underperformed and delivered only 39% (1 996) of the 5 000 planned units.



**Figure 1: Gauteng Planned and Actual Social Housing Delivery 2002/2003**

#### 2.1.2.1.3 Urban Regeneration

The following targets have been set for this programme:

- Creation of sustainable communities;
- Provision of appropriate and affordable housing;
- Creation of safe and secure environments;
- Planned, well administered, transparent and accountable provision of services;

- Provision of quantity infrastructure such as roads, storm water drainages, sewer systems, etc;
- Provision of quality, sustainable social amenities, including schools, clinics, etc; and
- Promotion of local economic development and support for local entrepreneurs investing in the area.

There have been a number of achievements under this programme including:

- more than 600 houses built in Simunye (Westonaria) for the people of Bekkersdal;
- R55 million approved for 200 houses (social housing) and 3 000 stands for incremental housing in Kliptown, over the next three years; and
- good progress being made by the Alexandra Renewal Project.

The Gauteng Department of Housing promised 40 000 new houses providing shelter to 200 000 people, over the next six years. Over 3 000 informal structures have been removed over a period of two years and people have been relocated to other areas offering a better quality of life.<sup>33</sup>

Despite the good progress reported in Alexandra a number of challenges persist. The following box highlights some of these challenges.

**Box 1: Housing and living conditions in Alexandra**

Alexandra is more than 91 years old and for all these years it has experienced problems of underdevelopment. By 2003 the same challenges continued to exist. These included overcrowding, high rates of unemployment, lack of basic facilities such as water and electricity, and people setting themselves up in the corners of their shacks to do business in order to make a living.

About 300 people still live in the Stiwetla section along the riverbanks of the Jukskei River. Very narrow pathways separate the overcrowded single room shacks. Pigs and dogs continue to forage in the piles of garbage on the streets.

In the Far East Bank, flats have been occupied illegally. The unemployed occupants believe that it is their right to occupy these flats as the State has failed to provide accommodation although they had been on the waiting list for more that seven years.

River Park was initially earmarked for people displaced by political violence in 1998. Some occupants pay rent while others do not and they have been threatened with eviction.

In a block of flats in section 12, Roosevelt, tenants said that most of them had lost their jobs after 1994 and consequently no longer paid rent. Some pay a contribution towards services, depending on how much money they can come by in a particular month.

Moreover, some of the new houses cannot be said to be permanent structures as stated in the policy documents and the Act as they are already falling down.

Because of the housing backlog in Alexandra residents decided to take over the Malboro transit village without obtaining permission to occupy the area.

Residents are concerned about the Gauteng Department of Housing's poor monitoring system. They say that contractors are being paid even though they have not finished their jobs and another is then hired.

*Interviews conducted by Thandisizwe Diko, 14 October 2003, in Alexandra*

#### 2.1.2.1.4 Customer Support Services

The objective of the Department is to ensure that it becomes the first port of call for housing and accommodation related issues. It therefore aims to reach as many people as possible at ward level, community forums, burial societies, churches and in sports clubs within two years.

According to the Department the content of this interaction will be life skills and home ownership education, with a message about the need to save, to be a provider and to live a healthy life. This will in turn promote civil society participation and transparency in the delivery of services and eliminate fraud and corruption.

While this is necessary, the Department also has a constitutional obligation to promote the right of access to adequate housing by raising awareness and educating people about this right.

As far as resolving reported cases goes, the Department did not have much success. During the past 12 months, of the 91 028 cases lodged, a mere 540 (0,6%) were closed, leaving 90 488 (99,4%) pending. Customer Support Services did, however, acknowledge 83 714 cases including 11 774 responses to queries by letters.

#### 2.1.2.2 Western Cape Department of Housing

Table 3 provides the targeted goals and actual goals attained through programmes and projects of the Western Cape Department of Housing (WCDH).

**Table 3: Targeted and actual goals attained 2002–2003**

<i>Programme/Project</i>	<i>Target Goal</i>	<i>Goal Achievement/Attained</i>
Project-linked subsidy	111 894 <sup>34</sup>	14 004 <sup>35</sup>
Consolidation subsidy	8 832	5 209
Institutional subsidy	6 939	689
Relocation subsidy	44	Not quantifiable
Integrated serviced land subsidy	655	Not quantifiable
Hostel upgrading programme	41 960	Not quantifiable
People's Housing Process	7 687	Not quantifiable

*Source: Western Cape Department of Housing Protocol*

In all these measures, although there is not clear explanation on how these measures cater for vulnerable groups, and why the inabilities to deliver against the targeted goals, the Department reported that it does cater for some vulnerable groups. The WCDH does not, however, state which programmes or projects cater for these groups. Instead it uses language such as, “all the programmes mentioned can accommodate or could have accommodated” vulnerable groups. The Department does state that it did not make fund allocations specifically for vulnerable groups. The Constitutional Court requirement is that the State must plan, budget and monitor the fulfilment of immediate needs and the management of crises. (para 68 of *Grootboom* as

previously mentioned) The failure of these programmes to cater specifically for these desperate groups is a possible violation of the right of access to adequate housing as explained through *Grootboom*.

### 2.1.2.3 Mpumalanga Department of Housing

The Mpumalanga Department of Housing (MDH) focused on implementation of existing programmes.

Table 4 shows targeted and actual goals attained through the programmes and projects of the MDH. Even though the Department states that most of these measures cater for some vulnerable groups, there are no specific objectives for this.

**Table 4: Mpumalanga Department of Housing Goals achieved 2002/2003**

<i>Programme / Project</i>	<i>Objectives</i>	<i>Goals achieved / attained</i>
Project-linked	Massive delivery that will benefit people who do not have their own stands and habitable houses	<b>6 888</b> received their houses with full ownership
Consolidation	Provide housing to people who own sites that were previously serviced by the Independent Development Trust (IDT) and other public funding	28
Institutional Housing	Provide housing on rental basis through housing associations	222
Hostel Redevelopment	Transform the patriarchal environment and integrate hostels with existing settlement	<b>232</b> (this may be translated to 696 families who benefited)
Individual/Contractor Based Individual Subsidy (CBIS)	Develop existing settlements. This programme is also referred to as <i>in situ</i> upgrading	1 049
Discount Benefit Scheme	Assist tenants and others to acquire ownership of State-financed rental housing	2 459
People's Housing Process	Full-scale delivery of housing through a principle of bigger and better houses.	<b>386</b> (This may be translated to 1 930 family members who benefited, based on an average household of 5)

*Source: Mpumalanga Department of Housing protocol*

The Department increased its delivery for the year under review to 21 607 until January 2003. This increase is from 14 584 for the year 2001/2002. Despite the cut in the budget vote, from R451 246 000 (2001/2002) to R366 292 000 (2002/2003), this shows a commitment to address the housing backlog. The MDH addresses the needs of vulnerable groups as follows:

- **Children with disabilities (physical and mental):** This category of disabled children are catered for because their parents will get a R25 580 subsidy as compared to R23 100 for beneficiaries with able children.

- **Persons (excluding children) with disabilities (physical and mental):** These people also qualify for R25 580 as opposed to the R23 100 for which able people qualify.
- **Persons living in rural areas:** The Department reported a change of focus, with some 72% of all projects allocated to rural areas.

As far as the obligation to protect the right of access to adequate housing is concerned, the MDH reports to have monitored the quality of houses built by contractors through its building works inspectors. Municipal inspectors were also used to extend inspections. This shows an understanding of the obligation.

However, it is difficult, in the absence of specific targets, to measure success in meeting departmental targets. Table 4 as provided by the Department contains no specific targets.

#### 2.1.2.4 KwaZulu-Natal Department of Housing

The KwaZulu-Natal Department of Housing (KZNDH) instituted the following measures:

- Interim Provincial Procurement Implementation Guidelines;
- Provincial Guidelines: Preparation Funding;
- Policy Guidelines: Procurement of Land and Professional Services – all subsidy mechanisms;
- Policy Directive on Non-Credit Linked Individual Subsidies; and
- Guidelines on Rural Development.

During the reporting period, KwaZulu-Natal reported a total of 19 991 households as homeless. A total of 14 291 are concentrated in urban settlement areas and 5 700 in rural settlements. According to the Department, during the year under review, 5 500 homeless persons (500 in rural and 5 000 in urban) were provided with shelter. The province has reported 34 018 households in informal settlements, (8 200 in urban and 25 818 in rural settlements). The guidelines such as the Interim Provincial Procurement Implementation Guidelines and Preparation Funding have reportedly expedited housing delivery to the homeless.<sup>36</sup> However, because these are new guidelines, the Department could not provide information on the impact of these guidelines.

On HIV/AIDS, the KZNDH has a policy of providing specialised housing to assist HIV-affected people and AIDS orphans. The province makes provision for transitional housing for adults infected with HIV/AIDS.

KwaZulu-Natal underspent its departmental budget for the year under review; it also underspent in the 2001/2002 financial year. Given the under-expenditure, outcomes of the instituted measures and indicators, the Department needs to and can improve on its delivery.

### 2.1.2.5 Free State Department of Housing

As far as policies are concerned, the Free State Department of Housing (FSDH) instituted special needs policy only, which caters for the housing needs of the disabled.

Table 5 indicates delivery on ongoing programmes/projects of the FSDH.

**Table 5: Programmes/projects of the Free State Department of Housing 2002/2003**

<i>Programme/project</i>	<i>Achievement or goals attained</i>
Project-linked subsidy	30 165 subsidies were allocated with significant amount being women driven
People's Housing Process	1 850 subsidies allocated, making up 22 projects. Due to the nature of the projects, units are at various stages of completion
Consolidation subsidy	A proposal is still under consideration for those beneficiaries who are on the database but received vacant erven only
Hostel upgrading programme	1 535 hostel units are still under construction
Right-sizing subsidies	Proposals were received from Thubelisha for 258 units in Welkom and 203 units in Sasolburg. All units have been completed
Discount benefit scheme	2 329 properties have been transferred to the beneficiaries

*Source: Free State Department of Housing Protocol*

### 2.1.2.6 Limpopo Department of Housing

The Limpopo Department of Housing (LDH) reported one new policy measure, the National Housing Policy on Disability Variations, which aims to make the housing environment user-friendly for the disabled. The Department instituted a number of existing programmes. These include the following programmes, which have not been mentioned previously.

#### *2.1.2.6.1 Disaster and Emergency Management Services<sup>37</sup>*

This programme assists flood victims by providing flood relief. For the year under review the Department provided shelter and food to 2 213 disaster victims and distributed 630 tents to district municipalities.<sup>38</sup>

#### *2.1.2.6.2 Housing Development Programme*

This programme provides safe and secure shelter for rural communities and shack dwellers. Under the programme, 14 320 housing units were constructed. Ownership of 645 properties was transferred under the Discount Benefit Scheme; there were infrastructural projects in five municipalities. Some 175 water, sanitation, road, and storm water projects were implemented under the Consolidated Municipal Infrastructure Programme (CMIP) to improve access to water, storm water and roads.<sup>39</sup>



Other major projects included the launch of the Integrated Sustainable Rural Development Programme, an intergovernmental forum, a local government transformation conference and a housing summit.<sup>40</sup>

Despite all the challenges mentioned by the Department in implementing its programmes, there has been progress. The Department has so far built 14 320 housing units through its Housing Development Programme. The response to the emergency crises through Disaster and Emergency Management Services has been a positive development.

#### 2.1.2.7 Northern Cape Department of Housing

Northern Cape has the lowest population in the country. According to Census 2001, the province has a population of 822 727. The province also has the lowest number of informal dwellings (not in backyards) of 20 438.<sup>41</sup> It has a sizeable backlog of 414 436 housing units<sup>42</sup> which it has responded to by focusing on improving ongoing programmes. Even though the Northern Cape Department of Housing did not provide detailed information on the measures it has taken, it asserts that all the existing programmes and projects accommodate vulnerable groups.

#### 2.1.2.8 North West Department of Housing

Through its rural housing programme, a total of 5 805 dwellings have been constructed in 23 housing projects in rural areas.<sup>43</sup> The North West Department of Housing (NWDH) reported a backlog estimate of 486 000. During the year under review the Department delivered 21 204 housing subsidies and 16 707 housing units.<sup>44</sup> It also reconstructed 501 dwellings that had been devastated by floods.<sup>45</sup> The outcome of the measures instituted by the Department is provided in Table 6. These are ongoing programmes/projects.

**Table 6: Summary of the Outcomes of Measures Instituted by the NWDH 2002/2003**

<i>Programmes/projects</i>	<i>Outcomes</i>
People's Housing Process	6 projects built or under construction – 1 853 subsidies
Developer-Driven Individual Subsidy Programme	25 projects completed or under construction – 2 922 subsidies
Rental Housing	Projects for people earning less than R3 500 are implemented under the Institutional Programme
Emergency Programme	13 projects completed or under construction – 413 subsidies
Rural Programme	12 projects completed or under construction – 12 634 subsidies
Project Linked Programme	77 projects under construction or completed – 102 365 subsidies
Consolidation Subsidy Programme	8 projects under construction or completed – 4 495 subsidies
Hostel Redevelopment Programme	12 projects under construction – 2 948 subsidies
Institutional Subsidy	7 projects under implementation – 4 950 subsidies

The Project Linked Programme is the largest programme in the province and comprises 97 urban and peri-urban projects valued at over R1,7 million.<sup>46</sup>

#### 2.1.2.9 Eastern Cape Department of Housing

According to Census 2001, the Eastern Cape Province has a population of 6 436 763, of which 5 635 079 are black Africans. The province has 31 205 informal dwellings/shacks in backyards and 135 567 informal dwellings/shacks not in backyards.<sup>47</sup> The Eastern Cape Department of Housing (ECDH) reported that there were 979 160 families without houses.

With the introduction of a R2 479 subsidy to beneficiaries, the Department focused more on the People's Housing Process in order to match this amount with sweat equity, as the majority of beneficiaries are not working.

Table 7 reflects the outcomes of programmes and projects instituted by the Department during the year under review.

The Department reported a total of 166 772 households in informal settlements. Of these 154 969 are black Africans. During the year under review, the Department delivered 47 188 housing units and 85 811 State subsidies.<sup>48</sup>

**Table 7: Programmes and Projects Instituted by the ECDH 2002/2003**

<i>Programmes/projects</i>	<i>Achievements or goals attained</i>
Project-Linked Housing Subsidies	6 361 houses have been delivered within this subsidy instrument during the period under review, with a total expenditure of R76 million
Rapid Land Release Programme	Continuation of the programme with a second phase. This involves completion of 35 + 78 sites that have been approved. The top structure construction is included in the figure for Project Linked and People's Housing Process
Rural Housing Subsidies	A total of 137 housing units were constructed within this programme with an expenditure of R1,7 million
People Housing process	Through this programme 9 169 housing units have been completed, affording homes to the homeless. This expenditure amounts to R335 million
Institutional Subsidies	635 houses have been completed, at a cost of R21 million

## 2.2 Legislative Measures

Most of the following legislative measures during the period under review were instituted at national level.

### ***2.2.1 The Prevention of Illegal Eviction from and Unlawful Occupation of Land Amendment Bill***

The Bill proposes to amend the principal Act, the Prevention of Illegal Evictions from and Unlawful Occupation of Land Act No 19 of 1998 (PIE). The Act provides, *inter alia*, for the prohibition of unlawful eviction and procedures for the eviction of unlawful occupiers.<sup>49</sup> The amendment comes as a result of uncertainty on whether or not the PIE covers incidents of holding over.

The Amendment Bill had not been passed at the end of the review period. A critique of both the Bill and the principal Act is provided in section 4 of this report.

For the year under review it is appropriate to discuss the implications of the principal Act in line with the guarantee of section 26 (3) of the Constitution and more especially following the Supreme Court of Appeal Case of *Ndlovu v Ngcobo, Bekker and Another v Jika* 2003 (1) 113 (SCA). The importance of the Act is that if section 26 (3) of the Constitution is to have any impact on the common law, then that impact will have to be mediated through this legislation and others for circumstances to be said to be “legally relevant”.

Many people have been evicted from their homes or land since 1994. Most of them are unemployed. More than a million South Africans have lost their jobs since 1994 with the percentage of unemployed rising to 43%.<sup>50</sup> Many of these people have faced eviction because they cannot keep up bond repayments. Unemployment and an influx into the cities have caused homelessness, which in turn has resulted in an increased mushrooming of shacks for shelter.

Section 26(3) of the Constitution states that “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”. So all evictions that are carried out without a court order are unconstitutional and should be challenged accordingly.<sup>51</sup> The Act reinforces the “court order” requirement<sup>52</sup> and applies to the proceedings<sup>53</sup> for eviction against unlawful occupiers<sup>54</sup> (including persons who hold over) throughout South Africa. This was confirmed in *Ndlovu v Ngcobo*.<sup>55</sup>

The matter in dispute in this case, which led to the amendment of the principal Act was whether the definition of “unlawful occupier” in section 1 of the principal Act covers (1) tenants who initially take up lawful occupation of the land in terms of a lease agreement, but who refuse to vacate the land after lawful termination of the agreement; (2) mortgagors who default on their bond repayments and, after execution of the bond and transfer of the property to a third party, remain in occupation. The majority judgement answered these two questions in the affirmative. Despite acknowledging that the intention of the legislature in the Act was not clear, Harms JA held that “it cannot be discounted that Parliament, as it said, intended to extend the protection of the PIE Act to cases of holding of dwellings and the like”.<sup>56</sup> Until the amendment is passed, with the exception of evictions from commercial properties, proceedings for evictions must be brought under the PIE Act or other legislation dealing with the protection of tenants.

This Amendment Bill is a good response from the Housing ministry as it seeks to address an “unintended consequence” of the Act and therefore has the potential to reconcile the right not to be arbitrarily evicted and the Government’s obligation to promote the rental housing sector.

### **2.2.2 The Community Reinvestment Bill**

This Bill was introduced in 2003. For the past few years, financial institutions<sup>57</sup> have been heavily criticised by government and other role-players for a lack of commitment to addressing the high levels of underdevelopment in South Africa. Specifically, the criticism is based on the failure of the institutions' policies to address the poor socio-economic conditions that prevail in African and coloured communities and that the implementation of their policies has had a largely discriminatory, rather than developmental impact. During the year under review, government re-affirmed that legislative interventions were necessary to increase private sector investment in the lower end of the housing market. This led to vigorous debates around the Community Reinvestment Bill.

Low- and medium-income earners are victims of financial exclusions by the finance sector as a result of, *inter alia*, their economic status and the areas in which they live, i.e. townships and rural areas. This emanates from the fact that they do not have access to affordable credit and adequate banking facilities and the banks' practice of "redlining" certain geographical areas, which involves a blanket refusal to grant mortgage bonds in certain areas because of their poor socio-economic status.

The State has a constitutional mandate set out in section 26 (2) of the Constitution to give effect to the right of access to adequate housing in South Africa. Government is obliged to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right of access to adequate housing. This is a step in the right direction by the South African Government to achieve this mandate through making housing finance assistance available and by protecting the poor from unreasonable restrictions that impede their access to housing finances.

The Bill sets up some principles, targets and standards, which, *inter alia*, forbid redlining practices and encourages real investment in, and development of, poorer communities. Such developments are concerned with ensuring equitable access to resources and opportunities that have the potential to increase people's standards of living and remove the barriers that impede access to housing rights.<sup>58</sup> In order to achieve this, it sets up the following principles:

- Refraining from refusing home-loan finance purely on the grounds of the socio-economic characteristics of the neighbourhood in which the home is located;
- Refraining from the practice of redlining unless it is dictated by safe and sound business practices;
- Affording borrowers the necessary dignity, courtesy and honesty when discussing and processing applications for mortgage loans;
- Communicating transparently and openly with borrowers during all stages of negotiations;

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- Ensuring that borrowers know the outcome of their applications and, if rejected, that they are furnished with reasons why their applications were unsuccessful; and
- Encouraging, where possible, a climate of saving among homeowners and borrowers and providing meaningful incentives to those who save.<sup>59</sup>

Through this Bill, financial institutions have positive obligations to respond to the social and developmental needs of the country by providing home loans to low- and medium-income earners. If a financial institution is unable to meet the required standards<sup>60</sup> and targets,<sup>61</sup> alternative measures must be adopted. These include:

- providing funding through prescribed wholesale lenders at a mutually agreed interest rate;
- purchasing such wholesale lenders' securities and debt issues; and
- providing funding directly to market lenders for them to make available for loans.<sup>62</sup>

While this is a step forward by the Government towards the realisation of this right (pending the implementation of this Bill), it must be noted that, the term "sound and safe business principles" has brought about different interpretations of its meaning. For this reason, consensus needs to be reached on what constitutes a sound and safe business principle in the current dispensation, taking into account all relevant factors.

It is also important that the Government ensure that the process will not compromise the economy of the country by balancing all the interest of the parties involved. For example, the concern by the Banking Council that it has been providing assistance for eight years, which resulted in 65 000 repossessed houses and R236 million lost in five townships only in the Eastern Cape in 2001<sup>63</sup>, highlights the need for a closer consideration of the process and a call for government and financial institutions to discuss issues arising from the Bill.

It should be understood that the Bill does not oblige the financial institutions to enter unreasonably into transactions without giving due regard to the risks involved. It specifically states that financial institutions must not provide home loans in certain circumstances.<sup>64</sup> The inclusion of this clause has been questioned by many role-players, such as COSATU. In its submission, it raised a concern that the inclusion of such an escape clause that permits redlining on the basis of undefined "safe and sound business practices" could easily allow the financial institutions to justify continued discriminatory practices.<sup>65</sup> Banks do need to accept an element of risk in investing in communities, which they have long neglected. If their practice amounts to a racist, unfair discriminatory and anti-developmental practice, the banks have to refrain from that and this escape clause will have to be closely monitored, or else it defeats the purpose. The Bill was put on hold in 2003 pending the outcome of the Financial Services Charter.<sup>66</sup>

### ***2.2.3 Home Loan and Mortgage Disclosure Act 63 of 2000 (HLAMDA)***

This legislation came into effect at the end of 2002. The Act compels financial institutions in the business of providing home loans to disclose information on their home lending business in their financial statements.

### ***2.2.4 Amendment to the Housing Act 107 of 1997***

The Housing Amendment Act 4 of 2001 amended the Housing Act 107 of 1997 by the insertion of sections 10A and 10B. These sections were included to restrict the voluntary and involuntary sale of State-subsidised housing. The Amendment Act commenced on 1 February 2003, hence its relevance to this report.

The Department has acknowledged the following concerns with the implementation of these sections:

- The current sections 10A and 10B may well be unconstitutional (section 25 of the Constitution deals with an individual's right to property).
- The impact of the provisions are unjust in relation to persons who wish to improve their living conditions, or who have to relocate due to factors such as a change of employment.
- Its provisions are having a negative impact on the housing market as a result of the reluctance of financial institutions to offer loans to persons falling within the category protected by 10A and B, based on the fact that such institutions have no guarantees of recovering their risks. In order to comply with the constitutional obligations to respect, protect, promote and fulfil the right of access to adequate housing, amendments to the Housing Act of 1997 are being attended to, in particular, addressing the difficulties encountered with the implementation of sections 10 A and B.

### ***2.2.5 Disestablishment of South African Housing Trust Limited Act No 26 of 2002***

The disestablishment of the SA Housing Trust Limited Act was published in the *Government Gazette No 24146* on 5 December 2002 and came into operation on the same day. The Act disestablished the South African Housing Trust Limited, transferred the rights, assets, obligations and liabilities of the SA Housing Trust Limited to the Government of the Republic of South Africa and provided for matters in connection therewith.

## 2.3 Budgetary Measures

The aim of the various departments of housing is to determine, finance, promote, co-ordinate, communicate and monitor the implementation of policy for housing and human settlement. Access to housing and secure accommodation is an integral part of government's commitment to reduce poverty and improve people's quality of life. This requires a sustainable housing development process that will progressively provide adequate housing for all, as required by the Constitution. The Department of Housing therefore aims to ensure that every South African has access to a permanent residential structure, within sustainable human settlements, that guarantees privacy and adequate protection against the elements.<sup>67</sup>

This section seeks to analyse the budgetary measures adopted during the year under review and their impact based on the constitutional requirements. Assessing budgetary measures has not been an easy task since the expenditure estimates of the Department in its Medium Term Expenditure Framework (MTEF) does not provide a breakdown of the allocated funds that the specific programmes, despite this being required for monitoring purposes.

### 2.3.1 National Sphere

In order to achieve these objectives, the National Department of Housing was appropriated R4 299 481 000. This amount includes allocation for conditional grants (R3 906 674 000) and excludes donor funding of R55 030 000. According to Table 8, the National Department made savings of R86 351 000. This amount was to be surrendered to the National Treasury. The Departments' explanation for this saving is that:

*R12 522 000 can be attributed to savings as a result of overestimation of the amounts when the budgets were prepared due to various market factors such as interest rates and inflation forecasts expected at the time of budget preparation. An amount of R26 677 000 was suspended for transfer to National Treasury in accordance with the provision of the Disestablishment of the South African Housing Trust Act 26 of 2002.*

Some of the costs are related to personnel, administration and the purchase of equipment.

**Table 8: Total Departmental Allocation 2002/2003**

<i>Year</i>	<i>Total Dept. allocation R'000</i>	<i>Allocation as a % of the National Budget</i>	<i>Total Conditional Grants R'000</i>	<i>Total Donor Funding R'000</i>	<i>Projected Expenditure R'000</i>	<i>Actual Expenditure R'000</i>
01/02	459 053	1,4%	3 325 958	54 530	3 785 013	3 721 240
02/03	392 805	1,5%	3 906 674	55 030	4 299 481	4 213 130

According to the Department, the under-expenditure reflected in Table 8 had a minimal impact. It refers to this as savings.

The HSRP is a pilot programme that aims to improve the quality of human settlements through the identification and correction of imbalances and dysfunctionalities within such human settlements. The Department reported that considering the objectives of the programme, the budget could be regarded as inadequate. It negotiated successfully with the National Treasury to increase the housing grant so as to maintain the amount of housing delivery while improving on the quality of the housing settlement. An increase of R300 million was granted in 2002/2003. There was an under-expenditure of R19 648 000 against projected expenditure.

**Table 9: Human Settlement Redevelopment Programme (HSRP) 2002/2003**

<i>Year</i>	<i>Total Dept. Allocation R'000</i>	<i>Allocation as a % of the National Budget</i>	<i>Total Conditional Grants R'000</i>	<i>Total Donor Funding R'000</i>	<i>Projected Expenditure R'000</i>	<i>Actual Expenditure R'000</i>
02/03	106 565	4,9%	106 000		212 565	192 917

The Department refers to these as savings. The failure to fill departmental posts and approving tenders only in the last quarter of the financial year causing projects to start late, which in turn resulted in some funds not being spent should not be referred to as savings because these funds were supposed to be used and they were never used. This is under-expenditure at the expense of the poor.

The poverty relief funding allocation came from the National Treasury and was not intended to fund the total cost of the Presidential Pilot Project on Rental Housing. These funds were to be augmented by housing subsidy funds, funds contributed by the private sector and labour as well as contributions from institutions like the Social Housing Foundation. The Department feels that the allocation to the project was not adequate considering a backlog of 2,2 million housing opportunities. According to the Department, the implementation of this project was delayed due to late finalisation of the financial model as well as additional Treasury requirements.

**Table 10: Presidential Pilot Project on Rental Housing 2002/2003**

<i>Year</i>	<i>Total Departmental allocation R'000</i>	<i>Allocation as a % of the National Budget</i>	<i>Actual expenditure R'000</i>
02/03	75 million (poverty relief funding)	1,7%	225 million was transferred to the NHFC, which is managing these projects on behalf of the Department



## 2.3.2 Provincial Sphere

### 2.3.2.1 Gauteng Department of Housing

**Table 11: National Housing Subsidy**

<i>Year</i>	<i>Total Conditional Grants Allocation</i>	<i>Projected Expenditure</i>	<i>Actual expenditure</i>
2001/2002	R716 300 448	R716 300 000	R702 328 817
2002/2003	R1 215 018 000	R1 215 000 000	R1 169 157 000

Source: 5<sup>th</sup> Protocol Response from Gauteng Department of Housing

**Table 12: Alexandra Renewal Programme (ARP)**

<i>Year</i>	<i>Total Conditional Grants Allocation in Rands</i>	<i>Projected Expenditure</i>	<i>Actual expenditure</i>
2001/2002	74 000 000	74 000 000	58 172 000
2002/2003	89 825 000	89 825 000	87 454 000

Source: 5<sup>th</sup> Protocol Response from Gauteng Department of Housing

**Table 13: Human Settlements Programme**

<i>Year</i>	<i>Total Conditional Grants Allocation in Rands</i>	<i>Projected Expenditure</i>	<i>Actual expenditure</i>
2001/2002	27 202 000	27 202 000	2 101 000
2002/2003	48 548 000	48 548 000	38 192 000

Source: 5<sup>th</sup> Protocol Response from Gauteng Department of Housing

The variance in the budget allocation from the national housing fund for the GDH was as a result of the provision made for inflation increases in the quantum of the housing subsidy. The total amount appropriated in the adjustments budget 2002/2003 may be explained as follows:

- Inflation increases of the subsidy quantum: R13 million;
- Appropriation for the first time of own income generated by the Gauteng Housing Fund since 1994: R320 million; and
- Unspent Conditional Grant related to the Job Summit Initiative of the National Department of Housing: R80 million

Even though the budget allocation of the GDH has progressively increased, the delivery of houses remains very low. This progressive increase in budget indicates a commitment to improving the housing situation. However, the increase in budget should be balanced with an increase in delivery. The GDH, with a housing backlog of 500 000, has delivered about 18 857 houses for the year under review. Gauteng declined from 348 288 (2000/01) to 20 233 houses

for (2001/02).<sup>68</sup> This should not be encouraged unless there is a reasonable explanation for the decline.

The GDH has also underspent for the above mentioned programmes due to slow progress on the implementation of these projects. The complex procurement systems of the local authority and the Department of Housing and in some cases, negotiations with the community, resulted in delays.

#### 2.3.2.2 Western Cape Department of Housing

The Western Cape Department of Housing (WDH) reported underspending of total revenue as a result of posts not being filled in the Department. The Housing Conditional Grant was also underspent by 9%. The underspending of the Conditional Grant impacted on the ability of the Department to provide the maximum number of the beneficiaries with access to shelter. The Department did not provide reasons for underspending.

Table 14 illustrates expenditure on programmes and projects. For all these measures to be reasonable they must cater for vulnerable groups. Departments must provide adequate information on how these measures cater for these groups and what their impact has been.

These projects do not, however, provide any information on the impact of these measures for communities living in informal settlements in the Western Cape. In fact, according to the protocol response from the WDH, it does not know how many households live in the informal settlements in the Western Cape. According to *The Star* newspaper, there are about 119 informal settlements in the Western Cape; these contain about 142 706 households. The Department might thus be ignoring the rights of a significant sector of the Western Cape community.

According to the Department of Housing Strategic Plan, the Western Cape delivered 2 358 houses only at January 2003,<sup>69</sup> a mere two months before the end of the reporting period. This is a drastic drop from the 16 634 units delivered in 2001/2002, especially given that the budget was reported to be adequate. The Western Cape has a backlog of about 310 000 housing units. The decrease in delivery brings into question the reasonableness of the measures being taken to meet the backlog. Their impact can be very limited only especially since they do not specifically cater for informal settlements. They cannot, therefore, be said to be reasonable.

**Table 14: Expenditure on Instituted Programmes/Projects 2002/2003**

<i>Programme/project</i>	<i>Expenditure</i>
Project-linked subsidies	R 270 904 203
Consolidation subsidies	R 10 114 250
Institutional subsidies	R 388 087
People's Housing Process	R 41 551 184
Hostels upgrading	R 6 572 132
Credit-linked individual subsidies	R 3 105 500
Non-credit-linked individual subsidies	R 536 612
Relocation assistance	R 3 388 509
Old business (tenure upgrade maintenance of assets)	R 11 417 699

Source: 5<sup>th</sup> Protocol Response from Western Cape Department of Housing

### 2.3.2.3 Mpumalanga Department of Housing

The Mpumalanga Department of Housing (MDH) reported that underspending of the vote amounted to R15 269 000. This is 4,16 % of the R366 292 000 vote. According to the Department, this underspending was due to the fact that these projects were affected by legal constraints and were subject to legal matters from previous years. It must be noted that according to the 4<sup>th</sup> Economic and Social Rights Report of the Commission, the Department reported under-expenditure of 2,29% for the previous financial year. It will have to work on eliminating the under-expenditure, as it has implications for the progressive realisation of the right.

### 2.3.2.4 KwaZulu-Natal Department of Housing

The Department reported under expenditure of R163 518 000, or expenditure of R912 965 000 out of R1 076 483 000. The budgetary allocation towards programmes and projects was also underspent. It must be noted that the Department also underspent its budget for the year 2001/2002. According to the Department's protocol, the total departmental allocation was R964 250 000 and the actual expenditure was R837 141 000.

The Department believes that this did not have any negative impact on the realisation of the right. The under-expenditure may be attributed to the following reasons as forwarded by the Department:

- Funds allocated for capacity building were not spent as a result of tenders that were not finalised in time.
- Human Settlement Redevelopment Grant experienced difficulties with the non-submission of business plans by municipalities as well as a delay in the approval of projects by the National Department.
- The South African Housing Grant underspent due to a delay in the NHBRC contract being formalised in terms of low-cost housing project approval.

All the figures provided by the Department show under-expenditure of the budgets. The Department notes that despite under-expenditure, there has been a notable increase in subsidy amounts allocated per income bracket.

**Table 15: Budgetary Allocation for Programmes and Projects in KwaZulu-Natal 2002/2003**

<i>Programme</i>	<i>Allocation for programmes in projects</i>	<i>Total Conditional Grants Allocation</i>	<i>Actual expenditure</i>
Management Services	R70 206 000		R32 269 000
Corporate Services	R37 934 000	R53 867 000	R33 563 000
Planning, Legal Services & Information Management	R9 583 000		R7 130 000
Project Management	R896 585 000		R59 545 000
Integrated Municipal Support	R60 175 000		R59 545 000
Auxiliary & Associated Services	R2 000 000		R462 000

*Source: KZN housing protocol*

It should be noted that Table 15 as it was originally provided probably includes a typing error in that the project management programme more realistically had expenditure of R755 287 000 in 2002/2003.<sup>70</sup>

#### 2.3.2.5 Free State Department of Housing

The Department reported under-expenditure of R96 217 518 (33%) against a budget vote of R287 715 000. This resulted in a delay in the delivery of houses. The Department did not account for its under-expenditure.

#### 2.3.2.6 Limpopo Department of Housing

The Department reported that the allocated budget was inadequate; it spent all of the R4 153 000 allocated to it.

The Head of the Department, PW Ramagoma, says that the rate of spending by the Department has improved from 84% and 92% in the past two years respectively. In the year under review it was 94%.<sup>71</sup> The Department, however, feels that it is not receiving adequate allocations from National Level; it says that these allocations are based on census statistics that does not reflect the true status of the shortages in rural areas, and Limpopo province is predominantly rural. This thus disadvantages the province.

### 2.3.2.7 North West Department of Housing (NWDH)

**Table 16: Conditional Grant from the Housing Fund 2002/2003**

<i>Year</i>	<i>Total Conditional Grants Allocation</i>	<i>Total Donor Funding</i>	<i>Projected expenditure</i>	<i>Actual expenditure</i>
01/02	R25 898 4000		R258 984 000	R258 984 000
02/03	R323 872 000		R323 872 000	R306 000 000

*Source: North West Department of Housing protocol*

This Department reported under-expenditure of the conditional grant of R323 872 000 by R17 872 000 (6%). Under-expenditure was attributed to the following:

- Weak and under-capacitated municipalities (which are the project developers in the majority of cases in the Province) especially in respect of the requisite professional personnel. Related infrastructure delivery is the single most important negative factor impeding the faster and better delivery of adequate and quality housing.
- Mismanagement, incompetence, corruption, political intervention and nepotism at municipal level also impede the delivery of adequate and quality housing and related infrastructure.
- The constitutional requirement that Provinces must assist and/or even take over housing development functions where municipalities cannot effectively exercise their housing responsibilities is not possible, as most provinces require additional professional human resources and concomitant operational funding themselves.
- The very complex and all-inclusive nature of national housing policy impedes speedy and timeous delivery and expenditure.
- Delays experienced with the Deeds Office with the registration of transfer.
- The slow delivery associated with the People's Housing Process (PHP).

### 2.3.2.8 Eastern Cape Department of Housing

Since there is huge backlog in the province, the Department believes that the budget was not enough. Even though according to the Department, the expenditure levels improved during the year under review, the Department underspent its budgets vote of R1 221 072 000 by R376 471 000 as a result of rolling-over conditional grants from previous years. This affected the delivery of houses to the beneficiaries. The under-expenditure is attributed to capacity

constraints at municipal level. The Department has provided the following table for the National Housing Subsidy component of its expenditure.

**Table 17: National Housing Subsidy - Budget Allocation Towards Programmes and/or Projects 2002/2003**

<i>Year</i>	<i>Allocation for programmes and projects</i>	<i>Total Conditional Grant Allocation</i>	<i>Projected expenditure</i>	<i>Actual expenditure</i>
01/02	R508 011 025	R508 011 025	R580 011 025	R292 874 871
02/03	R508 806 000	R580 806 000	R580 806 000	R465 013 014

*Source: Eastern Cape Department of Housing protocol*

#### 2.3.2.9 Northern Cape Department of Housing

The Department was allocated R75 809 000. Despite requests for it to provide its actual expenditure, nothing had been received by the time of writing.

**Table 18: Budget of the Northern Cape Department of Housing 2002/2003**

<i>Year</i>	<i>Total revenue in R'000</i>	<i>Total allocation in R'000</i>	<i>Projected expenditure R'000</i>	<i>Actual expenditure R'000</i>
01/02	144 743	65 475		65 475
02/03	172 486	75 809	75 809	

*Source: Northern Cape Department of Housing protocol*

## 2.4 Housing Delivery<sup>72</sup>

According to the National Department of Housing's strategic plan for April 2003 to March 2006, from 1994/1995 up to January 2003 about 1 477 735 housing units had been delivered to qualifying beneficiaries or were under construction. According to this report, this meant that more than 5,6 million people had been assisted by the State with access to basic shelter. This number may have increased by the end of the financial year. Table 19 provides a mix of information from the strategic plan and updated figures from the National Department of Housing.

**Table 19: Number of Housing Units Completed/Under Construction from 1994 to 2003**

<i>Provincial Government</i>	<i>Number of units completed or under construction</i>			
	<i>1994/95 to 2000/01</i>	<i>2001/2002</i>	<i>2002/03</i>	<i>Total since 1994/95</i>
Eastern Cape	117 759	10 816	58 662	187 237
Free State	71 699	7 005	9 155	87 859
Gauteng	269 264	46 723	24 344	340 331
KwaZulu- Natal	206 670	14 379	24 485	245 534
Mpumalanga	68 860	14 584	21 649	105 093
Northern Cape	20 569	2 588	6 056	29 213
Limpopo	83 147	16 667	14 953	114 767
North West	87 684	13 885	23 784	125 353
Western Cape	148 376	16 634	20 500	185 510
<b>Total</b>	<b>1 074 028</b>	<b>143 281</b>	<b>203 588</b>	<b>1 420 894</b>

*Source: National Department of Housing ABC Housing Statistics, 2003*

Table 19 shows housing units completed or under construction from 1994 to 2003. Although other provinces show an increase during the year under review, some provinces such as Gauteng and Limpopo show a decline in delivery compared to the previous year.

#### ***2.4.1 General Indicators and the National Action Plan for Human Rights***

The departments were requested to provide information on the state of housing both in rural and urban areas and for different racial groups. Table 20 highlights the state of housing as provided by the National Department of Housing.

**Table 20: General Indicators and the National Action Plan for Human Rights**

<i>Category</i>	<i>Total</i>	<i>Rural</i>	<i>Urban</i>	<i>African</i>	<i>Coloured</i>	<i>Indian</i>	<i>White</i>	<i>Proposed number</i>
Number of households granted State subsidies	519 498	(1)	(1)	(1)	(1)	(1)	(1)	-
Number of houses built by the State	203 288	(1)	(1)	(1)	(1)	(1)	(1)	-
Number of households that are eligible for subsidies	6 445 341	(2)	(2)	(2)	(2)	(2)	(2)	-
Number of shelters provided for older persons	109 344	(3)	(3)	(3)	(3)	(3)	(3)	-
Number of homeless persons	9 342 791	(4)	(4)	8 690 066	437 151	65 824	149 750	-
Number of shelters provided for homeless persons	(5)	(5)	(5)	(5)	(5)	(5)	(5)	-
Number of households in informal settlements	1 376 706	(6)	(6)	(6)	(6)	(6)	(6)	-
Number of households in illegal settlements or housing	(7)	(7)	(7)	(7)	(7)	(7)	(7)	-
Number of people on the housing waiting list	(8)	(8)	(8)	(8)	(8)	(8)	(8)	-
Average waiting period on the waiting list	(8)	(8)	(8)	(8)	(8)	(8)	(8)	-
Number of dwellings without access to safe and healthy drinking water	1 655 703	(1)	(1)	1 626 391	18 947	1 960	8 403	-
Number of dwellings without access to adequate sanitation facilities	4 538 364	(10)	(10)	4 398 631	120 181	4 429	15 123	-
Number of dwellings without access to electricity	3 390 434	(11)	(11)	3 275 359	99 783	3 420	11 872	-
Number of dwellings that did not conform to the departmental construction and safety standards	6 469	(12)	(12)	(12)	(12)	(12)	(12)	-
Number of families without houses	2 399 825	(13)	(13)	(13)	(13)	(13)	(13)	-
Number of informal settlements	1 066	(14)	(14)	(14)	(14)	(14)	(14)	-

*Source: National Department of Housing Protocol*

*Notes: please refer to endnotes<sup>73</sup>*



## 2.5 Case Studies

Having discussed and analysed all the above mentioned measures by the national and provincial housing departments, the Commission drew on existing research material and conduct field work for case studies in order to substantiate its position on whether the measures adopted by the departments have progressively realised the right.

### 2.5.1 Case Study 1: *The Grootboom Judgement Two Years Later*

This case study is based on research by the Community Law Centre initiated in 2001. The paper provides a broad assessment of the implementation of the court orders in *Grootboom* and asks whether the formulation of the court orders have contributed to the lack of implementation of such orders.

#### 2.5.1.1 Background

The Wallacedene community – herein referred as the respondents<sup>74</sup> (the community involved in the *Grootboom* case) lived in appalling conditions in an informal settlement – Wallacedene – in the Western Cape. Wallacedene lies on the edge of the municipal area of Oostenberg, which in turn is on the Eastern fringe of the Cape Metro. The community eventually illegally occupied private land earmarked for formal low-cost housing called “New Rust”. At the beginning of winter, they were forcibly and inhumanely evicted from this land and rendered homeless. The root cause of their problem was the intolerable conditions under which they were living while waiting to be allocated low-cost housing.<sup>75</sup>

- Conditions under which most of the residents lived included:
- a quarter of the households had no income;
- more than two-thirds of households earned less than R500 per month;
- about half the population were children;
- they had no water, sewage or refuse removal services and only 5% of the shacks had electricity;
- the area was partly waterlogged and dangerously close to a main thoroughfare;
- Mrs Grootboom lived with her family and her sister’s family in a shack about 20 m<sup>2</sup>; and
- many had applied for subsidised low-cost housing but had been on the waiting list for seven years; despite several enquiries from the municipality, no definite answer was given on this<sup>76</sup>.

The respondents sheltered on the Wallacedene sports field under such temporary structures as they could muster. Within a week the winter rains started and the plastic sheeting they had erected afforded scant protection. The next day the respondents' attorney wrote to the municipality and demanded that it meet its constitutional obligations and provide temporary accommodation to the respondents. The municipality responded that it had supplied food and shelter at the Wallacedene Community Hall to the respondents and that it was approaching the Western Cape government for assistance to resolve the problem. The respondents considered that the Community Hall provided inadequate shelter as it could house 80 people only.

#### 2.5.1.2 The Cape of Good Hope High Court

Mrs Irene Grootboom and others made an application in 1999 to the Cape of Good Hope High Court (hereafter the High Court) for an order requiring the Government (herein referred as appellants<sup>77</sup>) to provide them with temporary and adequate basic shelter or housing until they obtained permanent accommodation. They also sought an order directing the Government to provide their children with sufficient basic nutrition, shelter, health care services and social services.<sup>78</sup> The appellants were ordered to provide the respondents with shelter, potable latrines and a regular supply of water. The appellants challenged the correctness of that order.

#### 2.5.1.3 The Constitutional Court

The Constitutional Court handed down a declaratory order on October 4 2000 as follows:

- Section 26(2) of the Constitution requires the State to devise and implement within its available resources a comprehensive and co-ordinated programme to realise progressively the rights of access to adequate housing.
- The programme must include reasonable measures such as, but not necessarily limited to, providing relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations.
- As at the date of the launch of this application, the State housing programme in the area of the Cape Metropolitan Council fell short of compliance with the requirements in section 26(2) para (b) in that it failed to make reasonable provision within its available resources for people in the Cape Metropolitan area with no access to land, no roof over their heads, and living in intolerable conditions or crisis situations.<sup>79</sup>

#### 2.5.1.4 Objective of the Case Study

- To establish whether pursuant to the Constitutional Court Order of October 4 2000, there have been any measures adopted to implement the order.
- Whether those measures resulted in a significant improvement in the lives of the community of Wallacedene, who still reside in Wallacedene sports complex.
- Whether Western Cape Department of Housing (WCDH) complied with the Court's orders.
- Can the measures adopted during the year under review be said to be reasonable under the circumstances?

#### 2.5.1.5 Implementation of the Court Order

In its focus on the implementation of the court orders, the paper says the following.

- At the time of writing, an interlocutory order had been implemented to a limited extent for the following reasons:
- From the R200 000 made available to the community for basic shelter each dwelling was allocated sheets for a roof, as well as one window and a door.
- Twenty toilets were erected on the sports field, along with taps. In contravention of the interim order, as at October 2001, the toilets were not being maintained by the municipality. As a result, at the time of writing, eight of the 20 toilets were not in working while the remaining 12 were being used by 2 800 community members, as well as members of the surrounding Wallacedene community comprising approximately 6 000 shacks.
- Ten taps were installed by the Oostenberg Municipality. Initially, they were fitted with a mechanism that required a token (costing 25c) to be inserted before 25 litres of water were released. However, this system did not work efficiently and the mechanism was eventually removed. As a result, the community presently has free access to water.
- The Wallacedene community constantly faced threats of fire because it did not have electricity and was forced to use candles.
- Dwellings were built very close to each other due to the limited space available, which had resulted in four serious outbreaks of fire since the issue of the interlocutory order. The fire hazard is aggravated by the fact that many shacks are located quite a distance from the area where the ten taps are situated. The result is that the fires are difficult to control and extinguish.

- They faced the possibility of contracting illnesses because of the waterlogged surface on which their dwellings were erected and a lack of sanitation. There was no refuse removal and it was dumped in the area surrounding the taps and in vacant land adjoining the sports field, creating unhygienic conditions. Under the interim order, both the Premier of the Western Cape and the Oostenberg Municipality were ordered to provide basic sanitation services.
- Because of the proximity of the dwellings to the sports field, members of the community repeatedly had to deal with damage caused by soccer balls hitting their shacks.

Wallacedene falls under Oostenberg Municipality and was reported on by the Department of Housing; however, it did not report on Wallacedene as one of the areas that benefited from its programmes and projects despite attempts by the Commission to get some information on the developments.

According to the study, by October 2001, the lives of the people in Wallacedene had not improved; the measures undertaken, cannot, therefore, be said to be progressively realising the right of access to adequate housing, and this necessitates urgent attention.

### ***2.5.2 Case Study 2: A Community of Despair and Adversity – People with Special Needs (PSN)***

#### **2.5.2.1 Background**

A special task team whose goal is to house PSN has completed an impressive 50 houses for the people who are seen by the rest of the community as outcasts.<sup>80</sup>

This is a project started by the People with Special Needs Task Team in August 2002, and its main objective was to provide homes for those categorised as PSN. This includes partially and completely blind persons, the physically disabled, deaf and HIV positive persons.

The project was allocated R2,3 million by the Gauteng Department of Housing (GDH) for the construction of 100 houses – the first grant of its kind in South Africa. The land was secured for 500 houses. One hundred units were completed by the end of 2002.

#### **2.5.2.2 The Problem**

“The key aspect is to gain stability and to uplift the living standards of disabled people who don’t have a roof over their heads”.<sup>81</sup> The “roof over their heads” might be a problem statement. Understanding “adequate housing” as provided in our Constitution is vital in the process of uplifting the living standards of the

PSN. Providing housing for people regardless of any circumstances does not just mean a wall and a roof over their heads, but adequate protection and suitable space for eating, sleeping, relaxing and family life. Yet community members in Lakeside Proper experience the following hardships:

- These are one-room units with a toilet, no bathroom and no special toilets for people in wheelchairs. But these rooms are just halls without compartments. There is therefore no privacy and they have to use curtains to partition their rooms.
- In the units visited, there are no ramps leading to these units. Although Makram Leaf, a developer, had said there are ramps to these one-roomed houses, they themselves have had to construct the ramps in order to have easy access to their units.
- The walls of other units are shaky; roofs leak; door handles and electricity boxes are too high for people in wheelchairs; inside walls are not plastered; floors and walls are badly cracked; toilet water supply systems leak; the road is still gravel yet wheelchair-bound occupants are expected to use it even when it rains; and there is no storm water drainage and no vegetation.

Even though this must be taken as an improvement on the previous housing condition of the disabled people, it would seem that the objectives and the vision of the project are blurred and will not be realised soon unless drastic measures are adopted. Instead of creating a community for PSN, a community of despair and adversity is mushrooming.

#### 2.5.2.3 Towards a Solution

The situation in Lakeside Proper raises some serious concerns. It has only been a few months since these units have been completed and already there are serious problems. The construction of more units is underway; but should the project continue constructing defective homes for People with Special Needs? When these units have to be repaired, will it not be a waste of taxpayers' money? Is it not time for the process of housing the poor to focus on quality of the units rather than the quantity?

Leaf was quoted as saying "I think that the Government should be complimented because this time they definitely put their money where their mouth is". This suggests that the Government is progressively realising the right of access to adequate housing for people in desperate need. On the contrary, the state of the units and their quality suggests that the guidelines set out in *Grootboom* are not being realised.

Until such time that all these initiatives are in line with the requirements set in this guide, the country's vision to house the poor and PSN is not nearly about to be achieved. The requirement is that all these measures should be reasonable. This is the question that this project should answer. If the project does not stand the test of reasonableness, Leaf's compliment will have to be reserved until the project is reviewed.

While some of the achievements in Lakeside Proper may have complied with the requirements set out in the *Grootboom* judgement, it still must be proved that there was a conscious effort to comply with those. After visiting the site, the recommendation is that the GDH, the task team, civil society and local communities should review the objectives of this project and improve it. While the initial objective might have been appropriate, creating a disabled community by putting people with special needs in one place apart from the rest of the community should be discouraged.

### **3. CHALLENGES FOR THE REALISATION OF THE RIGHT**

Despite the achievements at national, provincial and local levels, challenges remain in order to speed up housing delivery. Most of the challenges relate to the implementation of the planned measures.<sup>82</sup> These include the following:

#### **Discount Benefit Scheme**

The problem has been that it is a requirement that the municipality has to provide a clearance certificate before any transfer of a property can be done and some municipalities do not want to issue such certificates unless all municipal service arrears have been paid.

#### **The delay in the release of State-owned land as a result of land claims**

Some land identified for housing development is under the subject of land restitution claims. This has delayed housing delivery.

#### **Progress payment**

Present progress payment milestones hamper delivery because completed houses cannot be paid for before they are registered, which causes serious under-expenditure to be registered and affects delivery negatively.

#### **Municipalities and traditional authorities**

There is lack of collaboration between local, rural municipalities and tribal authorities.

#### **Corruption**

According to the National Department of Housing, by the end of the year under review about 114 cases had been handed over to Gobodo Forensic and Investigative Accounting for investigation. As at January 2002, 33 such cases came from Limpopo Province, 1 from KwaZulu-Natal, 2 from Eastern Cape, 11 from Western Cape, 14 from Gauteng, 6 from Mpumalanga, 11 from North West, 3 from Northern Cape and 20 from Free State.

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The cases were categorised into fraud (25), corruption (13) and/or maladministration (63). During the course of the year an additional 13 cases were handed over, mainly by provincial housing departments.

This process has resulted in police dockets being opened in seven cases with recommendation for criminal charges; three arrests were also made.

All the remaining cases that were classified either as fraud or corruption cases have been referred to the Office of the Public Prosecutor for further investigation and necessary action.

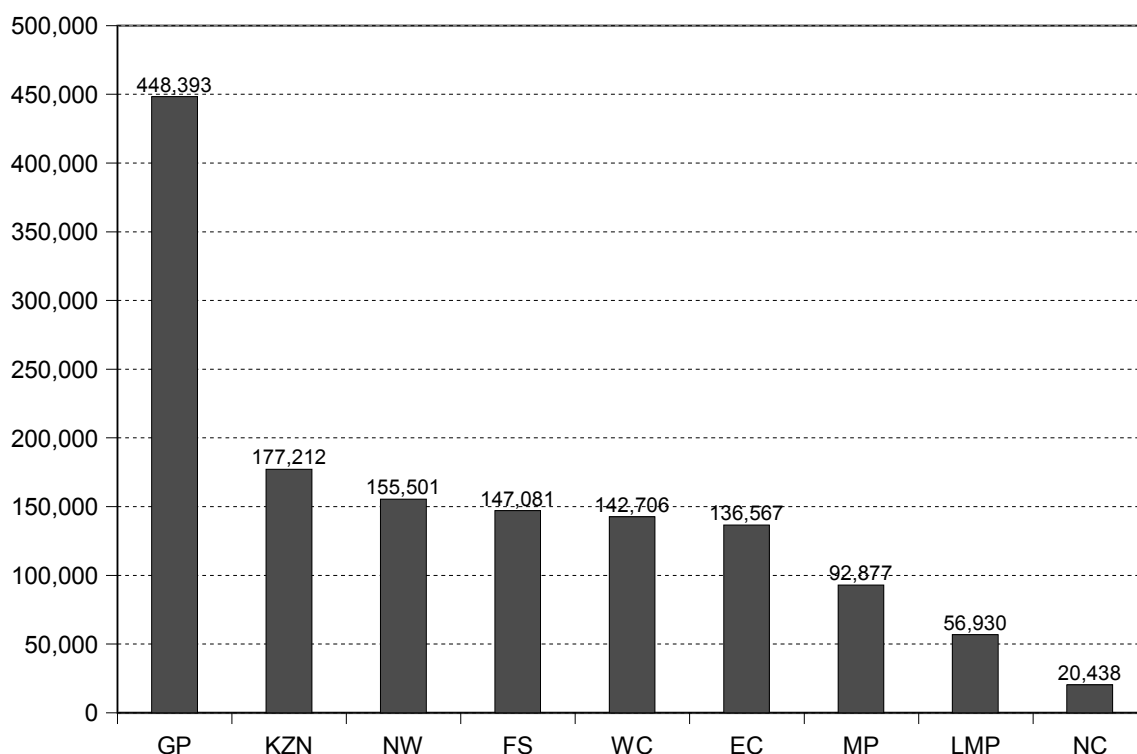
### **Capacity within municipalities**

Many municipalities do not have sufficient personnel dedicated to perform housing-related functions:

- Some beneficiaries could not be traced when they are expected to occupy their houses. The cause for this is that beneficiaries go to look for employment and decide to settle where they will be closer to their workplace.
- Municipalities did not understand their role as support organisations.
- Perceived delays and slow pace in the resolution and processing of lodged land claims for restitution.
- Policy clashes and contradictions between the Department of Land Affairs Land Acquisition Grant and the Housing Subsidy Grant, due to beneficiary overlaps.
- Ineffective enforcement of ESTA/LTA rights in the areas of illegal evictions and human rights' abuses on the farms.
- Contribution amount of R2 479 was a problem when it was introduced. Many departments have had to focus more on PHP for this reason.

## **4. CRITIQUE OF MEASURES INSTITUTED**

According to Census 2001, South Africa has about 459 526 informal dwelling/shacks in backyards and about 1 376 706 informal dwellings/shacks not in backyards. Mostly the conditions in these areas are intolerable.<sup>83</sup> The highest concentration of households in informal settlements not in backyards is found in Gauteng followed by KwaZulu-Natal, North West, Free State, Western Cape, Eastern Cape, Mpumalanga, Limpopo and Northern Cape.<sup>84</sup> Figure 2 highlights the number of households in the informal settlements per province.



**Figure 2: The number of households in informal settlements in each province**

*Source: The Star 14 October 2003*

Given the statistics in Figure 2, this section seeks to determine whether or not measures adopted by the national and provincial government to meet the constitutional obligation to realise the right of access to adequate housing progressively are reasonable within the ambit of section 26 of the Constitution. The assessment is informed by the above mentioned international norms and standards, the requirements as set out by South African courts and some policy and legislative objectives that inform the process of housing in South Africa.

During the reporting period, most of the measures instituted by the Departments<sup>85</sup> to enhance housing delivery show an adjustment resulting in three shifts in emphasis. One shift was a need to balance the quantity of houses with the quality of houses being built since 1999. The second was an emphasis on the responsibility of beneficiaries by focusing on “people’s housing”. The third was the recognition of rental as a tenure option. These shifts show an element of flexibility in the measures – one of the elements of reasonableness. Whether or not the “progressive realisation” of the right of access to “adequate housing” has been achieved through this shift has not yet been determined.

#### **4.1 Urban or Rural Focus**

Based on all of the above mentioned measures it may be concluded that, during the year under review, circumstances have forced the State to move the focus



consciously away from the rural poor to the urban poor. The circumstances include a continuing problem of the cost of acquiring land for housing, which would ensure access to economic opportunities, transport and other services. Census 2001 estimates that in 1996, some 54% of the South African population was urbanised. This has increased to 57,5% or some 25,8 million people.<sup>86</sup>

On the one hand, in provinces like Gauteng, this has forced the National Department and all other departments to focus on inner city programmes including urban renewal. This situation has been aggravated by the influx of refugees and illegal emigrants from neighbouring countries.

On the other hand, since housing is one of the few interventions by the State to place a physical asset directly in the hands of the poor, the programmes focusing on rural areas have been very slow in delivery. The majority of programmes have, however, focused on urban settlements.

It is not clear whether the majority of the poor people in rural and urban centres – most of whose income is below the poverty line – will participate in the majority of the programmes, as most seem to require a minimum contribution (R2 479). The departments will need to explain how the unemployed and poor benefit from these programmes.

The Commission is aware that those who cannot afford the financial contribution in People's Housing Process can contribute by building their own houses through sweat equity. The reality is that there are poor people who cannot offer any contribution because of poor health. However, the Department reports that certain people will be exempted from contributing in kind. The Commission supports this initiative. These include:

- persons classified as aged;
- disabled people; and
- people with health problems.

Circumstances to focus more on urban communities should not be used as an excuse to neglect people in rural areas. With exception of Mpumalanga (43%) and North West (57%) the percentage of the rural housing subsidy from 1994 to 2003 was 0%.

#### **4.2 Failure to Achieve the Key Outputs, Indicators and Targets Set**

Table 21 provides targets that were set up by the NDH for the year under review.<sup>87</sup> As can be seen, the NDH failed to meet half of the targets and failed to account for this.

**Table 21: Key Outputs, Indicators and Targets Set by the National Department 2002/2003**

<i>Sub-programme</i>	<i>Output</i>	<i>Output measure / indicator</i>	<i>Target</i>	<i>Reached or not reached</i>
<b>National Housing Policy and Strategy</b>	Rental housing policy	Rental housing policy and subsidy mechanism	In place July 2002	Not clear
<b>Housing Framework Legislation</b>	Regulations for Home Loan and Mortgage Disclosure Act	Timely finalisation of regulations	May 2002	No, since promulgation of regulations is delaying the Act
	Community Reinvestment Bill	Cabinet approval	April 2002	Introduced in 2003
	Monitoring of housing related legislation	Reports on compliance with regulations	Two reports per year	Not clear
	Draft of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Amendment Bill	Timely re-submission of the Act	February 2002	In October 2003 public comments were still being taken
<b>Human Settlement Policy and Integration</b>	International multilateral co-operation	Compliance with international agreements on human settlements	March 2003	Not clear
	Human settlement policy framework	A policy framework promoting sustainability	May 2002	Not clear

### 4.3 Under Expenditure

Most of the reasons reflected by housing departments for under-expenditure may be attributed to lack of strategic planning. They seem to be unable to distinguish between under-expenditure of the budget vote and a saving. A saving is realised where activities have been set up and implemented comprehensively at a cost less than was budgeted for. Under-expenditure occurs when activities are set up but there is a failure to spend the budget intended for those activities and the intended objectives are not attained. Departments need to improve their planning strategies.

### 4.4 Policy/Programmes and HIV/AIDS

For the year under review, it should be noted that there was no comprehensive housing response to people living with HIV/AIDS and disabled people. The requirement of reasonableness from the *TAC* case states that a programme should be made known effectively (*TAC* para 123).

Proper communication implies proper engagement at inter-departmental level. It means sorting out differences between the departments about institutionalisation of the people affected or infected with HIV/AIDS and/or the utilisation of their extended families.

These measures have not been met at either national or provincial level.

In 2000, a number of NGOs active in Pietermaritzburg were invited by the KwaZulu-Natal Department of Housing to a workshop, to seek their assistance in implementing housing programmes for people living with HIV/AIDS and AIDS orphans. The workshop report highlights a lack of consensus between the Welfare Department, the Department of Housing and the NGOs.<sup>88</sup>

According to the report, the Department of Housing is promoting institutional care for AIDS orphans, whereas the Department of Welfare does not support institutional care except as a last resort. Given the scale of the pandemic, there is a need for a holistic and integrated response to it. So the Department of Housing, the Department of Social Development, and housing practitioners and development workers need to go beyond the provision of a simple shelter and must create a holistic environment where all the fundamental human needs are met. Additional space in homes of people who care for individuals either affected or infected by AIDS is vital in order to alleviate problems of overcrowding and sanitation, which may otherwise encourage the spread of opportunistic diseases. This will not be achieved unless these role-players comply with para 123 in the *TAC* case (mentioned previously) as a priority.

#### **4.5 Census 2001 and Housing Delivery for 2002/2003**

The Department in its indicators has reported on the number of households in informal settlements; number of homeless persons; number of households without access to safe and healthy drinking water; number of households without access to adequate sanitation facilities and electricity; and families without houses. The source of this information is Census 2001. For example, Census 2001 estimated that about 1 376 706 households lived in informal settlements. For the year under review, the Department also provided the same number of households in informal settlements as was estimated in Census 2001. This means that even though the reporting period is after 2001, the number of the households living in informal settlements has not increased or decreased.

An analysis of this could be that the Department does not have a proper monitoring mechanism to keep record of its work, or that the instituted measures during the year under review did not improve the living conditions of these vulnerable groups.

This is problematic as it means the Department does not keep proper track of the work it does. The Department needs to work with Statistics South Africa to update and monitor the impact that its measures have in the improvement of the lives of the poor.

#### **4.6 Old Projects/Programmes v New Policy/Programme Directions**

Although the National Department of Housing has realised its shortfalls and the effects on the lives of beneficiaries, in all the reported programmes, policies and projects, there is no express indication, either by the various housing departments or other role-players (such as banks) to rectify unsuccessful

projects. Instead, the Department continues to introduce and implement new policies without any research as to why the current programmes and project are not successful. For example, the controversy associated with bonded house projects such as in Phumula Gardens in Johannesburg, which was developed in 1994, and the issues around habitability of RDP houses have not been mentioned.<sup>89</sup> The fact is that beneficiaries – whose right to adequate housing has allegedly been compromised – still live in those houses because they do not have any choice. Yet some of the houses do not come close to being permanent structures as contemplated in the Housing Act and the Housing Code.

One challenge identified with bonded houses is the education of home owners. It is questionable whether beneficiaries are properly educated on home ownership before they commit themselves to buying a bonded house. Pieter Venter, ABSA National Manager, Segment Focus, when responding on this issue stated that “residents not only attend a three-hour interactive modular workshop but were also given borrower education material to take home with them at the end of which they were certified”. The materials are, however, written in English only. It must be borne in mind that the language in which the beneficiaries are addressed plays an important role. All the concerns raised must be attended to. Furthermore, the Department must carry out further research on the failure of the already running programmes and projects.

#### **4.7 Policy/Programmes and Farm Workers**

The South African Human Rights Commission’s Report of Farming Communities highlights the key challenges on farms in relation to the right of access to housing and makes recommendations. Clearly the programmes/policies and projects discussed above did not deal with the realisation of the right to adequate housing on farms. The situations on farms, according to the report, include:

- women being discriminated against in terms of the provision of housing because men are still regarded as the only possible head of the household;
- demonstrating little understanding of the rural context;
- clearly not grappling with the issues of farming communities;
- not resolving the issue of the provision of housing to individuals residing on private land;
- insufficient steps being taken to address housing for farm dwellers;
- unwillingness by the DOH and Department of Land Affairs to clarify where the responsibilities lie at departmental level; and
- lack of government planning at all levels for the provision of emergency accommodation, pending eviction.

The benchmark for reasonableness in *Grootboom* states that considering housing problems in their social, economic and historical context, the programme must be “balanced and flexible and make appropriate provision for attention to housing crises and to short, medium and long term needs”. A reasonable programme cannot exclude “a significant segment of society”. Conditions do not remain static and therefore the programme will require continuous review (para 43). This requirement creates an opportunity for the National Department of Housing to review its measures continuously so that these can accommodate the farming community. The Department has not complied with the requirement for reasonableness in the sense that all the measures (policy/programmes and budget) do not make appropriate provision for attention to housing crises and to the “short, medium and long term needs” of the farming community. These have not, therefore, been reasonable and have not progressively realised the right.

#### **4.8 Global Context and Housing**

The housing industry operates within the context of the larger socio-political economy of the country and the globe, and there are many external factors that influence housing that are not easily controllable. In essence globalisation means privatisation. Privatisation of socio-economic rights such as housing may have both positive and negative outcomes. Negative outcomes include a situation where a wealthy corporate sector in South Africa focuses on those above the poverty line who can afford to buy houses; and the public sector focuses on the poor. South Africans should be concerned so that the State and its private partners do not exacerbate unfair social and class divides by prioritising South Africa’s standing in the global economy above the basic needs of its poorest citizens. (Harrison *et al.*, 2003:2).

### **5. RECOMMENDATIONS**

#### **5.1 Policy Coherence**

“Institutional fragmentation has made it increasingly difficult to define boundaries in power and responsibility between spheres of government and between government departments, private and community sectors. As the number of agents involved in public policy have multiplied so the question of co-ordination has become more critical. Policy coherence essentially involves the integration of agendas between separate agencies, and common programme [s] across sectors” (Harrison, *et al.*, 2003:19). The realisation of the right of access to housing depends not only on the provincial and national departments of housing, but also on other departments. Thus problems in housing call for a coherent policy framework in order to allow collaborative work between departments and all other role-players in pursuit of a common agenda.

For example, the Department of Housing in its protocol reported that it believes that the provision of shelter for homeless people is a primary responsibility of

the Department of Social Development. This needs clarification in line with the Department of Housing's obligations in terms of the Housing Act.

The Department of Housing also advocates the institutionalisation of some vulnerable groups, whereas the Department of Social Development promotes the use of existing family units, such as extended families for HIV/AIDS victims such as orphans as a first resort and institutionalisation as a last resort. The Departments must discuss this issue.

## **5.2 People with Special Needs**

The elements of reasonableness must be considered seriously, for without it projects will not muster the requirements of *Grootboom*. Those projects that have not taken these elements into account are in danger of falling short of these requirements. The NDH must take a leading role and empower those who are committed to assisting, like the Task Team for PSN. A good monitoring system for these projects will help to improve both the quality and sustainability of the projects. Failure to take these steps will inevitably result in a mushrooming community of despair and adversity.

## **5.3 Integration of Communities**

The Department should guard against the mistake of disintegrating the existing communities in the process of assisting them. In the process of housing the HIV/AIDS victims, orphans, and the aged, an effort must be made to integrate them within the broader community.

## **5.4 Planning**

Planning is a process of "dialogue between different systems of meaning in the search for areas of consensus, and should not be regarded as a technical procedure" but as consensus building through communication (Harrison, *et al.*, 2003:21). In a South African context with its enormous complexity and diversity, it must be accepted that modernist planning, which imposed frameworks, master plans and very little social interaction, is inappropriate. The National Department of Housing must consider adopting a communicative action approach, which encourages the involvement of all beneficiaries and those affected in its planning in order to promote difference and diversity while achieving integration. Strategies that emerge through a process of inter-discursive reasoning or argumentation are more likely to provide an enduring and effective basis for action than those arrived at through abstracted reasoning of a planner or that are imposed by a dominant actor (Healy, 1993:238).

Some reasons for under-expenditure on some programmes and projects both at national level and provincial levels reflect a lack of careful planning. The implementation of all the programmes, projects and legislative frameworks require a well thought-out planning and monitoring system to ensure the delivery of quality products.

### **5.5 Tribal Authorities and Land Availability**

The most common explanation for slow delivery in rural areas is that traditional authorities are not willing to forgo their powers in respect of land allocation, administration and management. However, the National Department of Housing has reported that at the core of the problem is the issue of governance, which includes political and economic considerations. Indeed, a proper consultation process must be followed with all the parties involved in order to find an alternative form of redress where the land under claim has been identified for housing development.

### **5.6 Private Land Identified for Housing**

Well-located land for housing development is essential for the realisation of the right of access to adequate housing. The National Department has proposed the establishment of a dedicated fund for acquiring well-located land for low-cost housing. These should be established as a matter of urgency.

### **5.7 Culturally Adequate Housing**

The International Covenant on Economic, Social and Cultural Rights stipulates key elements necessary for a meaningful enjoyment of this right.<sup>90</sup> All these elements must be met by government for this right to be realised. Culturally adequate housing has not been considered in South Africa. Young (1990) defines “cultural imperialism” as “the universalisation of a dominant group’s experience and culture, and its establishment as the norm” (Harrison *et al.*, 2003:37). The kinds of houses being built across the country seem to follow the same style whether in rural, semi-urban or urban settlements. The National Department of Housing must attend to the concern that its housing development seeks to encourage cultural imperialism; it must make space for the fundamental features of basic human rights including diversity and mutual respect for difference. The People’s Housing Process has a potential of attending to this and therefore must be strengthened even though this process slows delivery.

### **5.8 Access to Information**

Lack of access to information has, *inter alia*, resulted in unethical behaviour in housing development in South Africa. At both national and provincial levels, little progress has been made to stop these irregularities. It is, however, evident that the same public has suffered tremendous loss of confidence in the Department. An ideal housing industry will be one that is not sheltered by secrecy, corruption, repression and human rights’ abuses.

Housing must realise that secrecy and lack of accountability of financial institutions, developers and government officials have fuelled people’s misgivings. A raft of corrupt practices and inhumane irregularities in housing has undermined the livelihoods of millions of poor people. This calls for the

National Housing Department to find a better way of using legislation that promotes access to information. The Home Loan and Mortgage Disclosure Act (HLAMA) as mentioned above seeks to promote access to information<sup>91</sup> and the Department must understand and operationalise the Promotion of Access to Information Act (PAIA) 2 of 2000. The Act aims, *inter alia*, to create a framework to allow the public access to the records that government holds on its behalf.<sup>92</sup>

One of the major obstacles in the fight against corruption in housing is the reluctance of individuals to “blow the whistle” on corrupt activities for a number of reasons, including fear of retribution, being labelled *impimpis* or traitors, and lack of legal protection or support from government.<sup>93</sup> The Protected Disclosures Act 26 of 2000 encourages employees to report wrongdoings by employers or corrupt colleagues.<sup>94</sup> For this Act to be effective in the Department of Housing, three things must be observed. First, there must be the political will to confront a culture that scorns whistle-blowers. Second, employers in housing must be trained to implement a viable whistle-blowing policy that allows employees to raise concerns without fear of reprisal. Third, workers themselves must know and understand their rights under the law in order to be able to report misconduct in a proper manner<sup>95</sup>.

These pieces of legislation should be implemented comprehensively to promote participation, curb corruption and promote accountability of all role-players in housing the poor.

### **5.9 Public Participation**

Lack of participation has been mentioned a number of times in this report. It is not enough for the Department to mention participation without appropriate clarification of what it means. Participation could mean:

- manipulative participation;
- passive participation;
- participation by consultation;
- participation for material incentives;
- functional participation;
- interactive participation; or
- self-mobilisation.

There is no doubt that the participation of beneficiaries could improve the effectiveness of housing development. But not all of the above-mentioned types of participation are appropriate. Interactive participation and self-mobilisation are suitable for housing development processes in South Africa. In interactive participation, the DOH could ensure that beneficiaries and relevant NGOs participate in joint analysis, development of action plans and the formation or strengthening of local housing institutions. Their participation must be seen as a right, instead of a means to achieve project goals. These people must have a



say over local decisions and determine how available resources are used. In self-mobilisation the beneficiaries must participate by taking initiatives independently to change systems if needs be. (Pretty, 1995).

### **5.10 Eviction**

After nine years of democracy and despite the existence of human rights values in South Africa, the use of violence, harassment and other tactics to facilitate eviction remains common. All persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats.<sup>96</sup> The practice of illegal and forced evictions should be vehemently condemned as a violation of human rights. The human cost involved in forced evictions must be analysed within a human rights framework. Evictions must always be avoided where possible.

### **5.11 Bonded Houses**

As part of the education process on bonded houses, the hidden costs should be revealed and discussed in order to help prospective buyers to make an informed decision. Failure to do this should be challenged in terms of section 32 of the Constitution and the Promotion of Access to Information Act, for it is in the interest of the home owners to know about such.

It is also questionable whether the failure to provide information on these hidden costs is part of “sound business practice”. It should follow that the banks and other financial structures should also account if it is clear that, had the home owners been provided with the hidden information they would probably not have taken the bonded houses.

### **5.12 Farm Workers**

Based on the finding of its report on housing for farm workers (see above), the SAHRC has made a number of recommendations:

- All the relevant departments should come together and create a policy document on the provision of housing, which clearly states where the responsibilities lie. This policy will need to be taken down to the provincial and local level for implementation.
- Furthermore, the policy and implementation plan must be submitted to the SAHRC.<sup>97</sup>

## **6. CONCLUSION**

The Department of Housing has embarked, since 1994, on a process of addressing a housing situation in which the poorest were housed in the most unfavourable conditions. During the year under review, the Department had focused on the implementation of this ongoing project, which continues to be a work in progress.

Despite the advances made, there are serious challenges in the implementation of programmes and projects. It is clear from housing legislation that the Government is committed to bettering the lives of the poor. Whether unintended or not, unfortunately the outcomes of some of these programmes and projects have given birth to results not entirely different from those under the system of Apartheid prior 1994; namely poor quality housing, small sizes, leakages, defective workmanship, cracks, and badly located areas.

The National Department of Housing has acknowledged these challenges and is engaged in addressing them. Even though the response is not clear, there appears to be a combined effort by all the relevant departments to rectify these problems.

As stated above, the South African landmark case on socio-economic rights (the *Grootboom* case) requires that where the State progressively realises a socio-economic right, both policy and the measures taken to implement that policy must be in line with the standard of reasonableness as set out in that judgement. It cannot be disputed that the measures adopted by the State on housing during the year under review still need to be improved on, and that the policy framework needs refining, in order to pass the test of reasonableness set out in this case.

During the year under review the Housing Ministry built 203 288 housing units.<sup>98</sup> The Department reported 9 342 791 homeless persons in South Africa. About 1 376 706 households live in informal settlements and 2 399 825 families are without houses. This is a major challenge for the Department and it has made some progress. However, based on the challenges facing the Department including: the poor quality of houses delivered; fragmentation between the various departments involved with and related to the delivery of housing, resulting in the lack of a comprehensive and co-ordinated response to the housing crisis for vulnerable groups such as HIV/AIDS victims; a lack of capacity at the municipality level which results in slow delivery and an inability to spend budget votes; and a lack of adequate information from the departments when they report to the SAHRC; it is difficult to say that there has been a “progressive realisation of the right of access to adequate housing” during the year under review, as defined in the *Grootboom* judgement.

This should not be understood to be suggesting that the Department of Housing is not moving in the right direction. It has laid a foundation from which it can build. The enormous housing challenges cannot be expected to be dealt with within nine years. This is work in progress and the Department must reflect on its shortfalls and celebrate its successes.

- 1 See section 28 (1) (c)
- 2 See section 35 (2) (e)
- 3 Government of Republic of South Africa and Others v Grootboom and Others 2001 (11) BCLR 1169 (CC).
- 4 Ibid., para 35
- 5 Ibid., para 34-44
- 6 Minister of Health and others v Treatment Action Campaign and others, 2002 (10) BCLR 1075 (CC), para 123
- 7 Section 1 of the Housing Act 107 of 1997
- 8 For a list of these instruments and treaties, refer to the *4<sup>th</sup> Economic and Social Rights Report 2000/2002*, published by the South African Human Rights Commission, Chapter 2: Access to Adequate Housing, p21
- 9 General Comment No 4, para 8 of the Committee on Economic, Social and Cultural Rights, 1991.
- 10 Istanbul Declaration on Human Settlement, available online: [www.unhabitat.org](http://www.unhabitat.org)
- 11 Housing Priorities for 2002: brief by Minister, May 7 2002, available online: [www.pmg.org.za](http://www.pmg.org.za)
- 12 United Nations Human Settlements Programme (UN-HABITAT) *Rental Housing. An essential option for the urban poor in developing countries, 2003*. Available [online] [www.unhabitat.org](http://www.unhabitat.org)
- 13 *Social Housing Foundation: Guidelines for Making Social Housing Affordable* (2001) p7
- 14 *Evaluation of USN Co-operative Housing Models Report* (2002) Urban Sector Network
- 15 These problems are experienced across the Social Housing Sector
- 16 Some administrative staff do not have the necessary qualifications and skills to perform this mandate
- 17 Evaluation of USN Co-operative Housing Models, Ibid., p 14
- 18 See page 75 of the report
- 19 See footnote 13
- 20 See footnote 1 8
- 21 National Housing Programmes: *Housing Assistance in Exceptional Urgent Housing Situations*, Chapter 3
- 22 Grootboom, *op. cit.*, para 51
- 23 Ibid., para 52
- 24 Ibid., para 64
- 25 Ibid., para 65
- 26 Ibid.
- 27 National Home Builders Registration Council, Housing Consumers Brochure

- 28 If a complaint is related to three months' non-compliance, and a housing consumer has notified the home builder, the NHBRC will seek to resolve the complaint telephonically and through correspondence with the home builder. The NHBRC will pursue the home builder, so as to ensure that s/he complies with obligations to the housing consumer in terms of Section 13 (2)(b)(ii) of the Act, to rectify minor defects within three months of the date of occupation. The builder will undertake rectification of defects.
- 29 The home builder provides the housing consumer with a one-year warranty against roof leaks upon occupation of the home. If a housing consumer experiences a roof leak in a home within one year of the date of occupation, and the home builder has failed to respond to the complaint, the NHBRC will notify the home builder and seek an immediate response, failing which the NHBRC may issue a request for conciliation. It is the obligation of the home builder to rectify such defects notified to him/her by the housing consumer within one year.
- 30 In terms of Section 13 (2)(b)(i) of the Act, where a complaint from a housing consumer related, in the opinion of Council, to a possible major structural defect, the NHBRC may seek the home builder's response, and may request the prescribed refundable conciliation deposit from the consumer. The conciliation deposit will be refunded once the complaint has been dealt with, unless the complaint is found to be frivolous.
- 31 SAHRC, *4<sup>th</sup> Economic and Social Rights Report 2000/2002*, *op. cit.* p28
- 32 Gauteng Department of Housing, Annual Report 2002/2003
- 33 Annual Report, *op. cit.*
- 34 This is the total number of all goals attained for 33 municipal areas as reported by the Department.
- 35 Ibid.
- 36 KwaZulu-Natal Department of Housing Protocol (2002/2003)
- 37 Department of Local Government and Housing: Annual Report 2002/2003, p9
- 38 Ibid.
- 39 Ibid., p10
- 40 Ibid., p13
- 41 Statistics South Africa, 2001
- 42 Northern Cape Department of Housing Protocol
- 43 Ibid., p26
- 44 The Annual Report of the Department reflects 16 751 housing units which were delivered during the year under review.
- 45 Ibid., p4
- 46 Ibid.
- 47 Statistics South Africa, *op. cit.*
- 48 Eastern Cape Department of Housing Protocol
- 49 See the Preamble of this Act
- 50 Harrison, *et al.*; 2003, p41

- 51 Section 8 (4) states that “any person whose rights or interests have been prejudiced by contravention of section 8 (1) has the right to institute a private prosecution of the alleged offender”.
- 52 Section 8 (1) states “No person may evict an unlawful occupier except on the authority of an order of a competent court”. Section 8 (3) states that “any person who contravenes a provision of (1) ... is guilty of an offence and liable on conviction to a fine, or to imprisonment not exceeding two years, or to both such fine and such imprisonment”.
- 53 See Section 4 for “eviction of unlawful occupiers”, section 5 for “urgent proceedings for eviction”, and section 6 for “eviction at instance of organ of state”. These provisions have been amended in the draft amendment.
- 54 Section 1 of the PIE explains the term “unlawful occupier” as meaning a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, excluding a person who is an occupier in terms of the Extension of Security of Tenure Act 62 of 1997 and excluding a person whose informal right to land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act 31 of 1996. The draft amendment of the Act substitutes this definition by inserting that the definition of an unlawful occupier “excludes a person who having initially occupied with such consent thereafter continues to occupy once such consent has been withdrawn”. The draft amendment was published in August 2003 only, which is the period out of the 2002/2003 reporting period.
- 55 *Ndlovu v Ngcobo, Bekker and Another v Jika* 2003 (1) 113 (SCA) (para 5)
- 56 *Ibid.* para 23
- 57 Financial institution means any bank or mutual bank registered as such under the Banks Act 94 of 1990, or the Mutual Banks Act 124 of 1993, or any other registered institution whose business is, in full or in part, either the acceptance of deposit from the general public, the advance of credit to persons or both such acceptance and advance, with the security of registered mortgage bond or any other form of acceptance security, for the purpose of providing home loans.
- 58 ESR Review, *Economic and Social Rights in South Africa*, Community Law Centre (University of Western Cape)
- 59 See section 4 (1) of the Community Reinvestment (Housing) Bill of 2002
- 60 This refers to the performance, conduct and level of compliance that is prescribed by the Minister to a financial institution in attempting to meet its target.
- 61 This refers to that proportion of a financial institution’s book that is prescribed by the Minister for disbursement either directly or indirectly to low- and medium-income level households for housing purposes.
- 62 Section 4 (1)(h), of the Bill
- 63 *The Daily Dispatch*: Online reported the response from the Banking Council CEO Bob Tucker on Tuesday, August 6 2002. Also available [Online] <http://www.dispatch.co.za/2002/08/06/easterncape/BANK.HTM>
- 64 This includes: Lending without due regard to a borrower’s repayment ability, for low-income borrowers, making mortgage loans where the principal amount loaned is greater than the amount needed for housing purposes; and providing funding directly to niche market lenders to make available for end user loans. See section 4 (2)
- 65 COSATU 2002, Submission on the Draft Community Reinvestment (Housing) Bill
- 66 This does not fall within the period under review (April 2002/March 2003) and therefore will be discussed in the next reporting period.
- 67 Vote 17: Housing: 2002 estimates of National Expenditure, p372
- 68 Housing in Southern Africa, 2002
- 69 Department of Housing Strategic Plan: April 1 2003 to March 31 2006

- 70 See Kwazulu-Natal Treasury Documents on Income and Expenditure Expenditure for the South African Housing Fund.
- 71 Department of Local Government and Housing: Annual Report 2002/2003, p13
- 72 Since the inception of the housing subsidy programme in April 1994 to January 31 2003. Housing subsidies have been the primary mechanism to realise this right progressively in South Africa
- 73 1) The reporting format of the Housing Subsidy scheme does not provide for classification according to rural/urban as well as race. However, almost 50% of the 1,4 million houses built since 1994 were built in urban areas.
- 2) Projected figure of the number of households with monthly income less than and equal to R3 500. The data is only available at provincial level.
- 3) The information is based on subsidies allocated to persons aged 61 and older from 1994 to 2002.
- 4) This figure includes informal dwelling/shacks in backyard, informal dwellings/shacks not in backyard, house/flat/room in backyard, room/flat let not in backyard but on a shared property, tents, and caravans, excluding traditional dwellings. No data is available in terms of rural-urban split.
- 5) The provision of shelters is primarily the role of the Department of Social Development.
- 6) This figure is based on the census category “Households in informal dwelling/shacks not in backyard”.
- 7) No data is collected by the National Department of Housing on illegal settlements. This is a matter that is dealt with at the local sphere of government.
- 8) The average period of time spent by an individual on a waiting list varies from province to province. Only a few provincial governments keep waiting lists. Based on the provincial waiting lists available, the maximum period a person can be on a waiting list is six years.
- 9) This figure is for the number of households without access. It includes the Census 2001 categories: no access to flush, pit latrine, or bucket latrine (excluding access to other unspecified sanitation facilities). No data is available on the rural-urban split.
- 10) This figure is for the number of households without access. It includes the Census 2001 categories: no access to electricity (excluding access to gas, paraffin, candles or other sources). No data is available on the rural-urban split.
- 11) This figure represents all non-compliances for the year 2002/2003, as recorded by the NHBRC.
- 12) This information is not available at national level.
- 13) The figure comprises the Census 2001 categories, “House/flat/room in backyard”, “Informal dwelling shack in backyard”, “Informal dwelling /shack not in backyard”, “Room/flat let not in backyard but on a shared property”, “Caravan/tent”. The data is available at provincial level only.
- 74 Respondents include children and their parents
- 75 Government of the Republic of South Africa and others v Grootboom and others 001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC), para 3
- 76 Ibid., paras 7 and 8
- 77 The first appellant was the National Government; the second one was the Premier of the Province of the Western Cape representing the Western Cape Provincial Government; the third was Cape Metropolitan Council; and the fourth was Oostenberg Municipality.
- 78 Grootboom, *op. cit.*, para 13

- 79 Ibid., para 99
- 80 Renay De Witt, *Creating Communities for people with special needs*, Housing in Southern Africa, December 2002
- 81 Renay De Witt, *Creating Communities for people with special needs*, Housing in Southern Africa, December 2002
- 82 These are taken from the response to protocols from the Departments of Housing.
- 83 *The Star*, Millions in SA reside in squatter camps – Minister, 14 October 2003
- 84 Statistics South Africa, *op. cit.*
- 85 This also includes the National Department of Housing even though it did not submit its report.
- 86 Statistics South Africa, *op. cit.*: investigation into appropriate definitions of urban and rural areas for South Africa: discussion document. Report No 03-02-20 (2001)
- 87 The Commission was also hoping that the NDH would provide reasons for failing to meet its own benchmarks, as they are vital for the realisation of the right of access to adequate housing.
- 88 Workshop Report: Speak out on Vulnerable Children, HIV/AIDS, and Housing, available [on line] <http://www.usn.org.za/speak-out%20report.htm>
- 89 Phumula Gardens is a private development of bonded houses that was developed by Homes for South Africa. The project began in 1994 and it was one of the first housing projects to take place after the new Government came into power. Previously disadvantaged groups were suddenly given the opportunity to purchase property. Many of them apparently jumped into homeownership without giving it a second thought. Many residents were not fully aware of the responsibilities and hidden costs that come with owning a home. As a result, banks repossessed many of the bonded houses. (Some 30 000 have been repossessed in South Africa during the last eight years.) Homes for South Africa lost in excess of one million rands due to vandalism. As Phumula Gardens residents feel that they have not been given their money's worth; the local government is also losing money because residents are refusing, or cannot afford, to pay for basic services.
- 90 For a more detailed discussion on the elements, see the General Comment No 4, para 8 of the Committee on Economic, Social and Cultural Rights, 1991. Can also refer to the *3<sup>rd</sup> Economic and Social Rights Report by the South African Human Rights Commission 1999/2000*, Chapter 6: Access to Adequate Housing, p250
- 91 Section 2 (1) of the Act provides that “Every financial institution must disclose the required information in its annual financial statement”.
- 92 PAIA, *A user guide for government administrators*, SAHRC Resource Manual, module one
- 93 Robin Hodess with Tania Inowlocki and Toby Wolfe, Global Corruption report (2003) *A special focus to access to information* by Transparency International, p17
- 94 Section 2 (1) of the Act provides that the objectives of the Act are:
- a) to protect an employee, whether in private or the public sector, from being subjected to an occupational detriment on account of having made a protected disclosure;
  - b) to provide for certain remedies in connection with any occupational detriment suffered on account of having made a protected disclosure; and
  - c) to provide for procedures in terms of which an employee can, in a responsible manner, disclose information regarding improprieties by his or her employer ...
- (3) Any provision in a contract of employment or other agreement between an employer and an employee is void in so far as it:

- a) purports to exclude any provision of this Act, including an agreement to refrain from instituting or continuing any proceedings under this Act or any proceedings for breach of contract; or
- b) (i) purports to preclude the employee; or
- (ii) has the effect of discouraging the employee, from making a protected disclosure.

95 See note 60

96 General Comment No 4 (1991) of the Committee on Economic, Social and Cultural Rights on the Right to Adequate Housing, para 8 (a)

97 The recommendations are discussed in detail in the report, pages 44 to 196

98 National Department of Housing Protocol