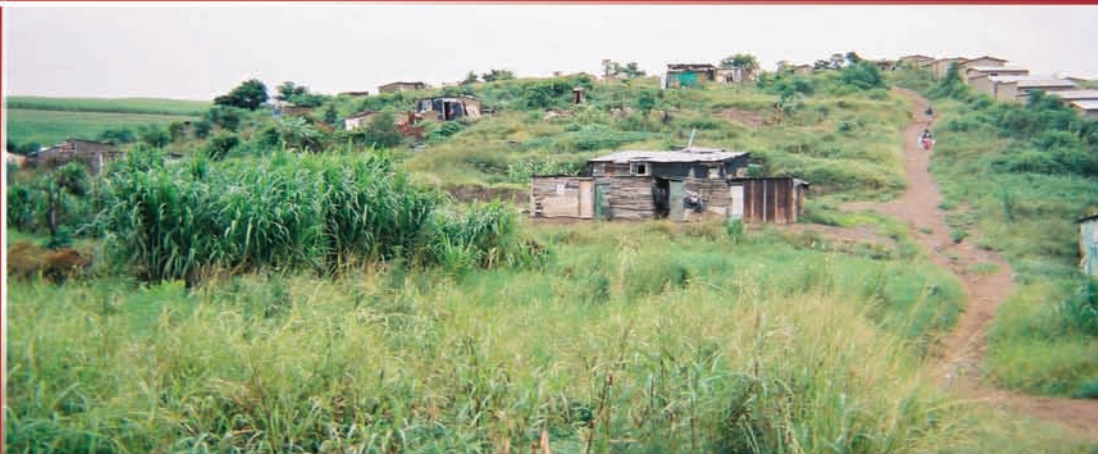


Chapter 9



The right to land



CHAPTER 9: THE RIGHT TO LAND³⁹⁹

9. INTRODUCTION

In South Africa, studies have found that poverty is generally higher in rural areas, and the incidence of poverty is higher amongst rural households without access to land.⁴⁰⁰ The purpose of land reform in South Africa, as stated in the White Paper on Land Reform, is threefold. Firstly it aims to address the injustices of racially based land dispossession. Secondly, it should provide more equitable distribution of land ownership. Thirdly, land reform should assist with reducing poverty and contributing to economic growth.⁴⁰¹ Land reform was to be central to a programme for rural development, and agrarian reform is thus integral to the process of land reform.

It is against this purpose that the progress of land reform will be assessed. In order to achieve this outcome, the land reform programme has three main pillars; firstly, land restitution; secondly, land redistribution and thirdly, land tenure reform. It is argued that land reform has been implemented in an ad-hoc manner based on a supply and not on a needs basis and that it has taken place in the absence of clearly defined outcomes and a proper rural development framework. The consequence of this is that very little has changed in the ownership structure of land in South Africa and rural poverty remains dire. The findings of this report will show that the land reform landscape is littered with failed projects due to a number of policy and implementation failures, and land has not been a vehicle for post-apartheid transformation as originally envisioned.⁴⁰² The government has also failed to secure land rights for those lawful occupiers residing on other peoples' land, such as in communal areas and on farms. Even where consent has been tacit, the courts have found that it can also be tacitly withdrawn, which leaves occupiers in a precarious position. The question of what is lawful in the case of tacit occupation has become murky.⁴⁰³ It is argued in this chapter that the government has not really understood the root causes of programme failure and has thus only adjusted the purpose and target group of the programme, moving further away from a pro-poor agenda. Further, the government has been accused of not really wanting to change the mode of production in land use nor mediate the competing tensions between the private land owners, commercial farmers, traditional leaders and the landless.

The chapter begins with an overview of the international, national, legal and political frameworks and mechanisms for land rights. This is followed by a descriptive section reporting on the indicator for MDG 7, that is, the proportion of the population with access to secure tenure. The chapter goes beyond reporting on the MDG as it is argued that the quantitative targets set do not have real substance. The "main themes arising" section in this chapter will summarise the sections on planning, MDG and the analysis of the progressive realisation of the right to land. It then analyses planning specifically in relation to information gathering and monitoring, and budgetary information. To overcome what may be considered as a largely quantitative focus, the final section will provide a qualitative analysis of the progressive realisation of the right to access to land in South Africa. This will include an analysis using the 4 As, that is, the government programme must be appropriate to meet the needs of beneficiaries, land must be available where beneficiaries need it, there needs to be equitable access to land for a diversity of land beneficiaries, including vulnerable groups, and the land and support provided to beneficiaries must be adequate. Recommendations are provided at the conclusion of the chapter.

9.1. The Meaning and Content of the Right

In this section, an overview is provided of the main international instruments and South African constitutional and legal obligations regarding the right to access to land on an equitable basis. South African legislation, policies and programmes that have been implemented to give effect to this right are also highlighted. The analysis of the effectiveness and impact of these is discussed in the section on the progressive realisation of the right.

399 Note: The Department of Land Affairs did not make any written submissions to the SAHRC, an oral presentation was made and their input has been captured through the transcripts. There were only two submissions specifically on land issues from civil society organisations – these were 'Women on Farm's', and the 'Black association of the agricultural sector'.

400 Cater & May, (1997); May & Deinginger, (2000).

401 Department of Land Affairs. White Paper on Land Reform, (1997).

402 Hall, R. (Ed). *Another Countryside*, (2009).

403 The PIE act has also been interpreted very narrowly, for example by Yacoob J in the Joe Slovo judgement which would make it almost impossible for occupiers to show that it was not living unlawfully on land because it was given tacit consent by the state. Fortunately, the other judges did not concur with this argument. <http://constitutionallyspeaking.co.za/joe-slovo-case-the-good-the-bad-and-the-mostly-unstated/>



National Legislation and Agreements

The key international instruments which cover land rights are:⁴⁰⁴

- UN Declaration of Human Rights, 1948 which provides for a right to own property and prohibits the arbitrary deprivation of property (Article 17).
- African Charter on Human and People's Rights (ACHPR 1981) which guarantees the right to property, allows state interference with people's property rights in the interests of public need and general community interests, and protects the rights of dispossessed people to lawful recovery of their property and adequate compensation.
- Convention on the Elimination of All forms of Discrimination against Women (CEDAW 1979), which protects rural women's rights to participate in and benefit from rural development, agricultural programmes, agrarian reform and land settlement.
- The Peasants' Charter (UN Food and Agricultural Organisation) which advocates for land tenure reform and land redistribution for those who are landless and for small farmers, and it also regulates changes in customary tenure.

The Constitution not only protects the right to property but also provides for the protection of rights that are less than ownership. Section 25 (1–9) deals with property rights and tenure as follows:⁴⁰⁵

- 25 (1) refers to deprivation of property, that no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
- 25 (2) refers to expropriation of property, which may be expropriated only in terms of law of general application.
- 25 (3) deals with the just and equitable compensation, reflecting an equitable balance between the public interest and the interests of those affected.
- 25 (5) obligates the state to take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain equitable access to land.
- 25 (6) and (9) provides for the security of tenure and obliges parliament to make laws that promote security of tenure, or provide comparable redress for people or communities whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices.
- 25 (7) deals with restitution of property or equitable redress for people or communities dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices.
- 25 (8) ensures that the state can take steps to redress the results of past discrimination without being frustrated by private property rights, so long as the measures are "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom" section 36 (1).
- Sections 25 (5), (6) and (7) form the three pillars of South Africa's land reform programme.

*"While the enforceability of section 25 (5) on land redistribution would be open to challenges on the basis of an 'available resources' determination, sections 25 (6) and (7) grant secure legal entitlements to the intended beneficiaries of the remaining two legs of the government's land reform programme, namely land restitution and land tenure reform."*⁴⁰⁶

Enabling Legislation, Policies and Programmes

In 2009, the Department of Rural Development and Land Reform (DRD&LA – formerly the Department of Land Affairs (DLA)) identified its priorities as follows:

*"The Department of Land Affairs' key priorities include: redistributing 30 per cent of white owned agricultural land to historically disadvantaged South Africans by 2014 in line with the 2000 ministerial directive; providing post-settlement support; finalising outstanding land claims; and reforming the tenure system."*⁴⁰⁷

404 Khoza (note 26 above).

405 Ibid; the Constitution.

406 Twala, D. (2003).

407 Department of Land Affairs, Budget Vote 27, (2009).



The White Paper on South African Land Policy, 1997 details the government's Land Reform Programme, which has three sub-programmes:⁴⁰⁸

1. Land Restitution focuses on the restoration of land rights. Its purpose is to restore land ownership (or provide compensation) to those who were dispossessed without adequate compensation by racially discriminatory practices after 1913. In the first phase of land reform (1994/99) all claims were assessed by the independent and specialised Land Claims Court. In order to speed up the process of settling claims, the government delegated decision making to an administrative process through the Commission on the Restitution of Land Rights (CRLR) that has branches based in the nine Provinces, and the Land Claims Court that acts as final arbiter in restitution cases.⁴⁰⁹
2. Land Redistribution is intended to provide the disadvantaged and the poor access to land for residential and productive purposes. Its purpose is to ensure equitable distribution of land ownership, to reduce poverty and promote economic growth. The main mechanism for land acquisition was to be "market-assisted" by negotiating with existing owners and providing state grants to beneficiaries. It is also "demand-led" as the initiative for the projects would come from the beneficiaries and not the state, and "community-based" as groups would have to pool their subsidies to purchase the land and farm collectively.⁴¹⁰ It differs from the traditional "willing-buyer willing-seller" approaches in other countries as the beneficiaries, rather than the state, are the willing buyers. The main function of the state in South Africa is to facilitate the administrative process, subsidise the land transfer, provide the grants (R16000–R17000) and plan for land use. The primary target group was the landless poor in the rural areas, who were subjected to a means test in order to qualify. In the 1990s, this process fell under the Settlement Land Acquisition Grant (SLAG)⁴¹¹ but it was replaced by the Land Redistribution for Agricultural Development (LRAD) programme following a policy review. The main shift in emphasis was a greater focus on the commercial use of the transferred land, and a sliding scale for differently sized grants was introduced (from R20 000–R100 000), depending on what the beneficiaries could contribute in terms of assets, cash or labour.⁴¹² This also meant that the purpose and target group of land reform changed and the focus became emerging farmers, rather than the poorest, and the slant shifted towards a stronger commercial orientation. As a result, the means test was dropped, and the only qualifier was race. The process of approvals of grants was also decentralised from the National to the Provincial Departments.⁴¹³
In February 2008, a new policy framework, framed as the Land and Agrarian Reform Project (LARP) was announced. This institutionalised inter-governmental cooperation as it was a joint programme of the DRD&LA and the DOA. This focus on land and agriculture was further entrenched by the reframing of the Department of Land Affairs into the Department of Rural Development and Land Reform under the new dispensation in 2009. A Land Expropriation Bill was also tabled in 2008, but has been contested by commercial farmers, big business and opposition parties, and at the time of writing, was not yet passed. The policy of market-led grant assisted transfers remains in place, even though the Land Summit in 2005 denoted a possible shift in that the government recognised that it hampered reform⁴¹⁴ and that non-market alternatives should be explored.⁴¹⁵
3. Land Tenure Reform is designed to provide security to all South Africans under diverse forms of locally appropriate tenure. It aims to create a unitary non-racial system of legal tenure rights and to formalise communal land rights in rural areas. This is legislated through the Communal Land Rights Act (CLRA) 11 of 2004 which aims at according legal recognition/formalisation of insecure land tenure rights. However, CLRA is still not being implemented.⁴¹⁶ Land tenure reform also addresses strengthening the rights of tenants on mainly white-owned farms.⁴¹⁷

408 Kariuki, S. Failing To Learn From Failed Programmes: South Africa's Communal Land Rights Bill (CLRB 2003), *Wiener Zeitschrift für kritische Afrikastudien*. (2004), 4(52).

409 Twala, D. (2003); Hall (note 418 above).

410 Hall (note 418 above).

411 Twala, D. 2003; Hall (note 418 above).

412 Hall (note 418 above).

413 Ibid 7.

414 The analysis of this policy will be provided in the section on progressive realisation.

415 Hall (note 418 above), 7.

416 Ibid; CLARA faces a legal challenge on the constitutional grounds that it failed to provide secure tenure, or allow for democratic governance of land rights. It is also said to be racially discriminatory, and fails to promote gender equality. It is also said to allocate excessive discretionary powers to the Minister of then Land Affairs.

417 Twala, D. (2003).



Other key pieces of legislation related to land are:

- The subdivision of Agricultural Land Act 70 of 1970.⁴¹⁸
- The Interim Protection of Informal Land Rights Act 31 of 1996 (which only remains in force until the CLRA is implemented).⁴¹⁹
- Communal Land Rights Act (Signed into Law in July 2004, but not yet implemented).
- The Restitution of Land Rights Act of 1994.
- The Extension of Security of Tenure Act (ESTA).
- The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE).
- The Communal Property Associations Act 28 of 1996.
- The Land Reform (Labour Tenants) Act 3 of 1996.
- The Development Facilitation Act 67 of 1995.
- The Transformation of Certain Rural Areas Act 94 of 1998.

9.2. The Relevant MDG, Targets and Indicators

Goal 7: Ensure Environmental Sustainability	
Target	Indicators
Target 11: Have achieved, by 2020, a significant improvement in the lives of at least 100 million slum dwellers.	Proportion of the population with access to secure tenure.

The indicator for Target 11 speaks to security of tenure and is intended to measure an improvement in the lives of slum dwellers, and this is discussed in the housing chapter. In this chapter the focus is on security of tenure with regard to property rights, and is primarily focused on land redistribution, land tenure reform and restitution. This is closely linked to issues of rural development and agrarian reform. Agricultural policy issues related to food and land issues related to the environment are dealt with in the chapters on food and environment respectively.

The MDG do not touch on the critical transformative nature of the land question in Africa. Issues regarding land are generally raised in connection with agriculture development, poverty reduction and food security. The goal of security of tenure is raised in relation to slum dwellers. The question of the transformative power of land, linked to historical redress in the countries affected by colonisation, is not covered. Neither is the perspective that access to land is crucial for changing structural inequalities in class and race in agricultural production covered. These issues are important though in the South African context, and are discussed in the section on the progressive realisation of the right.

9.3. Main Themes Arising

9.3.1. Government's understanding of the progressive realisation of ESR

The rights-based approach

The land reform programme of the government has failed to take individual beneficiary needs into account and has been focused on protecting existing modes of production, vested commercial interests and promoting a commercial class of black farmers. It has moved increasingly away from its original purpose as defined in the White Paper on Land, as being a pro-poor policy. However, the recent ANC conference in Polokwane re-affirmed the ANC commitment to ensure that land reform is a key instrument of socio-economic transformation.

However, the evidence of the large scale evictions of farm workers and the protection of the rights of traditional leaders in communal areas shows that the executive and the legislature has been unwilling to challenge existing modes of production and land uses in both commercial farming areas and in communally owned land areas.

⁴¹⁸ The Subdivision of Agricultural Land Repeal Act 64 of 1998 was passed in September 1998, but has not been signed into law by the President, apparently because of the need for new land management legislation, Hall (note 418 above), 39.

⁴¹⁹ Khoza (note 26 above).



The nature and content of the obligation to progressively realise ESR

In terms of achieving socio-economic rights, the changes in the land reform programmes from SLAG to LRAD did not have a positive impact on land reform outcomes for the poor, and effectively just shifted the purpose and target group for land reform from the very poor to those with better resources. Both promote collective ownership and production, which it is argued have been one of the main causes of failure in achieving improved livelihoods for the poor via land reform. Another key policy failure has been that since more poor black people have lost their hold on land through evictions and migration than have gained access to land through land reform since the end of apartheid, it can be seen that little progress has been made in terms of securing land rights. Further, the failure of almost half of land redistribution programmes meant that there has been little impact on livelihoods. The underlying policy failure though, has been that the land reform programme has not been located within a broader vision for agrarian reform, and hence the needs of most current and potential land reform beneficiaries, who do not want to engage in large scale commercial agriculture, cannot be met.

Constitutional accountability

The greatest disregard for constitutional accountability has been the inadequate response of the state to prevent evictions of farm workers, and to ensure that “no one may be evicted from their home ... without an order of court”.

9.3.2. Public participation

The principle of participatory democracy

Although not much has been written on public participation in the land sector, it can be argued that the failure to recognise individual needs results from a failure to adequately consult and engage beneficiaries. The land reform summit of 2005 was a positive turning point in land reform, and included a broad spectrum of land stakeholders. However, little has changed since then and policy options are still being considered.

Access to information

The data on land reform is very poor and the DRD&LR only reports on two global indicators, namely, the hectares of land transferred and the number of land claims settled each year. The national data base of land reform projects, from which one could gain the project type, location, size, land and other costs, and membership (beneficiaries) is not available for public scrutiny.

9.3.3. Social exclusion

Equality of access: poverty and vulnerability

The evidence is that while those who do have access to land in rural areas have a slightly better quality of life, it has not lifted the majority out of poverty and it can be argued that the state has failed to secure land rights for individuals in communal areas and for farm workers.

Gender inequality

Women seem to be the biggest losers of the land reform programme, as they often have to rely on male farm workers to gain access to land, and they also customarily have no rights to land in traditional areas.

9.3.4. From strategic planning to implementation

The poor administration of land claims, corruption, poor land use planning and decision making, a lack of a comprehensive and integrated post-settlement support programme⁴²⁰ and weaknesses in data standardisation and reliability all inhibit the progressive realisation of this right. These are explored in more detail in the rest of the chapter.

9.3.5. Planning Systems

Information gathering and monitoring

There is very limited data available on land reform that can be used to make assessments of progress. To reiterate a previous point, the DRD&LR maintains a national data base of land reform projects from which one could gain the project type, location, size, land and other costs, and membership (beneficiaries). However, this is not

420 Despite the name being the Comprehensive Agricultural Support Programme (CASP), it is not directly linked to LRAD beneficiaries and hence systems and procedures are not aligned.



available to the public and therefore it is not possible to disaggregate by types of land reform projects, geographic spread or beneficiary profile.⁴²¹ The Department only reports on the number of land claims settled each year and the total number of hectares of land redistributed to land reform beneficiaries.⁴²² The lack of data on evictions was raised as a concern in the 2007 hearings of the Commission on Land Tenure Security, Safety and Labour Relations in Farming Communities since 2003. Section 9 of ESTA which requires owners to inform the DRD&LR of the termination of the right of residence has either not been adhered to or the department has not presented this data. This is an important indicator as it speaks to compliance with the law and measures the scale of evictions and resulting homelessness.

At a local level, the municipal land audit to determine the availability of smaller agricultural properties has not been done.⁴²³ It is inconceivable how planning is expected to occur without necessary audits of the availability of land.

Monitoring the impact of land redistribution on livelihoods is also critical, and there have been attempts to develop indicators and a framework for measuring impact but thus far there has been no agreement on the indicators to be used. The DRD&LR did implement Quality of Life surveys, but changes to methodology and sampling makes comparisons over time difficult. The surveys are, however, a useful instrument and do provide insights into land use patterns and incomes generated from land rights.⁴²⁴

Budgetary planning and oversight

Budget data was obtained from Annual Reports of the Department of Rural Development and Land Reform. Departmental annual financial statements are recorded from 1 April to 31 March of every year. An analysis of the overall spending patterns of the government (Table 25) shows that the Gross Domestic Product (GDP) increased. In the years 2005 to 2006, the government showed a steady increase in terms of GDP but the figure dropped to 5.1% in 2007 from 5.4% in 2006. However, it is important to note that GDP has been growing steadily over the past few years and this may mean that government's options to increase its social spending have improved.

Table 25: Real GDP Growth (Inflation adjusted figures) from 2005 to 2007.

Year	Real GDP Growth (Rbn)	Increase/Decrease
2005	1 115.14	5.0%
2006	1 175.22	5.4%
2007	1 235.63	5.1%

Table 26: Total Government Revenue and Total Expenditure, from 2005/06 to 2007/08

Total Government Revenue and Total Expenditure, from 2005/06 to 2007/08			
Year	Total Revenue	Total Expenditure	%
Jun-05	R 411.70	R 416.70	101
Jul-06	R 475.80	R 470.60	99
Aug-07	R 544	R 533.90	98

The table above shows that government has been spending the majority of its funds and in 2005 the government overspent on its revenue by R5 billion or spent 101% on its total revenue. The increase in total expenditure had positive implications for funding allocation to the Department of Rural Development and Land Reform. This is evident in the increased allocation and expenditure on land in Table 27 below.

Table 27 explores the state's allocation and expenditure patterns for public service provision in different categories. Although there is no specific reference to government expenditure on land for the years 2005/07, indicators in the "other" sector indicate that it increased from 15% to 17% in the years 2005 and 2007, respectively. However, the year 2007 shows a slump to 12, 6% in government expenditure on other sectors.

421 Hall (note 418 above), 25.

422 Department of Land Affairs (note 423 above).

423 Hall (note 418 above), 39.

424 Ibid 44–45.



Table 27: Government Expenditure in 2005–2007

Government Expenditure 2005/07			
Sector	2005	2006	2007
Transport and Communication	4%	6.7%	7.3%
Welfare	17%	15.5%	14.9%
Protection Services	17%	15.3%	14.7%
Water and Agriculture	4%	5.3%	5.1%
Education	18%	17.8%	17.6%
Housing	2%	1.8%	7.5%
Health	11%	10.5%	10.4%
Debt	12%	10.0%	9.3%
Other	15%	17.0%	12.6%

Budget income and expenditure (Table 28) for the Department of Rural Development and Land Reform indicates that overall there has been a gradual increase in the budget allocation from the National Treasury Department over the periods 2005/06 to 2008/09. However, this increase has been met with some under-expenditure. In 2005/06, the department underspent by close to 30% on its budget of R3 897 117. This means that the Department only spent 73% of its total budget in that year. This is the largest shortfall to date. In the financial years of 2006/07 to 2008/09, the department managed to spend at least 99.5% of its total budget.

Table 28: Budget allocation, expenditure and variance for the National Department of Rural Development and Land Reform from 2005/06 to 2008/09

Department of Land: Appropriations and Expenditure from 2005/06 to 2008/09												
R'000	June 2005-06			July 2006-07			August 2007-08			September 2008-09		
DLA	Receipt R	Payments R	%	Receipt R	Payments R	%	Receipt R	Payments R	%	Receipt R	Payments R	%
Total	3 897 117	2 848 223	73.1	3 730 196	3 725 551	99.9	5 928 269	5 897 497	99.5	6 659 396	6 654 636	99.9

Trends in annual growth and real percentage rates for the Department of Rural Development and Land Reform are varied. From 2005/06 to 2006/07, the percentage annual growth of appropriations was negative at -4.2% because the department was awarded less funding for 2006/07. Taking into consideration inflation for the year, the real growth was -7.6%, which means that growth was not only negative, but also slowed down. In 2006/07, the Department spent R877 328 more than in 2005/06. This translates to 30.9% annual growth and a lower percentage of real growth at 27.5%. The following year, 2006/07 to 2007/08, the annual percentage growth for appropriations proved to be more positive than in 2005/06 at 58.9%. Real growth for this period remained steady at 54.2%. In terms of expenditure, actual expenditure from 2006/07 to 2007/08 jumped to 58.3%. When one takes inflation into account for that period, the real percentage growth lies at 53.6%.

9.4. Progress Made in Terms of the Relevant MDG

Proportion of the population with access to secure tenure

The land question in South Africa goes beyond the proportion of the population with secure tenure, as it also contains a transformative agenda. The proportion of land that is owned by black people is also a critical consideration. Another important dimension is the land use rights that people have who live on land that belongs to another. These include labour tenants as well as people who reside on communally owned land. In this section the quantitative targets regarding land reform in the three programme areas of government are discussed, namely redistribution, restitution and land tenure reform. The analysis of the success and challenges of these programmes is provided in the section on progressive realisation. However, the stumbling block in determining the access to



secure tenure is that government does not report on the numbers of beneficiaries of land reform programmes but only on the amount of land transferred. This makes it difficult to report on the indicator per se, and the hectares transferred become a poor proxy indicator because it does not take forced evictions into account. As highlighted below, significant numbers of black people have lost their hold on land since 1994 due to a combination of forced evictions, coercion and migration.

Redistribution

The target for redistribution of land owned by whites into black ownership is 30% by 2014, a total of 24.5 million hectares. Since 1994, the Department has delivered approximately 5.2 million hectares (2.1% of the target) of white owned agricultural land to land reform beneficiaries and is planning to redistribute a further 19.3 million hectares by 2014.⁴²⁵ Only about 2.7 million hectares have been transferred under the redistribution program since 2004.⁴²⁶ This has increased from 144 000 ha of land in March 2005.⁴²⁷ The pace of redistribution is thus exceedingly slow and the Department is unlikely to meet its set target. In 2002, Cousins estimated that it would take 200 years to transfer land to the estimated 20 000 rural communities in the ex-homeland areas.⁴²⁸ Hall further argued that the target of 30% was arbitrarily established and was initially set for the first five years of land reform, and then extended when it was clear that it was significantly under-achieved. It has now become the goal with which all land reform projects are justified and she describes it as the “holy grail of land reform”. *“The core problem that remains is the disjuncture between the target and the means adopted in pursuit of it, neither of which is informed by a vision of intended policy outcomes.”*⁴²⁹ It is this disjuncture that is discussed in the section on progressive realisation.

Restitution

In total 1.9 million hectares of land have been transferred through the restitution programme⁴³⁰ and it seems that the Department has a good record of settling lodged claims, albeit, not at the pace originally envisaged.

*“The department has settled 94 per cent (74 989) of the 79 696 land claims lodged since 1994. Despite the efforts of the Land Claims Commission to settle the remaining 4 707 very complex rural land claims by March 2008, these will not be settled before 2010/11. Most of these claims are in dispute and have to be settled in the Land Claims Court. Project Gijima provides guidance on how to finalise different categories of claims.”*⁴³¹

Since many of these claims were settled with cash payments, the access to land remains low, and according to the Special Rapporteur:

*“The state has acknowledged that only 3%⁴³² of land was redistributed between 1994 and 2006, resulting in many remaining landless and thus without prospects for development or poverty alleviation.”*⁴³³

425 Department of Land Affairs (423 above), 618.

426 Department of Rural Development and Land Affairs (DRD&LA), presentation to the SAHRC ESR public hearings, (2009). According to Hall (note 418 above), only 4% of white owned agricultural land has been redistributed through all aspects of land reform combined.

427 South African Human Rights Commission. 6th ESR Report, (2006), 4. This assumes the figure quoted above of 2. m ha is also land transferred under LRAD.

428 Cousins in Kariuki, 2004, 63.

429 Hall, R. & Cliff, “Introduction,” in Hall, R. (ed). *Another Countryside? Policy Options For Land and Agrarian Reform in South Africa*, (2009), 2.

430 DRD&LA (note 442 above).

431 Department of Land Affairs (note 423 above), 618.

432 It is not always specified in the source documents whether reported percentages of land transferred are for each specific programme area, or whether they are for all transferred land.

433 UN Human Rights Council, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Miloon Kothari: addendum: mission to South Africa, (29 February 2008), A/HRC/7/16/Add.3, <<http://www.unhcr.org/refworld/docid/47d55d3f2.html>>.



One can therefore infer that the land restitution programme has not achieved the aim that was originally intended or envisaged and given that the majority of claims were settled via financial compensation, the programme did not alter the agrarian structure in South Africa.

Land Tenure Reform

Tenure reform has only transferred 165 000 hectares of land⁴³⁴ which means that the pace of settlement of labour tenant claims has been slower than the other pillars of land reform. According to the 2007 Annual Report of the DRD&LR, none of the 200 disputed labour tenant cases referred to court were settled and 589 undisputed cases were settled out of a target of 6271 for the year.⁴³⁵

The unintended negative impact of farmer reactions to attempts to secure land rights to labour tenants has been evictions. A national evictions survey conducted in 2005 found that an estimated 940 000 farm dwellers were forcibly evicted between 1994 and 2003, and double that number moved off farms due to forced eviction and voluntary migration. According to the survey the “... rate at which black people have been forcibly evicted from farms since 1994 – often simultaneously losing their jobs, homes, household assets and livestock – exceeds the rate of forced removals from farms in the last decade of apartheid. This suggests that more black South Africans lost their hold on land, through coercion, since 1994 than gained it through all land reform measures combined.”⁴³⁶

In the final analysis, both the percentage of land transferred, and the numbers of people who have lost land needs to be tallied to determine whether security of tenure is increasing or not. The figures quoted above highlight that if all the figures are combined, even in quantitative terms, little progress has been made regarding the proportion of the population gaining secure tenure. Ultimately though, the land reform programme must be judged against its intended outcomes, and the Department of Rural Development and Land Reform highlighted that chasing targets has caused quality problems:

*“Precisely because of an attempt to chase targets in terms of hectares, a whole lot of mistakes have been committed. Sustainability has suffered in terms of projects that we have implemented. We released a report last year that indicated that about 49% of our projects could be said to be sustainable, in 51%, there is something terribly wrong with that.”*⁴³⁷

The section on progressive realisation will interrogate the causes of the failures of the land reform programmes, and also highlight some success. The oral submission of the Department of Rural Development and Land Reform suggests that it has identified the following reasons as the causes of the failure of land reform programmes:

1. Chasing targets vs. sustainability.
2. Who should be given access to land and the suitability of applicants, “we must deal very soon with the issue of, particularly in the redistribution program, in terms of who actually gets given access to land. Is it everybody that is looking at owning something or is it someone who can develop and produce on that piece of ground”.⁴³⁸
3. Limited funding for the programme.
4. The willing-seller willing-buyer model.⁴³⁹

“We are currently reviewing the willing-seller willing-buyer approach, as you know there is going to be a lot of contestation around that, it’s not an issue that is going to be resolved very soon; so something needs to be done to push prices down because the fiscus cannot afford to fund the program at this scale at which prices are going up. So that is what we need to do very quickly.”

9.5. Findings on the Progress Made by the State on the Realisation of the Right

In this section an analysis of the progressive realisation of the right to have access to land on an equitable basis is provided. Fulfilment of the right is analysed according to the 4 As, that is, the government programme must be appropriate to meet the needs of beneficiaries, land must be available where beneficiaries need it, there needs

⁴³⁴ DRD&LA (note 442 above).

⁴³⁵ Department of Land Affairs Annual Report, (2007), 60.

⁴³⁶ Hall (note 445 above), 10.

⁴³⁷ DRD&LR (note 442 above).

⁴³⁸ Ibid.

⁴³⁹ Advocate Mngwenge does not specify whether it is for acquisition of land and post-settlement support.



to be equitable access to land for a diversity of land beneficiaries, including vulnerable groups, and the land and support provided to beneficiaries must be adequate. Ultimately, the question of progressive realisation of equitable access to land is an evaluation of the land reform programme of the government, and as such it must be measured against its intended purpose. One of the problems with this is that the purpose of land reform has shifted, and the target group has been changed, as the government attempts to learn from past failures and increase its success rate. This means that the intended outcomes will also have changed. Yet, the latest analysis of policy shows that there are inherent problems that need to be addressed in land reform if the right to land is to be achieved. A recent review by the Department of Land Affairs and Rural Development indicated that only 49% of land reform projects are sustainable in terms of agricultural production and the livelihoods of beneficiaries.⁴⁴⁰ The possible causes of failure are discussed below.

9.5.1. Appropriateness

The ANC initially envisaged land reform as being central to a strategy of rural development.⁴⁴¹ Yet, Hall and Cliffe argue that this has not been the case and rural development has focused on transport and industrial infrastructure within spatial development nodes.⁴⁴² They argue further that rural development has not received adequate attention when compared to programmes for the urban working class. In addition, there are also structural policy issues that have not been appropriate to meet the needs of the landless. Firstly, the low grants in the first policy phase (SLAG), meant that groups of people had to come together to acquire land in the form of a Trust or Communal Property Association. These were often disparate groups of individuals that came together and lacked any social cohesion or common vision for land use. The revision of the policy and the introduction of LRAD meant that individual, as opposed to household grants, were introduced. The lacuna in this policy revision is that due to the high land prices group projects remain typical which obviates the actual objective.⁴⁴³

Various forms of collective ownership and production exist, including group-based ownership and production, group-based ownership with household production, individual or household based projects (mainly from family based land claims), joint-ventures, strategic partnerships and co-management. The latter two are now favoured, even though the first is still dominant. These collective forms of ownership have resulted in many problems:

1. Firstly, management and production became confused. Both were implemented collectively and therefore most land reform projects are run as production collectives.⁴⁴⁴ One gap was the management of individual household assets such as livestock, which in some cases were supposed to be kept in communal areas (traditional lands), and tensions arose over land use.⁴⁴⁵ Often beneficiary communities settled on land without any prior understanding among themselves about what their respective use rights would be, and this is problematic as it often results in elite capture. To quote from the transcript of the hearings: *“You have a land reform process involving 100 people, three people own all the livestock that the land can carry. The rest do not benefit. That’s problematic; it doesn’t reach the obligation in the Constitution for equitable benefit”*.⁴⁴⁶
2. The second problem that emerged was conflict over the distribution of benefits.⁴⁴⁷
3. Thirdly, the government’s programme has not been appropriate in that land use planning has been poor resulting in very limited benefits to land users.
4. Fourthly, the overall paradigm encapsulated the expectation that the mode of production would imitate the model of white commercial farming. However, the problem was that beneficiaries had neither the capital nor the skills to manage large commercial type enterprises, and thus highly capital intensive modes of production were not appropriate, and led to poor outcomes.⁴⁴⁸ This assumption of income generated by communal production led to an omission in business plans – production for own consumption. As the benefits of communal production either did not materialise or took time to be realised, project members began cultivating for their

440 Department of Land Affairs (note 423 above), 618.

441 Hall (note 445 above), 1.

442 Ibid, 2.

443 Hall (note 418 above), 26.

444 Ibid 26.

445 There are other complications regarding grazing for communally owned and individually owned livestock and details can be found in the Hall book, chapter 1.

446 SAHRC Hearings, Transcript, (2009).

447 Hall (note 418 above), 26.

448 Ibid 27.



own household needs (at times sub-dividing land informally) and thus deviated from the land use envisaged in the business plans.⁴⁴⁹ To quote Hall, the *“Failure to provide for and support household-based production within group projects has been a major failing in land reform plans, arising from a blind-spot in policy”*.⁴⁵⁰

5. In cases where Communal Property Associations experienced an attrition of members (largely due to failed plans), they were automatically in contravention of their legal status and therefore were not able to access the balance of their grants from the government, or enter into contracts with other third parties.⁴⁵¹
6. The sixth problem relates to the transactability and credit worthiness of land when it is communally owned. Where the legal and financial system is not supportive, group ownership prevents access to credit where land is to be used as collateral. To a large extent this is the current situation in South Africa, which leaves already struggling beneficiaries without any means to apply for credit.
7. Joint ventures are another form of land reform that is increasingly encouraged. They typically involve a partnership (often very unequal in power relations) between a group of beneficiaries and the state or private commercial entities. However, they have been criticised for failing to provide benefits of access to land such as land usage for own production, security of tenure and access to capital. In the case of farm-worker equity schemes, for example, workers may only benefit while they are employed on the farm and relinquish their rights to land and housing when they are not. Contract farming or out-grower schemes seem to be more appropriate, yet domination by large purchasers up the supply chain often causes downward price pressure at the farm gate leading to the self-exploitation of producers. Strategic partnerships are becoming the predominant mode of restitution claims, particularly in Limpopo, Mpumalanga and to some extent in KwaZulu-Natal.⁴⁵² Beneficiaries receive full-ownership of claimed properties, but farming operations are controlled by companies in which they are shareholders. In these cases, the mode of production remains unchanged and continuity of production is deemed to be the indicator of success. The key problem here is that there are no short-term gains for beneficiaries as profits are usually ploughed back into the business, and rental incomes are often below market rates, and they do not have land use rights. In some cases beneficiaries do have preferential access to employment, but this often means displacing existing farm workers.⁴⁵³

The common theme here is that the mode of production in land reform has favoured commercial agriculture, and has not provided for a diversity of beneficiary needs. The comment by the representative of the Department of Rural Development and Land Reform at the hearings that only those suitable for commercial farming should possibly be considered as land beneficiaries is an indicator of this thinking. The danger here is that land reform is thus not appropriate to the needs of many of the landless, who may want to subsidise other forms of income via household production, or may not want to use the land for agricultural purposes at all, but only for settlement. Another major obstacle to changing the mode of production and recognising the diversity of land needs is the difficulty of sub-dividing agricultural land. In fact, as an indicator of political will, the state has shown that it is not able or willing to tackle commercial farming interests. The Subdivision of Agricultural Land Repeal Act 64 of 1998 has not been signed into law by the president, even though it was passed by parliament a decade ago.⁴⁵⁴ Without subdivision, LRAD perpetuates the problems it was intended to solve, as the grant size may have increased, but there is no equivalent flexibility in land size. *“Thus, there is a mismatch between policy mechanisms emphasising entry at a variety of different levels (ranging from food safety-net projects to small and medium-sized farms) and the actual array of properties available to would-be beneficiaries.”*⁴⁵⁵

Individual land use has been successful where beneficiaries are able to contribute considerable investment into land and inputs.

449 An example of this is the Makana CPA outside of Grahamstown. Hall (note 418 above), 27–28.

450 Ibid 28.

451 Ibid.

452 Examples are the Zebediela Citrus Estate in Limpopo, Makuleke co management agreement in the Kruger Park, STentor Sugar cane plantation and Giba banana plantation both in Mpumalanga.

453 Hall (note 418 above), 30–32.

454 Ibid 39.

455 Ibid.



“It should be acknowledged up-front that different kinds of scales of production are needed in land reform to fit different needs and situations. However, what is striking from the South African experience is, on the one hand, the marginalisation of individual or household options for ownership and use, except for those with substantial own resources. Business plans often aim to curb, rather than support, efforts at self-provisioning by beneficiaries, while the grant system and farm sizes impede household-based ownership and production, whether for consumption or sale.”⁴⁵⁶

This reveals that land reform has not been supported as a means of changing the nature of production in former white owned farm lands. In fact, Hall argues that projects have been designed largely to change as little as possible, beyond the ownership structure, and production regimes remain unaltered. The attempt has been to create a new class of commercial black farmers, a move away from the original purpose of land reform, where the beneficiaries were the rural poor and landless.

The example of the Richtersveld case, which was settled in the Constitutional Court in 2007 after ten years of legal battles, reinforces the argument that land reform policy, and the instruments of implementation, have not always been favourable to transformation. It is estimated that it cost the state in excess of R50-million in legal costs to fight this case.⁴⁵⁷ In an analysis of the ruling of the Land Claims Court, which found against the claimants in what is seen as an Aboriginal Claim, Roux argues that it appears that the court fell back on a formalistic mode of legal reasoning in order to justify an outcome that was actually motivated by policy considerations.

“... the issue of the recognition of the doctrine of aboriginal title in South Africa is highly controversial, since the recognition of this doctrine would call into question the validity of a great many title deeds. In this instance, the culture of legal formalism is less a straitjacket from which the court is unable to escape, than a convenient disguise for the policy choice the court feels unable openly to articulate.”⁴⁵⁸

The issue of land use planning and mining rights makes the government's commitment to land redistribution and land tenure questionable. There are many instances where communities have been relocated as a result of mining activities, and it appears that mining rights almost eclipse the rights on the land.⁴⁵⁹

The changes to policy thus far have not brought South Africa any closer to providing equitable access to the right to land, and the solution is “... not merely to deliver more of the same, faster. Instead a bold new direction in policy was needed, alongside a complete overhaul of the way in which it is implemented”.⁴⁶⁰ A policy rethink is necessary, with a focus on the intended economic outcomes and located in a broader agrarian reform agenda. The ANC policy conference in Polokwane in June 2007 reflected this thinking, as the report on economic transformation reiterated that a transformation of land use patterns is necessary which balances the social and economic needs of society.⁴⁶¹ However, the government's narrow focus on meeting land redistribution targets, which in themselves have proven to be arbitrary, and the shift away from a pro-poor policy which promotes transformation, shows a limited understanding of the constitutional obligation for progressive realisation of the right to access to land in an equitable manner. The government's commitment to land reform is also called into question as it has failed to audit its own land that could be available for redistribution. Finally, the one-size-fits all policy, which is clearly not based on the meaningful engagement and participation of beneficiaries in defining land use patterns, defies a rights-based approach which recognises the full diversity of individual needs in society and is premised on notions of participation and empowerment.

456 Ibid 34.

457 “Tears of joy as Richtersveld land claim is settled,” *Mail and Guardian*, (9 October 2007), <<http://www.mg.co.za/article/2007-10-09-tears-of-joy-as-richtersveld-land-claim-is-settled>>.

458 Roux, T. ‘Pro-poor court, anti-poor outcomes: explaining the performance of the South African Land Claims Court,’ *South African Journal on Human Rights*, (2004), 20.

459 SAHRC hearings, submission from panellist, (2009).

460 Hall (note 445 above), 11.

461 Hall (note 418 above), 24.



Tenure reform

The other key policy consideration and state programme is tenure security, which critics argue has been the least focused on and possibly the most transformative aspect of land reform.⁴⁶² The government's focus has been on transferring land ownership of communal land to "traditional communities", as opposed to securing individual land rights. The state supported land-right administration collapsed with the end of the Bantustans, leaving a gap in the registration of permission to occupy (PTOs). This has left many people with very insecure rights over communal land and resources and due to statutory land tenure systems under apartheid, rights of black people to hold, occupy or use land were not registered under the central deeds registration. The implication is that there are many long-term occupiers who are not able to establish a clear legal right to the land. This has left millions in the former "homelands" in a vulnerable position.⁴⁶³

Steps were taken in the 1990's to update title deeds, and to provide interim protection to land rights holders while new comprehensive law reform was awaited.⁴⁶⁴ The most significant law reform has been the promulgation of Communal Land Rights Act (CLRA) in 2004, which promotes a model of privatisation under local control. This act has not yet been implemented as it faces a constitutional challenge. It is argued that it fails to secure tenure or provide for democratic governance of land rights, discriminates on the basis of gender and allocates excessive discretionary powers to the Minister of Land Affairs.⁴⁶⁵ CLRA has also been criticised for failing "... to come to terms with the sociological complexity and uniqueness that defines South Africa's rural societies with respect to land matters. A poorly drafted tenure policy is bound to exacerbate the historically ingrained problems facing the rural population".⁴⁶⁶ Issues such as the community conflicts of allegiance to tribal leadership, heritage, power dynamics, tribal lineages and apartheid constructions of rural communities, all belie the notion of a community whose rights to land are derived from shared rules as defined in section 1 of the Act.⁴⁶⁷

The CLRA and existing tenure legislation has also been criticised for putting financial barriers in place for land conversion in that the whole process could cost thousands of rand.

*"Today, surveyors are obliged to document the land, town planners have to draft a development plan and conveyances are required to make the legal transfer. A deeds register must be opened and a fee paid to register the property. In the end, it costs thousands of rand to make the conversion."*⁴⁶⁸

Thus while the informal right to land is protected, it needs to be made meaningful through a process of registration that is accessible. People on communal land need to be able to transact the right to land, and seek development assistance in order to give meaning to their right to land.

The tenure security of farm workers has really come under threat since 1994⁴⁶⁹ and the large extent of evictions is highlighted under the section on the progress towards the MDG above. The failure of the state to protect the rights of farm workers is mainly ascribed to a lack of political will on the part of the government to protect farm workers:

*"While the current Minister periodically lambastes white farmers for forcibly evicting farm dwellers, there is little to indicate that the government wishes, or is willing, to stop this. Instead, government posts dedicated to enforcing farm tenure laws have been done away with and new legislation to be introduced in 2009 is expected to establish one law to regulate evictions, possibly diluting the (already weak) rights enshrined in the key farm tenure law, the Extension of Security of Tenure Act 62 of 1997 (ESTA)".*⁴⁷⁰

The Commission produced a report on the progress made in terms of Land Tenure Security, Safety and Labour Relations in Farming Communities since 2003.⁴⁷¹ The key observation regarding Land Tenure Security was that little progress had been made since 2003. Other findings were that:

462 Hall (note 445 above), 9.

463 Khoza (note 26 above).

464 Hall (note 445 above), 10.

465 Ibid.

466 Kariuki (note 424 above).

467 Ibid.

468 Grube, L. 'Communal Land Rights Act needs to be revised', SA Reporter, (26 June 2009), <http://sareporter.com/index.php?option=com_content&task=view&id=696&Itemid=60>.

469 This is discussed in greater detail in the housing chapter.

470 Hall (note 445 above), 10.

471 South African Human Rights Commission. *Progress made in terms of Land Tenure Security, Safety and Labour Relations in Farming Communities since 2003*, (2008).



1. Farm dweller populations remain mainly invisible in municipal planning and decision making.
2. The government has not clearly articulated its policy perspective with regard to providing farm dwellers access to services, whether these will be provided/strengthened on or off farms.
3. There is a breakdown in trust within this sector between organised agriculture, the government and NGOs.
4. Amendments to ESTA have not been made as intended. The negative unintended impacts of ESTA on the land security of farm workers, together with the lack of a larger development programme to address living and working conditions on farms, has left farm workers in an even more disadvantaged and vulnerable position.
5. There is inadequate data on illegal or other evictions, and the data that is available from NGOs is contested by the agricultural association.
6. SAPS remains uninformed about the legal requirements of ESTA and tends to favour farmers in tenure disputes.

The issue of farm workers tenure security, particularly the lack of compliance with ESTA provisions by farmers and the narrow rulings of the courts, is discussed in the housing chapter. What is pertinent in this chapter is the access to land for farming for farm workers, and what the findings have highlighted is how their efforts to secure land have been frustrated by administrative and judicial processes. This is illustrated in the case study below which was taken from the submission to the Commission by the Women on Farms project.

Case study: Struggle to secure agricultural land for women

The Rawsonville Women's Agricultural Cooperative is comprised of 15 unemployed women farm workers, most of whom have been working on farms all their lives. Since 2006 they have tried everything possible to access land. These efforts have included:

1. Securing a signed contract with the Breedevalley Municipality in 2006 for land. This contract was subsequently withdrawn by the municipality on the basis that an administrative mistake had been made on their part and promising that alternative land would be allocated. The women are still waiting.
2. Negotiations with a farmer who was willing to sell a piece of land for below market value. However, because the Department of Rural Development and Land Reform did not respond in time, the farmer sold the land to another white farmer instead.
3. Lodging an official land redistribution application with Department of Rural Development and Land Reform. However, the budget was fully spent for that year and the undertaking was that the application would be considered the following year. This is despite the fact that the cooperative was part of the group that welcomed the Minister Lulu Xingwana to Rawsonville in 2007 when she came to launch the new land reform programme, promising the Rawsonville women that they would be prioritised for land reform.

At the recent provincial Food Summit, the women heard again that will be a priority. Despite the claims of urgency about the food crisis, nothing has as yet unfolded on the ground

The women have reached a point of desperation. They have exhausted all official avenues and do not know what else to do. In their own words, they *"don't have dreams of becoming rich. We are just tired of seeing our children going to bed hungry at night when we can see all the unused land around us with white farmers owning more land than they possibly can farm."*

9.5.2. Availability – 'willing buyer willing seller' market led policy approach

The availability of land for redistribution purposes has been based on the "willing buyer willing seller" policy approach which has come under fire from many quarters. In South Africa, land reform has been premised on open land markets, where the role of the state has been to provide small land-acquisition subsidies.⁴⁷² The Department in its submission argued that the high cost of land is one of the main reasons that the land budget is inadequate. In a PLAAS publication, Edward Lahiff expounded on the challenge related to the willing buyer willing seller approach as follows: *"The 'willing buyer, willing seller' approach has come to signify not only a lack of compulsion on landowners and the payment of market-related prices for land, but also a minimal role for the state in strategic planning and implementation. This has led to a slow rate of land transfer and inappropriately designed, under-financed and isolated settlements poorly integrated to the agricultural economy and state support services"*.⁴⁷³

⁴⁷² Hall (note 445 above), 3.

⁴⁷³ Lahiff, E. State, Market Or The Worst Of Both? Experimenting With Market-based Land Reform In South Africa, *PLAAS Occasional Paper No. 30*, (2008), 1.



In another publication, Hall outlined the problem with the land reform programme as follows: *“The programme has been characterised by an overwhelming dependence on markets to determine the shape and pace of reform, through landowners’ decisions as to which properties are offered for sale and the ruling market price. Coupled with this has been a highly bureaucratic process, which has delayed the disbursal of land acquisition grants (for redistribution applicants) despite some moves towards decentralisation. There remains a mismatch between the limited and ad hoc market opportunities that arise and the bureaucratic means available to respond to them, neither of which may bear much relation to actual land needs of would-be beneficiaries or rural development priorities”*.⁴⁷⁴

Hall further argued that talking about a demand-led approach is also misleading, as many people who need land may be too disempowered or lack awareness of their rights to demand it.⁴⁷⁵ However, the Department of Rural Development and Land Reform has recognised that due to the controversy around amendments to this policy (and more aggressive expropriation), which actually lies at the heart of the private property debate that raged at the time of drafting the constitution, it is not going to be resolved soon.

This was clear during the interactions at the hearings given the antagonistic approach from Agri SA which resulted in Department of Rural Development and Land Reform making an appeal to Agri SA to realise that *“we are in this together”*.⁴⁷⁶

9.5.3. Access to land (social exclusion)

Women, farm workers, the disabled and the youth have been identified as marginalised groups to be prioritised for land reform in government documents related to land reform. The focus on the “poor” was removed with the introduction of LRAD, and replaced with these marginalised groupings. There is, however, no strategy targeted specifically at these groupings and no data to show the extent to which they have been beneficiaries of land reform. There are two aspects of LRAD that generate exclusions; firstly the requirement to commit one’s own resources and secondly, the business planning process that requires profit generation. In the 2007/08 research of the Commission on progress made in terms of Land Tenure Security, Safety and Labour Relations in Farming Communities since 2003, the following were findings regarding women and children as marginalised groups:⁴⁷⁷

1. The failure to provide tenure security on farms has been particularly problematic from a child rights perspective as these children are denied access to opportunities for education, health care and so on;
2. Women are in a particularly vulnerable position as they mostly depend on their male partners for tenure security.

The role of traditional authorities in terms of distributing or allocating land user rights within communities is of particular concern from a gender perspective as it limits women’s right to access to land, notwithstanding the fact that many of them are sole providers.

With regard to benefits for the poor, Lahiff makes the following commentary: *“The extremely slow pace of reform (far below official targets) is the most obvious limitation to equity gains, but this is compounded by an emphasis on disposal of state land and tenure upgrading, which leaves the vast majority of white-owned land untouched. The disposal of land already allocated for use by black people, together with the mass removal of farm dwellers, merely serves to complete processes begun under apartheid, and results in little nett redistribution of assets. In addition, a range of barriers imposed by the functioning of the market and by bureaucratic processes, together with the lack of a credible strategy for poverty alleviation, make it likely that the principal equity gains will be along the lines of race, but with limited benefits flowing to the very poor. More definitive conclusions will require much better data than is currently available. Indeed, it is symptomatic of the unstrategic nature of the programme that it attempts to operate without an effective feedback of quality data into the planning and implementation process”*.⁴⁷⁸

Another particularly vulnerable group are the Khomani San people. In 2003, the Commission conducted an inquiry into the human rights violations of the Khomani San people. The inquiry found that their much hailed land claim had resulted in failed dreams and tells a story of neglect by most government institutions, including at the local level.

474 Hall (note 445 above), 3.

475 Hall (note 418 above), 67.

476 SAHRC Hearings (note 462 above).

477 Farm workers issues have been discussed separately.

478 Lahiff (note 489 above), 19.



The report found that substantive planning had taken place during the settlement process. *“The implementation phase, however, failed to initiate a process of sustainable development at different levels, to protect basic human and other rights of the land claim beneficiaries, as well as to capacitate the long-disadvantaged Khomani San people”.*⁴⁷⁹

9.5.4. Adequate land and provision of services (from strategic planning to implementation)

One of the main problems with the government’s programme has been post-settlement support.

*“The growing evidence of a lack of post-settlement support and the resulting failure on the ground to improve the livelihoods of those returning to their land has, in the past few years, started to erode the symbolic achievements of restitution).”*⁴⁸⁰

The ability of the state to provide post-settlement support is hampered by the willing buyer willing seller policy, as it precludes proper planning and a consolidated approach. Land reform has also been isolated from local development planning. In line with this, land use planning has been identified as one of the major challenges in access to land, and the land use planning and land settlement decision making process has been somewhat disjointed, particularly between the three tiers of government. The Land Use Management Bill is expected to assist with this by establishing a new National Land Use Commission and a communalised system of land use regulators.⁴⁸¹ However, the bill was withdrawn from Parliament in 2008, to be reviewed. Related to this is that land restitution or redistribution may result in a settlement which is not recognised as such by the municipality, which means that there is no planning for the delivery of services or infrastructure to that community.⁴⁸² In respect of land restitution, the current plans are that the restitution branch of the Commission for Land Restitution must be phased out by 2011, and that all land claims should be settled by then. The current process for this phasing out has seen the Department of Rural Development and Land Reform forge a relationship with municipalities so that municipalities can take care of existing claims. However, municipalities have major reservations about taking over the Department’s unfinished work in the face of overburdened municipal functions and insufficient funds to pay land claims.⁴⁸³

The Comprehensive Agricultural Support Programme (CASP) is the main vehicle for “emerging farmers” to receive support, yet in most regions infrastructure was the only form of support provided.

*“Support in the form of technical advice, training, marketing, production inputs and risk management had been largely ignored by implementers, and while some land reform beneficiaries had access to CASP funds, in other areas officials directed these away from land reform towards emerging farmers considered to be more commercially oriented.”*⁴⁸⁴

The link between those acquiring land through LARP and those receiving benefits from CASP has not been institutionalised, resulting in fragmented services delivered through different institutions which have different administrative and financial procedures and priorities. This makes the process very cumbersome.⁴⁸⁵

The other key aspect that limits the realisation of rights is maladministration and corruption in land institutions. The primary example in this period is the reported wide scale fraud and corruption at the Land Bank, including misappropriation of funds from the AgriBEE fund intended for emerging farmers for personal gain by Land Bank officials.⁴⁸⁶

In sum, the failure of almost half the land reform projects is also problematic in terms of progressive realisation of socio-economic rights, as the right to land is not delivering the restoration of dignity or economic benefits to

479 South African Human Rights Commission. *Report on the inquiry into the Human Rights Violations of the Khomani San Community*, (2004), 27.

480 CASE (note 207 above).

481 Parliament of South Africa. “New land management bill proposes reform of land use in SA,” Portfolio Committee on Agriculture and Land Affairs, (1 June 2008), <http://www.sabinet.co.za/sabinetlaw/news_par662.html>.

482 SAHRC (note 462 above).

483 Interview with official at the Commission on Land Restitution, Western Cape.

484 Hall (note 418 above), 127.

485 Ibid 129.

486 “Are we winning the war on corruption?” *Mail and Guardian* (27 November 2009), <<http://www.mg.co.za/article/2009-11-27-are-we-winning-the-war-on-corruption>>.



hopeful beneficiaries and is not contributing to improved rural development. The effectiveness of land reform projects is hampered by many factors, including the various policy and programmatic initiatives which preclude the needs and aspirations of individuals wishing to have access to land either in the form of ownership or land use rights. SLAG and LRAD, for instance, promote collective ownership and production, and do not cater for individual household provision in most cases. The willing buyer willing seller model is supply driven and does not consider the land use needs of beneficiaries, and the planned use of the land as per the intention of the beneficiaries is not integrated into redistribution decision making.

Current policies do not cover enough of those who need access to land and thus the progressive realisation of the right to land is only applicable to those in the policy net. Excluded are farm dwellers, women in traditional areas and those who cannot establish a clear legal right to the land. The fact that more poor black people have lost their hold on land via evictions than have gained from land reform in the post 1994 period means that there has been a regression in the realisation of the right to land. The state has not acted decisively to intervene in evictions and has not taken reasonable measures to assist those who have lost access to land and housing. The findings in this section imply that the land reform program in its current form is unworkable. This is predominantly due to the state's conventional ownership paradigm that is inconsistent with the reality on the ground. The one-size-fits-all mentality in respect of the different tenure systems that exist in South Africa will inevitably lead to failed projects. As a result, the practical implementation of the various programmes has failed. This is due to three main factors:

1. The failure to secure land rights for those living on farm lands and in communal areas, and to act decisively against evictions;
2. A one size fits all paradigm regarding the mode of production (being commercial in nature) that leads to failed projects; and
3. Poor post-settlement support programmes have contributed to the assessment that the right to land is not being progressively realised.

9.6. Recommendations

A new phase of land reform located within a wider agrarian reform is needed and will require new institutional arrangements.⁴⁸⁷ These will have to encompass the following:

- (a) A policy review in terms of the understanding of community in rural areas.
- (b) A review in respect of the arrangements with regard to Traditional Leaders.
- (c) Improved land use planning and consideration of land use planning and restitution/redistribution when considering land resettlement and the provision of mining rights.
- (d) Implementation of and reporting annually on the recommendations of the Commission's 2007 hearings on Land Tenure Security, Safety and Labour Relations in Farming Communities.
- (e) Consideration of the standardisation of an indicator framework for measuring outcomes that is people centred within a people centred development paradigm. Possible indicators could be improved food security; employment, and a more egalitarian distribution of income; increased well-being; improved housing, ownership of household items and access to fuel for cooking; reduced vulnerability; increased mobility and improved sustainability: more sustainable use of the natural resource base.⁴⁸⁸
- (f) Implementation of quality of life surveys on a regular basis and maintaining standard sampling methods and research tools for ease of comparison and tracking over time.
- (g) Creation of substantive rights in land for occupiers..
- (h) Implementation of a well-resourced programme of information dissemination, support to farm dwellers and enforcement of the tenure laws.
- (i) Proactive creation of new, sustainable settlements in farming areas.
- (j) Finding ways of separating tenure and employment rights.

487 Cliffe, L. Policy options for land reform in South Africa: New Institutional Mechanisms?, PLAAS Policy Brief 26, (2007), <<http://www.plaas.org.za/publications/policy-briefs/pb26.pdf>>.

488 Hall (note 418 above), 41.



However, there are immediate and achievable steps that should be taken now to improve the situation. The Constitution makes it clear that “*no one may be evicted from their home without an order of court.*” Therefore, this should be given effect immediately. In addition, it must be ensured that, when a matter does go to court, farm dwellers are given a fair hearing, which must include legal representation. In the long term the creation of a new dispensation in farming areas must be developed that includes commercial farms, small farms, space for new and emerging farmers, and new settlements for farm dwellers. Such new settlements must give farm dwellers homes of their own and new economic and production opportunities.⁴⁸⁹



489 Summary of Key Findings from the National Evictions Survey, <http://www.nkuzi.org.za/docs/Evictions_Summary.pdf>.

Chapter 10



The right to housing



CHAPTER 10: THE RIGHT TO HOUSING

10. INTRODUCTION

In this chapter the progressive realisation of the right to adequate housing for the period 2006 to 2009 is reviewed against international commitments and the Constitution. South Africa's progress towards meeting the relevant MDG related to improving the lives of slum dwellers and security of tenure is assessed (Goal 7: Ensure environmental sustainability; Target 11: Have achieved, by 2020, a significant improvement in the lives of at least 100 million slum dwellers and Indicator: Proportion of the population with access to secure tenure). While the indicator for MDG 7 provides a starting point for analysis, it does not challenge the extent to which progressive realisation of the right to adequate housing is being realised in qualitative terms within a rights-based framework. This discussion and analysis is provided in the final section of the chapter, which includes an analysis using the 4 As – accessibility, adaptability, availability and acceptability. The chapter also looks at government planning in terms of monitoring and evaluation as well as an analysis of the budget. Recommendations for further action are provided at the end of this chapter. The “main themes arising” section is a summary of the sections on planning, the relevant MDG and the analysis of the progressive realisation of the right to adequate housing.

It is argued in this chapter that while South African policy and legislation generally shows a commitment to fulfilling both international and constitutional obligations, and there are signs of evolution in the housing policy that are directed to providing more sustainable and suitable housing solutions, in this review period there is still a large gap between policy and implementation. More worrying, is the postulate of a conservative state attempting to erode gains made via political transformation in an attempt to speed up service delivery. In this regard, even though the National Legislature and the Constitutional Court have shown their progressive understanding of the right to adequate housing,⁴⁹⁰ in some instances the Constitutional Court has made conservative judgments in the name of the ‘greater good’⁴⁹¹ and in favour of provincial governments. It is therefore critical that the Commission ensures that improving the lives of slum dwellers and ensuring tenure security does not convert into a discourse and practice of slum eradication and the relocation and marginalisation of the poor and working classes in the name of delivery.

10.1. The Meaning and Content of the Right

Meaning in human rights law

In international discourse the right to adequate housing is derived from the right to an adequate standard of living, which is contained in Article 11 (1) of the ICESCR and Article 28 of the UN Convention on the Rights of Persons with Disabilities (UNCPRD),⁴⁹²

“The states parties to the present covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realisation of this right, recognising to this effect the essential importance of international cooperation based on free consent.”

As a signatory to the convention, South Africa has committed itself to not act contrary to the object and spirit of the treaty. The UNHRC has identified the following principle issues which should be considered important in relation to this right:

1. The right to adequate housing applies to everyone and enjoyment of this right should not be subject to any form of discrimination.
2. The right to adequate housing should be seen as the right to live somewhere in security, peace and dignity, and should be ensured to all persons irrespective of income or access to economic resources. According to the Commission on Human Settlements and the Global Strategy for Shelter to the year 2000, adequate shelter means “adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities – all at a reasonable cost.”⁴⁹³

490 For example, the rejection of the KZN Slums Act and amendments to PIE.

491 For example, the Joe Slovo relocations and evictions.

492 The UNCPRD was ratified by South Africa in November 2007, <<http://www.africandecade.org/reads/uncrpd-ratification-update/>>.

493 The right to adequate housing (Art.11 (1)): 13/12/91., CESCR General comment 4. (General Comments) 4: The right to adequate housing Art. 11 (1) of the Covenant), (Sixth session, 1991) Contained in document E/1992/23



Taking into account cultural, environmental, social, economic and other factors, the Committee believes that certain aspects of the right are appropriate in any context and can be considered the key determinants of adequate housing. These are: legal security of tenure; availability of services, materials, facilities and infrastructure; affordability; habitability, which includes application of the Health Principles of Housing of the World Health Organisation; accessibility (taking into account the special housing needs of vulnerable and / or disadvantaged groups); location; and cultural adequacy.

In terms of progressive realisation and considering resource availability, the state should undertake immediate actions to improve the housing situation. There are certain steps that countries can take immediately without needing significant budgets, for instance, abstaining from certain negative practices. Effective monitoring is also identified as being critical. Forced evictions are deemed as “... *prima facie incompatible with the requirements of the covenant and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law*”.⁴⁹⁴

The South African government is a signatory to the International Declaration on Targets for the Eradication of Backlogs in Basic Service Delivery.

National Legislation

The Constitution⁴⁹⁵ explicitly addresses the right to adequate housing. Section 26 states that “1. *Everyone has the right to have access to adequate housing. 2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. 3. No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.*”

Section 28 (1) (c) of the Constitution also calls for the right of children to shelter. Other constitutional rights that can be used to protect housing include:

- Section 9: The right to equality.
- Section 33: The right to just administrative action.
- Section 10: The right to dignity;
- Section 28 (1) (b): The right of the child to family care or parental care and section 12 (1) the right to freedom from violence (especially in the case of domestic violence situations).⁴⁹⁶
- Section 25 (5): The right to have access to land, “*the stronger the right to land, the greater the prospect of a secure home*”.⁴⁹⁷
- Section 25 (6) also protects vulnerable groups by reinforcing security of tenure.

The Constitutional Court, in the *Government of the Republic of South Africa and Others v Irene Grootboom and Others* (2000 (11) BCLR 1169 (CC)), added impetus to the understanding of the right to access adequate housing as it requires available land, appropriate services such as the provision of water and the removal of sewage, and the financing of all of these, including the building of the house itself. For a person to have access to adequate housing, all of these conditions need to be met: there must be land, there must be services, and there must be a dwelling. Access to land for housing is therefore included in the right of access to adequate housing in section 26. A right of access to adequate housing also suggests that it is not only the state that is responsible for the provision of houses, but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing. The state must create the conditions for access to adequate housing for people at all economic levels of our society, and the housing policy must take this into account.⁴⁹⁸ The state’s primary obligation to those who can afford to pay lies in unlocking the system, providing access to housing stock, and providing a legislative framework to facilitate self-built houses through planning laws and access to finance.⁴⁹⁹

494 UN Human Rights Council, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Miloon Kothari: addendum: mission to South Africa, 29 February 2008, A/HRC/7/16/Add.3, <<http://www.unhcr.org/refworld/docid/47d55d3f2.html>>.

495 The Constitution.

496 Khoza (note 26 above).

497 Ibid.

498 Government of the Republic of South Africa (note 19 above).

499 Ibid 36.



The Grootboom judgment was the first of a long line of cases which informed the Constitutional Court's decision in the case of *Residents of Joe Slovo Community v Thubelisha Homes and Others* CCT 22/08. The judgment in this case underscored the necessity for the state to provide adequate alternative accommodation when it evicts a settled community from their homes.⁵⁰⁰ The judgment also stipulated standards with which the “temporary accommodation units” had to comply, including the provision of services and facilities. Furthermore, the court ordered the government to allocate 70% of the Breaking New Ground (BNG) houses⁵⁰¹ at Joe Slovo to the relocated communities (the remaining 30% would be allocated to the back-yarders of Langa). Finally, the court found that the consultation process with residents had been too limited and ordered the authorities to “meaningfully engage” with the community on the logistics of the eviction, such as the timetable and the provision of transport facilities to places of work, schools and clinics.⁵⁰²

The judgment in the *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others* (2001 (7) BCLR (CC) held that the government could change legislation and land-use zoning if that legislation hampers it from fulfilling its constitutional obligations.⁵⁰³

In terms of the responsibilities within government for housing, the National Executive Branch is in charge of the design of national policies while the provinces have responsibility for the delivery of housing programmes and other state services and implementation of national policy. Municipalities also have competence in local matters affecting their jurisdictions. They implement national housing policies in their areas of jurisdiction if accredited to do so and also have legislative competence for settlement planning under Schedule 4 of the Constitution.⁵⁰⁴

In the years following the first democratic election in 1994, the housing programme was characterised by policy formulation, restructuring of the various housing departments into one, establishing institutional capabilities, a legislative and regulatory framework and delivery processes that were intended to redress apartheid housing ills and promote non-discriminatory and equitable provision of housing. Since 1994, the government of South Africa has put in place a number of legislative and other measures aimed at fulfilling the right to adequate housing, including the provision of rental housing, allocation of land for purchase and subsidising the building of housing, among others.⁵⁰⁵ Some key pieces of legislation include the following:

- The 1995 White Paper on a New Housing Policy and Strategy for South Africa and the Reconstruction and Development Plan (RDP) which had a quantitative focus and aimed to eradicate the housing back-log in ten years by constructing 350 000 housing units per year.
- The Housing Act 107 of 1997 which repeals all discriminatory laws on housing, dissolves all apartheid housing structures and creates a new non-racial system for implementing housing rights in South Africa.⁵⁰⁶ It makes a commitment to the progressive realisation of adequate housing and commits local government to take *reasonable* steps to ensure this.
- The Extension of Security of Tenure Act 62 of 1997 (ESTA) which provides security of tenure and protection from arbitrary evictions for people in rural areas and peri-urban land, and requires that a land owner must get a court order before evicting occupiers.
- The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) provides a framework to prevent unlawful occupation and at the same time ensure that unlawful occupiers are treated with dignity, giving special consideration for the most vulnerable occupiers. PIE makes it a criminal offence to evict someone without a court order.

500 The Olivia Road Case (Case CCT 24/07) the judgement, however, says that the City cannot be expected to make provision for housing beyond what its available resources allow, but that at least the City must meaningfully engage with the evictees in a reasonable way.

501 BNG houses are low-cost government housing available at low rentals.

502 “Joe Slovo eviction: Vulnerable community feels the law from the top down,” *Business Day*, (22 June 2009).

503 SAHRC (note 443 above).

504 Ibid.

505 Much of the information in this section is from Khoza (note 26 above).

506 It defines “housing development” as: ... the establishment and maintenance of habitable, stable and sustainable public private residential environments to ensure viable households and communities in areas allowing convenient access to economic opportunities, and to health, educational and social amenities in which all citizens and permanent residents of the Republic will, on a progressive basis, have access to permanent residential structures with secure tenure, ensuring internal and external privacy and providing adequate protection against elements; and potable water, adequate sanitary facilities and domestic energy supply.



Other key pieces of legislation are:

- The Housing Consumers Protection Measures Act 95 of 1998 (HCPMA) which protects housing consumers by establishing the National Home Builders Registration Council (NHBC), tasked with ensuring quality in housing provision.
- The Rental Housing Act 50 of 1999, which defines the role of the government in rental housing, creates structures and defines relationships to regulate the proper functioning of the rental housing market, which is also favourable to low-income groups.
- The Home Loan and Mortgage Disclosure Act 63 of 2000 aims to promote fair lending practices. The Act establishes an Office of Disclosure which is supposed to play a central monitoring and enforcement role.

In 2000, the National Housing Code was launched, the purpose of which is to set out clearly the National Housing Policy of South Africa, in one comprehensive document.

Further enhancements to the policy and legislation framework to improve performance since the last ESR reporting period are:

- The Housing Development Agency Act 23 of 2008 which established the Housing Development Agency (HDA), which is tasked with the development, management and co-ordination of housing provision nationally. It is established to serve as the focal point and special purpose vehicle for municipalities, provinces and national government, including parastatals, to prioritise land assets in favour of housing.
- The Social Housing Act 16 of 2008, which provided a legal framework for the regulation of the social housing sector that will ensure a viable and sustainable social housing sector, which will also contribute to the overall functioning of the housing sector, and cater for low-income groups. The Act identified important principles for Social Housing so as to address the priority needs of low and medium income households. These reflect the key determinants of the ICESCR right to adequate housing, such as supporting the economic development of communities, consultation and participation.

Government Plans and Programmes

- The Housing Subsidy Scheme was introduced in 1995 to fast track the pace of housing delivery and to provide housing opportunities through different housing programmes.
- The Emergency Housing Programme (found in Chapter 12 of the National Housing Code) was created in 2004 as a result of the Grootboom judgment. Assistance is provided through grants to municipalities to enable them to help people in emergencies by providing land, municipal services infrastructure and shelter. People who get assistance under this programme can later apply for subsidies for permanent housing under the Housing Subsidy Scheme if they qualify.
- In September 2004, the government approved a Comprehensive Plan for the Creation of Sustainable Human Settlements – commonly known as Breaking New Ground (BNG). In this plan, the government and other key stakeholders committed themselves to improve every slum in the country and house the homeless; broaden the range of housing finance; ensure minimum standards for housing provision; and ensure the attainment of MDG 7, Target 11. The strategy for slum improvement was in-situ upgrading, as contained in Chapter 13 of the National Housing Code which covers the rules for in-situ upgrading of informal settlements.⁵⁰⁷
- The BNG plan was supplemented by the signing of the Social Contract for Rapid Housing Delivery on 22–23 September 2005, whereby signatories committed to removing or improving slums; fast-tracking housing for the poorest of the poor; providing rental and bonded houses; ensuring social housing nearby employment opportunities; removing blockages and improving permissions time related to the built environment; and ensuring consumer education/understanding in all housing development projects.⁵⁰⁸

⁵⁰⁷ National Department of Housing. National Housing Programme: Upgrading Of Informal Settlements (Final version), (2004).

⁵⁰⁸ Department of Human Settlements, submission to the SAHRC, (2009).



- In order to ensure that provinces, municipalities and housing institutions improve their service delivery models, the National Department of Human Settlements (DHS, formerly known as the National Department of Housing) realigned its organisation and budget structure, creating the Strategic Relations and Governance programme and strengthening the Housing Planning and Delivery Support programme, to provide support for the development and implementation of these service delivery models.⁵⁰⁹
- The Farm Resident Housing Assistance Programme was introduced in 2008, which allows for farm workers' engagement in the settlement planning process.
- An Individual Rural Subsidy Instrument was also introduced in collaboration with the Rural Housing Loan Fund, and is focused on people living in communal areas with no or limited security of tenure.
- In 2008/09, a strategy for accelerated housing delivery for Military Veterans of the anti-apartheid struggle was introduced.

In the Western Cape, Parliament endorsed the Human Settlements Strategy in its Road Map to Dignified Communities Strategy.⁵¹⁰ This strategy breaks from the conventional thinking around housing delivery that characterised the post 1994 period, where the RDP housing and the service sites model reinforced poverty along apartheid racial and geographic lines, keeping the poor on the urban edge. The strategy highlights that, using the conventional paradigm with the current funding allocation, the backlog in housing will never be eradicated. Instead, it promotes a shift away from a focus on housing for the poor, and a one dimensional housing policy, to providing a range of different interventions, including incremental in-situ-upgrading; incremental housing development within green-field developments; social housing units; rental units; formalised back-yard tenancy; backyard homes; and GAP housing. One of the objectives of providing this mix of housing options is to ensure that the poor are integrated into towns and cities. Furthermore, with the move away from a dualistic housing market one must still ensure that densities do not drop below 100 people per hectare.⁵¹¹

Institutions established

The government created seven institutions to assist with housing provision particularly for the proportion of the population that did not qualify for a full subsidy under the Housing Subsidy Scheme, but which was also excluded from Private Sector Financing – about 30% of the population.⁵¹² These institutions are: National Home Builders Registration Council (NHBRC); National Housing Finance Corporation (NHFC); National Urban and Reconstruction Agency (NURCHA); Rural Housing Loan Fund (RHLF); SERVCON; Social Housing Foundation (SHF); and Thubelisha Homes. In 2009, the Department engaged in the rationalisation of housing institutions and task teams were overseeing the closure of Servcon and Thubelisha Homes.

In their place, the Housing Development Agency was established in March 2009 with the aim of doubling the housing delivery rate from about 250 000 to over 500 000 units per year. According to the then Housing Minister, Lindiwe Sisulu, the agency would address the shortage of well-located land where housing projects could be developed. *“The agency is a special-purpose vehicle that will acquire, hold, develop and release land for residential and community purposes to enable the creation of sustainable human settlements.”*⁵¹³

509 Housing Vote 26, National Treasury

510 Western Cape Department of Local Government and Housing. The Road Map to Dignified Communities, <<http://www.capegateway.gov.za/Text/2007/10/wcshss.pdf>>.

511 Ibid.

512 Department of Human Settlements website, <www.housing.gov.za>.

513 “Housing Agency to Speed up Delivery,” *South Africa Info*, (3 March 2009), <<http://www.southafrica.info/about/social/housing-030309.htm>>.



Table 29: Description of the current National Housing Programmes per Intervention Category⁵¹⁴

Financial	Incremental Housing Programmes	Social and Rental Housing Programmes	Rural Housing Programme
Individual Housing Subsidies	Integrated Residential Development Programme	Institutional Subsidies	Rural Subsidy: Informal Land Rights
Enhanced Extended Discount Benefit Scheme	People's Housing Process (PHP)	Social Housing	-
Social and Economic Facilities	Informal Settlement Upgrading	Community Residential Units	-
Accreditation of Municipalities	Consolidation Subsidies	-	-
Operational Capital Budget	Emergency Housing Assistance	-	-
Housing Chapters of IDPs	-	-	-
Rectification of Pre-1994 Housing stock	-	-	-

Major housing projects

The major housing projects implemented by the government since 1994 are Eastern Cape, Duncan Village and Zanemvula; Free State, Grasslands; Gauteng, Cosmo City, Brickfields and Chief Albert Luthuli; KZN, Emnambithi and Mount Moriah; Limpopo, Diteneng and Legae La Batho; Mpumalanga, Klarinet and Emsangweni / Nkanini; North West, Khutsong; Northern Cape, Lerato Park and Ouboks and Western Cape, N2 Gateway.

Provision of basic services

The Department of Cooperative Governance and Traditional Affairs (DCGTA, formerly the Department of Provincial and Local Government) oversees the support system for local government, which is mainly responsible for the provision of basic services. The provision of bulk infrastructure lies with the provinces and national government, and thus co-ordination and inter-sphere cooperation is required. Project Consolidate was launched in 2004, and has evolved into the government wide five year local government Strategic Agenda, which includes basic service delivery as a key performance area. In January 2008, Cabinet approved a task team to facilitate the Apex Priority Project referred to as "Speeding up of Community Infrastructure Delivery."

The DCGTA has also produced a National Indigent Policy Framework and the implementation guidelines for municipalities. DCGTA also issued Infrastructure Asset Management Guidelines in March 2007, and has been facilitating implementation within municipalities through the Comprehensive Infrastructure Planning Process (CIP).

In sum, the evolution of government legislation and policy reflects attempts to address shortfalls, and improvements have been introduced over the years. Delays in implementing the ESTA amendments do pose a problem for the rural poor, particularly farm workers, but this is discussed in the chapter on Land. The Western Cape takes its lead from the BNG strategy and seems to be leading the way in reconceptualising the approach to housing that moves away from a housing policy based on the singular notion of a "poor household". The analysis of policy and the gaps therein are discussed in more detail in the section on the progressive realisation of the right to housing.

⁵¹⁴ Department of Human Settlements (note 528 above).



10.2. The relevant MDG, Targets and Indicators

Goal 7: Ensure Environmental Sustainability	
Target	Indicators
Target 11: Have achieved, by 2020, a significant improvement in the lives of at least 100 million slum dwellers	Proportion of the population with access to secure tenure

The Mid-term Country Report on the MDG for South Africa includes the following types of settlements or dwellings as part of the definition of a slum: informal dwellings in informal settlements; backyard informal dwellings; sublet inner city tenements (which often cannot be differentiated from a non-sublet dwelling); hostels; and domestic workers' rooms.⁵¹⁵

South Africa has set a target of providing housing for all; achieving access to land tenure and eliminating slums altogether by 2015. In addition, it has pledged to increase the subsidisation for housing and increase the percentage of the population with access to modern infrastructure, utilities and services during the same period.⁵¹⁶

The indicator on the proportion of households with secure tenure is inter-related with other MDG. In terms of the Constitutional Court's finding on the meaning of adequate housing,⁵¹⁷ the target on the improvement in the lives of slum dwellers is also related to targets on land and water. The pace of housing delivery impacts on the right to adequate water and sanitation, as those living in informal settlements may have long waiting periods for access to these services.⁵¹⁸ The right to water and sanitation services is discussed in the chapter on environment, water and food in more detail.

Target 11 is a challenge to countries to improve the lives of slum dwellers while helping cities to grow without new slums. Slum households are defined by UN-Habitat as households that lack decent water supply, adequate sanitation facilities, sufficient living area (not overcrowded), decent structural quality and/or security of tenure. However, the attached indicator does not speak directly to the target. The indicator is about secure tenure and is quantitative, whereas the target is about improving the lives of slum dwellers and is both qualitative and quantitative. The assumption behind the choice of indicator is that the provision of secure tenure will significantly improve the lives of slum dwellers. However, there is no target set for the proportion of the population that should have secure tenure by 2020. Therefore, one can only measure one's progress against one's own targets and baseline. Assessing the qualitative improvement in the lives of slum dwellers is best covered in the section on the progressive realisation of rights, whereas the section on the progress of the MDG will cover the quantitative aspects of the indicator and the challenges raised by government in meeting these.

10.3. Main Themes Arising

There are a number of main themes which arise in this section from the analysis of progress on the relevant MDG and the analysis of the progressive realisation of the right to adequate housing.

With regard to the government's understanding of the progressive realisation of the right to housing, the evidence is that legislation and policy reflect the urgency for housing provision and the need to provide secure tenure for all, particularly the poor. While, for the most part, the government housing policy recognises the provision of housing as a socio-economic right, the policy process is still under refinement, and important new bodies such as the Housing Development Agency and legislation such as The Social Housing Act have been introduced during this reporting period 2006 to 2009.

⁵¹⁵ SAHRC (note 2 above).

⁵¹⁶ Ibid.

⁵¹⁷ Government of the Republic of South Africa (note 17 above).

⁵¹⁸ Langford, M. *Human Rights and MDGs in Practice: A review of country strategies and reporting*, (2009).



However, there are concerns that the state is not following a rights-based approach, as it is increasingly adopting a discourse and practice of negative measures and is seeking legislative changes in order to speed up delivery that militate against the principles of a rights-based approach. This is evidenced in the lack of application of in-situ upgrading in favour of slum eradication via evictions, which marginalises the poor and vulnerable even further. Thus, while quantitative progress is being made towards achieving increased security of tenure, the lives of slum-dwellers may not be improving in the process. The example of the first phase of the N2 Gateway project which displaced the Joe Slovo informal residents to Temporary Relocation Areas indefinitely on the urban edge is evidence of this. It is also seen in attempts to introduce the Slums Act in KZN and amendments to PIE, both of which were not accepted by the Constitutional Court. The state has also failed to adequately and meaningfully engage housing beneficiaries and slum dwellers in the means and ends of housing provision. The Joe Slovo judgment of the CCT,⁵¹⁹ which required the Western Cape government to have meaningful consultations with the residents on their impending evictions, is proof of the failure of the state to do this. Even this judgment of the Constitutional Court does not go far enough to promote meaningful engagement on the substance of the housing provision, as it merely compels the state to engage around the logistics of the relocation. This is not substantive engagement around the needs of housing beneficiaries. While the *availability* of housing may be increasing (2.3 million housing opportunities have been provided since 1994 and the current backlog is 2.2 million), the extent to which housing provision is *adequate*, *accessible*, and *affordable* is questionable. Recent policy analysis (including BNG in 2004 and Isidima by the Department of Local Governing and Housing in the Western Cape in 2007) recognises that perhaps it is the nature of the housing policy itself that needs to be changed. The 1994/04 housing policy is based on a singular notion of a “household” for the poor, and the main means of providing housing opportunities has been through providing RDP type houses and serviced sites. However, there is little evidence that BNG has been applied in the provinces during this reporting period. In addition, with current funding levels, these strategies will not deliver housing fast enough, and also do not cater for the diverse housing needs of people, including those with special needs, older persons, immigrants and women survivors of domestic violence. The lack of policy for these vulnerable groups is a concern and is exclusionary. Other groupings that are not adequately catered for in the provision of housing and basic services are farm dwellers, military veterans, rural people (including those on communal lands), inner city residents and backyarders.

With regard to constitutional accountability, government documents uphold the Constitution as the guiding framework for policy and legislation, yet the state is often more mindful of political targets in respect of housing delivery, than the constitutional obligation to provide *adequate* housing. Housing provision has often been of poor quality, delivered on the urban edge, and in dormitory type neighbourhoods without adequate infrastructure, services, and with limited or difficult access to economic, educational and recreational opportunities and facilities.

As indicated, the participation of housing beneficiaries and stakeholders in determining the scope of housing provision has been inadequate and mostly instructive on the part of the state. The realisation of the right to adequate housing in South Africa resembles a top-down approach in which beneficiaries and those affected by evictions and relocation are engaged only in pseudo-participation, if at all. Access to information is also problematic, particularly with regard to the process of conversion to the Housing Demand Data Base from the waiting list system. This lack of participation and transparency in housing allocation causes mistrust between the state on the one hand, and the people on the other.

Another impediment is the gap between strategic planning and implementation. Poor planning, fragmented policies and weak programme design and implementation are seen as root causes of many of the housing challenges. Firstly, good planning relies on reliable and accurate information. However, housing statistics are too global and need to be disaggregated, for example, in respect of key demographics or geographic location. Another problem is the interchangeable use of terms that have different connotations, particularly housing opportunities (which include serviced sites) with houses (which include a top structure). The tracking of population trends and population movements is critical for housing planning and needs to be more current. With regard to planning, monitoring and evaluation, the Department of Human Settlements is making progress with building platforms for improving planning, co-ordination and cooperation for housing delivery, such as the Informal Settlement Atlas and the National Demand Data base.

519 *Residents of Joe Slovo Community Western Cape v Thubelisha Homes and Others* (Centre on Housing Rights and Evictions and Community Law Centre University of the Western Cape as *amici curiae*), CCT22/08.



The actual figure on the proportion of the population with access to secure tenure is not evident in any documentation. The closest figure is the percentage of the population in formal dwellings, which in 2007 was 70.6%. The DCGTA is improving planning with municipalities through the introduction of the Comprehensive Infrastructure Planning Process (CIP) but translating plans into actions and quality service delivery remain a challenge.

Inter-governmental relations and communication is a further challenge, and the DCGTA raised the problem in its submission of vertical integration which is contained in how the powers and functions of the three tiers of government are defined in the White Paper on housing. Housing, for example, is not specified as a municipal function, and as such municipalities see housing provision as an unfunded mandate and many are not accredited to provide housing in accordance with the BNG policy.

In so far as service delivery is concerned, the National Department of Human Settlements is beginning to understand its role as facilitator and coordinator of the implementation of national legislation, policy and programmes. Provinces and municipalities need a lot more support to deliver integrated human settlements that meet the requirements of adequate housing provision. The quality and habitability of houses that have been built has also been poor and has been raised as a major challenge by government departments and dissatisfied beneficiaries. Diversifying the access points for housing provision, including the private and NGO sectors, could play an important role in housing service delivery. However, a clear message has been sent by the private financial sector that they will not provide bonded or low cost rental housing for the poor, and it is essential that the state fills this gap. Those in the low income market struggle the most with maintaining their bonds, particularly in the context of the tough economic climate. It is becoming increasingly difficult for a low income earner to enter the housing market as a new home owner. In this respect, the role of property speculators in pushing up housing prices and the practices of bulk buyers should be investigated. The diversification of housing options is a key issue if the pace of progressively realising the right to adequate housing is to keep up with growing demand. The Western Cape government adopted diversification as a strategy in 2007, moving away from the policy approach based on a purely quantitative analysis of the problem, being numbers of people who need access to land and services, with an equally quantitative solution, being the creation of a single homogenous product – the capital subsidy for an RDP house. The other aspect to consider is the provision of basic services, which at current estimates will take forty years to complete, not taking population changes into account. There still does not seem to be any creative thinking about how to solve this conundrum.

Having provided an overview of the main findings from the period under review (2006/09) related to housing, the following section will review the planning systems of the government in more detail. Planning is considered in terms of information gathering and monitoring; and budgetary planning and oversight.

10.3.1. Planning Systems

Information gathering and monitoring

There are a number of government efforts to improve planning and monitoring systems. These include the Guidelines for the Preparation of Multi-year Housing Development Plans (MHDP) for 2008/14; the Housing Investment Atlas, which is closely aligned with the Presidency's National Spatial Development Perspective (NSDP) initiative and the National Demand Data Base; and a national housing subsidy operational system (HSS). These are seen as platforms for improving co-ordination and cooperation for housing delivery. The Department of Human Settlements also maintains several data-banks that record urbanisation trends, home-ownership and links with other key data-banks to ensure that housing assistance beneficiaries are appropriately assessed and screened in accordance with the qualifying criteria determined in the housing policy. Furthermore, provincial performance reviews are held on a quarterly basis where reports including financial and non-financial performance are presented by provincial housing departments. This initiative assists in improving the alignment and accuracy of housing delivery statistics and project information. Provincial housing departments are provided with the opportunity to use the platform to escalate specific policy implementation and delivery challenges, and get almost immediate responses from the national department.⁵²⁰ The other key elements of the Department's planning and monitoring strategy for housing are the monitoring, evaluation and impact assessment policy and implementation guidelines, and the operating system for the policy and guidelines.

⁵²⁰ Department of Human Settlements (note 524 above).



The Commission has identified a number of weaknesses related to the monitoring of housing provision. These include the lack of sufficient reporting on the proportion of urban and peri-urban dwellers with access to secure tenure and basic services limits; the lack of current information on housing delivery, demand and needs, including people with special needs; and the lack of conclusive data on the number of informal settlement dwellers and on increases or decreases in that number.⁵²¹ There is also a lack of consolidated information and although the figures on housing provision are mostly available, those on the backlogs and demand are not. While South Africa is not required to report on housing to the ICESR, the reporting requirements are important to note as they would provide this overview of the housing environment that is much needed. It is impossible to gain this information from a single source currently, and it could be the basis of establishing a more comprehensive reporting system than the output driven indicators that are contained in the budget vote.

In their submission, the Western Cape Department of Human Settlements noted that the availability of reliable performance information is wanting. This was identified as a strategic focus area in the 2007/08 financial year.

With regard to the provision of basic services, the DCGTA is rendering assistance to municipalities to improve their planning through the introduction of the CIP. Most municipalities did not have the necessary information to be able to quantify backlogs and outline delivery programmes to achieve universal access within their municipalities, and thus the process of completing CIPs has been delayed. To date, 11 out of the 52 district and metropolitan CIPs are completed. Further, a special index will be established by Stats SA to measure universal household access to basic services and community infrastructure.⁵²²

The implementation of the indigence policy by municipalities is a concern. Only guidelines have been provided and each municipality, depending on its resources, is expected to develop its own strategy of extending free basic services to poor households while ensuring that the non-poor pay for services. However, there appears to be no monitoring of this process.

Another problem is the interchangeable use of the terms “housing opportunities” and “houses built”. For example, an analysis of the figures provided on the National Human Settlements website⁵²³ showed the Western Cape delivered a total of 34 157 houses. However, in the submission by the Western Cape Provincial Human Settlements Department, houses built were registered as 16 093, and the remaining 18 064 were actually serviced plots.⁵²⁴

Budgetary planning and oversight

Budget data was obtained from Annual Reports of the Department of Human Settlements. Departmental annual financial statements are recorded from 1 April and end on 31 March of every year.

An analysis of the overall spending patterns of government (Table 30) shows that the Gross Domestic Product (GDP) increased. In the years 2005 to 2006, the government showed a steady increase in terms of GDP. However, the figure dropped to 5.1% in 2007 from 5.4% in 2006. GDP has been growing steadily over the past few years.

Table 30: Real GDP Growth (Inflation adjusted figures) from 2005 to 2007

Year	Real GDP Growth (Rbn)	Increase/Decrease
2005	1 115.14	5.0%
2006	1 175.22	5.4%
2007	1 235.63	5.1%

⁵²¹ Huchzermeyer, M. presentation to the SAHRC ESR public hearings, (2009).

⁵²² DPGL, submission to the SAHRC, (2009).

⁵²³ Department of Human Settlements (528 above).

⁵²⁴ (note 526 above).



Table 31 explores total revenue and expenditure by the government for the years 2005 to 2007.

Table 31: Total Government Revenue and Total Expenditure, from 2005/06 to 2007/08

Total Government Revenue and Total Expenditure, from 2005/06 to 2007/08			
Year	Total Revenue R	Total Expenditure R	%
Jun-05	411.70	416.70	101
Jul-06	475.80	470.60	99
Aug-07	544	533.90	98

As the table indicates, the government has been spending the majority of its allocation and in 2005 it overspent on its revenue by R5 billion or 1% more than its total revenue. The increase in total expenditure had positive implications for funding allocation to housing at the provincial level.

Table 32: Government Expenditure in 2005/07

Government Expenditure in 2005/07			
Sector	2005	2006	2007
Transport and Communication	4%	6.7%	7.3%
Welfare	17%	15.5%	14.9%
Protection Services	17%	15.3%	14.7%
Water and Agriculture	4%	5.3%	5.1%
Education	18%	17.8%	17.6%
Housing	2%	1.8%	7.5%
Health	11%	10.5%	10.4%
Debt	12%	10.0%	9.3%
Other	15%	17.0%	12.6%

Table 32 explores trends in the government's expenditure in different service provision categories. This table shows expenditure on housing by the government was at 2% of the total revenue in 2005, 1.8% in 2006 and grew to 7.5% in 2007. There was an average growth of 5.7% in the government's expenditure on housing between 2006 and 2007, suggesting that it was prioritising housing provision. However, in Table 36, total revenue and expenditure indicate that in 2006, the government slightly underspent its funding.



Provincial Human Settlements Expenditure⁵²⁵

The provincial expenditure by Housing Departments (Table 33) for the years 2005/06 to 2008/09 is obtained from all nine provinces of South Africa.

Table 33: Provincial Expenditure for the Department of Human Settlements between 2005/06 and 2008/09.⁵²⁶

Provincial Human Settlements Expenditure				
million	2005–06 R	2006–07 R	2007–08 R	2008/09- Pre audited outcomes R
Eastern Cape	607.00	637.00	337.00	981.00
Free State	370.00	528.00	467.00	859.00
Gauteng	1 357.00	1 760.00	2 614.00	2 778.00
KwaZulu-Natal	816.00	1 705.00	1 311.00	1 627.00
Limpopo	383.00	605.00	633.00	825.00
Mpumalanga	269.00	330.00	652.00	797.00
Northern Cape	103.00	105.00	231.00	219.00
North West	615.00	697.00	786.00	952.00
Western Cape	552.00	769.00	1 122.00	1 306.00
TOTAL	5 072.00	7 136.00	8 153.00	10 344.00

Table 33 indicates that in terms of expenditure on housing, the Gauteng province recorded the highest expenditure followed by KZN and the Western Cape. The lowest expenditure rates can be seen in Mpumalanga and the Northern Cape, respectively. In 2006/07, all provincial expenditure was increased in each province. In 2007/08, three provinces - the Eastern Cape, Free State and KZN - recorded the lowest rates of expenditure than in their previous year. The Eastern Cape spent up to R300 million less than in its previous year, which indicates a decrease in expenditure by 50%. Overall, the provincial budgets indicate an increase in provincial spending for housing.

⁵²⁵ These figures are drawn from the budget votes. We are using this source of information because Provincial Annual Report documents per Province for all three years were difficult to obtain.

⁵²⁶ These figures are drawn from the budget vote, which means that they are not audited amounts. We used budget votes because Provincial Annual Report documents per Province for all three years were difficult to obtain.



Table 34: Provincial allocation, expenditure and variance for the periods 2006/07 to 2009/10.

This table illustrates variance between budget allocations and expenditure in provinces from the years 2006/07 to 2008/09.

R'000	2006/07		%	2007/08		%	2008/09		%
	Receipt R	Payments R		Receipt R	Payments R		Receipt R	Payments R	
Eastern Cape	1 009 138	1 009 138	100.00	585 353	585 353	100.00	1 192 697	1 192 697	100.00
Free State	745 870	738 610	99.03	904 074	891 902	98.65	1 070 617	1 068 442	99.80
Gauteng	2 171 717	2 174 866	100.15	2 659 097	2 659 097	100.00	3 255 260	3 834 198	117.78
KwaZulu-Natal	1 251 183	1 251 183	100.00	1 520 850	1 520 850	100.00	1 846 160	1 846 160	100.00
Limpopo	1 145 405	1 145 405	100.00	1 054 018	1 054 018	100.00	1 204 912	1 204 912	100.00
Mpumalanga	559 227	557 156	99.63	945 568	966 540	102.22	291 978	355 083	121.61
Northern Cape	261 535	261 281	99.90	297 878	297 500	99.87	365 070	364 672	99.89
North West	872 813	872 813	100.00	1 113 079	1 113 079	100.00	1 261 661	1 261 661	100.00
Western Cape	1 264 517	1 264 517	100.00	1 429 106	1 429 106	100.00	1 614 028	1 614 028	100.00
TOTAL	9 281 405	9 274 969	99.93	10 509 023	10 517 445	100.08	12 102 383	12 741 853	105.28



Table 35 reveals consistent expenditure at an average of 100% for each province across all three years. In general, variance across all provinces tended not to exceed 100%, suggesting that provinces spent their whole allocation. Two provinces, however, stand out in terms of excessive expenditure in the year 2008/09. Gauteng overspent on its provincial budget by 17.8% whilst Mpumalanga overspent on its budget by 21.6%. In the previous year, 2007/08, Mpumalanga overspent by 2% on its budget allocation. These variances are inexplicably high and call for further investigation in each province. A review of total provincial appropriations and payments are provided below.

Table 35: Total allocation and expenditure for provinces for the period from 2006/07 to 2008/09⁵²⁷

R'000	Total Receipts R	Total Payments R	% Variance
Eastern Cape	2 787 188	2 787 188	100
Free State	2 720 561	2 698 954	99
Gauteng	8 086 074	8 668 161	107
KwaZulu-Natal	4 618 193	4 618 193	100
Limpopo	3 404 335	3 404 335	100
Mpumalanga	1 796 773	1 878 779	105
Northern Cape	924 483	923 453	100
North West	3 247 553	3 247 553	100
Western Cape	4 307 651	4 307 651	100
TOTAL	31 892 811	32 534 267	102

Total provincial expenditure was consistent at an average of 100%. As mentioned in the provincial budget analyses above, Gauteng and Mpumalanga overspent on their provincial budgets and experienced total budget over-expenditure for all three years of 7% and 5%, respectively. Thus, the total payments made by provinces amounted to 2% over the full-expenditure.

Growth patterns of total expenditure of Provincial Human Settlements Departments show that for the years 2005/06 to 2006/07 there was a substantial growth in expenditure of 40.1%, and in real terms this translates into a 37.3% growth rate. The years 2006/07 to 2007/08 show a significant decline in the annual and real percentage growth. The annual percentage growth for provincial departments was only 14.3% from 40.3% in the previous year. Real percentage growth was 9.6% whilst in the previous year it was 37.3%. From 2007/08 to 2008/09, the annual percentage growth rate was 26.9% and the real percentage rate was 19.8%.

National Budget allocation, expenditure and variance

Table 36 shows that budget expenditure for the National Department of Human Settlements indicates that overall there has been an increase in the budget allocation from the National Treasury Department over the periods 2005/06 to 2008/09. However, at the time of writing this report, estimates for expenditure for the period 2008/09 were not available in the annual report although the budget vote shows that 100% of funds for the period were spent. In terms of percentage, budget expenditure for the national department confirmed that the national department has been spending less by an average of 2% each year even though budget allocation from National Treasury had increased by over R1,6 million each year.

⁵²⁷ These figures are drawn from the budget vote, which means that they are not audited amounts. We used budget votes because Provincial Annual Report documents per Province for all three-years were difficult to obtain.



Table 36: Budget allocation, expenditure and variance for the National Department of Human Settlements from 2005/06 to 2008/09

Department of Human Settlements: Appropriations and Expenditure from 2005/06 to 2008/09												
R'000	June 2005/06			July 2006/07			August 2007/08			September 2008/09		
Human Settlements	Receipt R	Payments R	%	Receipt R	Payments R	%	Receipt R	Payments R	%	Receipt R	Payments R	%
TOTALS	5 265 672	5 241 916	100	7 333 726	7 165 962	98	8 982 358	8 586 272	96	10 928 487	10 920 272	99.9

Trends in annual growth and real percentage rates do not show significant increases. There was a R2 068 054 increase in the budget allocation between the periods 2005/06 and 2006/07. Although this illustrates a 39% growth rate in the allocation for the year 2006/07, if inflation for that period is taken into account, the real percentage growth lies at 35.9%, 4% less than the nominal percentage growth rate. For the period 2007/08, the department received R1 648 328 more than in the year 2006/07 which was a 22.5% increase in the budget allocation. However, in the context of the undermining effect of inflation for the period 2006/07 to 2007/08, the real percentage growth lay at just 17.8%.

In 2008/09, the department received R1 946 129 more than in the year 2007/08. This means that the budget allocation was 17.8% higher than in 2007/08.⁵²⁸

The percentage growth rate for the budget allocations is only 0.5% lower than that for expenditure. For the period 2006/07, the department spent R1 924 046 more than in the period 2005/06. This translates into a 36.7% increase in the annual percentage growth. However, taking inflation into consideration, the real rate of growth for the year 2006/07 was 33.3%. In 2007/08, the annual percentage growth rate for the Human Settlements department was 25.3% more than in 2006/07. This means that the budget grew by R1 816 396. However, the real growth rate for the year was 20.1%. In 2008/09, the department received R1 946 129 more than in 2007/08, a 17.8% increase in the budget allocation. In real terms, the budget increased by a mere 10.7%.

Overall, trends in growth illustrate that the real percentage growth rates of the Department Human Settlements reduced the value of the rand. The Consumer Price Index (CPI), the government's key inflation indicator, indicates that between 2005/06 and 2006/07, the Consumer Price Index (CPI) was 3.4%. This means that budget allocation and expenditure by the national Department of Human Settlements for the year was 3.4% less than nominal allocation and expenditure. For the year 2006/07, the CPI was slightly higher than the 3.4% of the previous year as it had gone up by 0.5% to 5.2%. This means that the impact of inflation for expenditure was higher.

In sum, there has been an increase in the percentage annual growth of budget revenue and expenditure in the Department of Human Settlements. Expenditure on housing by the government was at 2% of the total revenue in 2005, 1.8% in 2006 and grew to 7.5% in 2007, which indicates a commitment to increase the allocation to housing. However, there was also slight underspending in 2006/07 and 2007/08 and 2008/09 of up to 2%. There was an average growth of 5.7% in the government's expenditure on housing between 2006 and 2007, suggesting that government was prioritising housing provision. From 2006/07 to 2008/09, funding allocation to the provinces has grown in the region of R1 billion and more for seven out of nine Provinces from year to year. Expenditure rates for the department are also generally high at 100% and more, suggesting an added commitment by the department to progressively realise socio-economic rights of people with limited access to housing.

10.4. Progress made in Terms of the Relevant MDG

Definition of security of tenure

Secure tenure is one of the most essential elements of shelter as it protects people against arbitrary forced eviction, harassment and other threats. Insecure tenure inhibits investment in housing, distorts land and service prices, reinforces poverty and social exclusion, causes severe stress and illness and has the biggest impact on women and children.⁵²⁹ The different types of tenure include rental accommodation (private or public), owner-occupation, cooperative housing, lease, emergency housing and informal settlements, including occupation of

⁵²⁸ Department of Human Settlements website, <www.housing.gov.za> <<http://www.housing.gov.za>>.

⁵²⁹ DFID Fact sheet, (2004), <<http://www.bvsde.paho.org/bvsacd/cd29/slumdwellers.pdf>>.



land or property. The government must take steps aimed at ensuring security of tenure to people and households that do not have security of tenure.⁵³⁰ The Joe Slovo judgment elaborated on the extent of the security of tenure, and the court found that tacit consent given by the City of Cape Town to residents to occupy land “... *could be tacitly withdrawn*”,⁵³¹ as long as the state has a plan for the upgrading of the area. This makes the tenure of people in informal settlements, where their occupation is tacitly given, very insecure, and it means that if they are unlawful occupiers as per the PIE Act, they would not qualify in respect of its provisions.

Progress on indicator regarding security of tenure

It is difficult to measure actual provision against baseline data due to migration and population patterns. The number, size and structures of households in South Africa have changed in the last 10 years. While the total number of households has increased from an estimated 9 059 571 in 1996 to an estimated 12 726 000 in 2005, the average household size has declined from about 4.48 in 1996 to about 3.69 in 2005.⁵³² Therefore, even though there has been much progress in the provision of housing, demand is continuously growing. The mid-term progress report of South Africa failed to mention the impact of population growth and urbanisation on achieving this target, but the submission of the Department of Human Settlements to the Commission highlighted these as challenges. The submission further highlighted that the 2008 Medium Term strategic outlook acknowledged the total estimated inadequate housing backlog and need of 2.2 million households. In other words, nearly 1 675 000 households currently live in freestanding informal settlements. There is a further estimated 525 000 households that reside in backyards, farms and communal land that also forms part of the housing backlog.⁵³³ The submission noted that the informal settlement upgrading programme aims to deliver secure tenure to slum dwellers. However, considering the Joe Slovo judgment, the process itself may be harmful as people may be relocated without secure tenure.

530 Ibid and Khoza (note 26 above).

531 De Vos, P. *Joe Slovo case: the good, the bad and the (mostly) unstated*, Constitutionally Speaking, (14 June 2009), <<http://constitutionallyspeaking.co.za/?p=1122>>.

532 Population And Household Projections For South Africa by Province And Population Group, 2001 – 2021, Unisa.

533 The Mid-Term Country report on the MDGs reports that 46% of South Africa’s urban dwellers were living in slums in 1990, a proportion that decreased to 29% by 2005. It is unclear if these results refer to inner-city dwellings, in which case peri-urban dwellings are omitted from the results.



An analysis of the types of housing provided per province in the 1996 and 2007 years is provided below.

Table 37: Types of Housing per Province in 1996 and 2007⁵³⁴

Types of housing by province, 1996 and 2007 (proportions)^a								
Province	Formal^b		Informal^c		Traditional		Other^d	
	1996	2007	1996	2007	1996	2007	1996	2007
EC	46.8%	54.7%	10.9%	8.0%	41.1%	36.7%	1.1%	0.6%
FS	62.5%	71.0%	26.0%	18.4%	10.2%	4.6%	1.3%	6.1%
Gau	73.9%	73.5%	23.8%	22.7%	0.7%	0.4%	1.6%	3.5%
KZN	55.3%	60.5%	11.2%	8.6%	32.0%	27.4%	1.5%	3.5%
Lim	62.0%	83.2%	4.9%	5.6%	31.8%	9.0%	1.4%	2.2%
Mpu	64.9%	77.0%	15.6%	11.7%	17.9%	7.0%	1.7%	4.3%
NW	69.5%	66.5%	22.1%	23.8%	7.0%	2.3%	1.3%	7.4%
NC	80.1%	80.4%	14.0%	10.5%	3.9%	4.3%	2.0%	4.5%
WC	81.3%	83.4%	16.6%	14.2%	0.9%	0.8%	1.2%	1.7%
SA	64.4%	70.6%	16.0%	14.4%	18.2%	11.7%	1.4%	3.3%

Source: 2007/08 Survey, p504

a The proportions for the provinces denote the percentage of that type of household out of all households in that province. The proportions for South Africa denote the percentage of that type of household out of the total number of households in the country. Thus in 2007 some 54.7% of all households in the Eastern Cape lived in formal dwellings. Similarly 70.6% of all South African households lived in formal dwellings.

b Formal refers to house/brick structure on separate stand or yard, flat in block of flats, town/cluster/semi-detached house, unit in retirement village, and a room/house/dwelling in backyard.

c Informal refers to dwelling/shack in backyard and not in backyard.

d This includes caravan/tent, hostels and compounds, and unspecified dwellings.

This table shows that the proportion of the population living in formal housing increased by just over 50% between 1996 and 2007, from 5 384 819 to 8 819 521. Thus 70.6% of South African households lived in formal dwellings in 2007, compared to 64.4% in 1996. During the same period, the population grew by 7.9 million, while the average household size decreased from 4.6 to 3.9 people per household. Although the table shows a proportional decline in the number of informal houses (by 10%), the actual number increased from 1.5 million to approximately 1.8 million during this period.⁶⁴ Informal housing decreased from 16% of total housing in 1996 to 14.4% in 2006. The number of traditional dwellings decreased from 1 644 388 to 1 459 380 during the same period.⁵³⁵

According to the submission of the Department of Human Settlements, in September 2006 the department recorded having delivered over 2.2 million houses to an estimated 8.4 million people since 1994. By 31 March 2009, the department recorded having delivered over 2.8 million houses to an estimated 13 million people. This is an increase of 0.6 million houses provided in the period under review for 4.6 million people. As of 2007, 2.4 million subsidies have been approved for housing construction by government.⁵³⁶

The Department of Human Settlements highlighted in their submission that:

*"Considering that the housing programme delivers secure tenure (land), access to basic services (water, sanitation and energy) as well as shelter (housing) it can be confirmed that enormous progress is being realised progressively in the achieving the Millennium Development Goals. Furthermore, enhancements to the 'Informal Settlements Upgrading' programme aimed at accelerating the development and/or formalisation of informal settlements is bearing results."*⁵³⁷

Although at the hearings the Department of Human Settlements argued that for the first time since the end of

534 SAIRR. *SAIRCC Today: Service Delivery – An Overview*, (2008), <http://www.sairr.org.za/sairr-today/news_item.2008-11-21.0078415165/?searchterm=housing>.

535 Ibid.

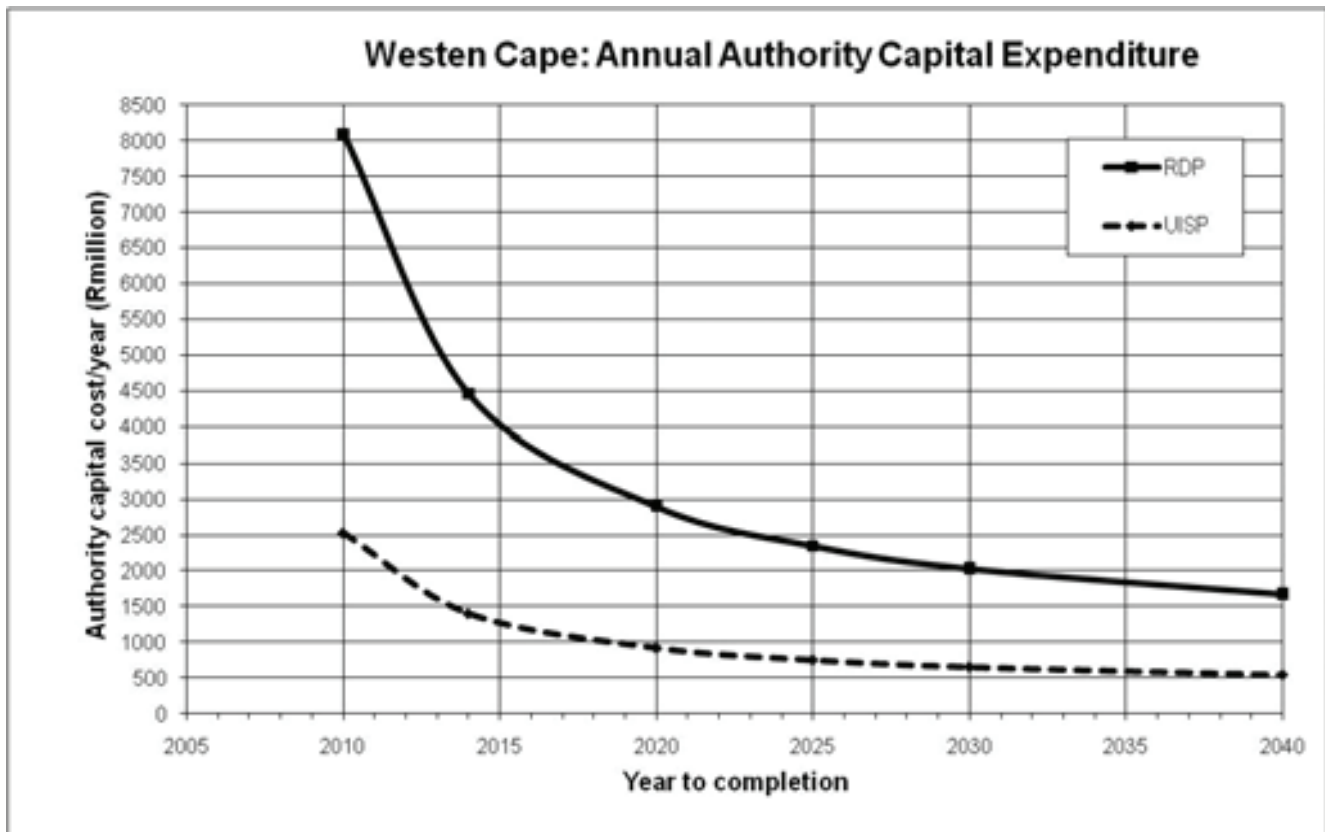
536 United Nations Human Rights Council (UNHRC). *Mission to South Africa: Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in its Context*, (2008).

537 Department of Human Settlements (note 524 above).



apartheid the housing backlog is less than the number of houses provided, in certain provinces the housing backlogs are ever increasing. According to an article in *The Times*, the housing backlog in the Western Cape is growing by 12 000 to 18 000 per annum and between 1996 and 2001, the number of informal households increased by over 36 000.

Figure 3: Estimated backlog in housing provision at current budget levels⁵³⁸



This graph, from the Western Cape Department of Local Government and Housing strategy (Isidima), shows that in that province, with current funding levels, the backlog will not be eliminated within 30 years.

⁵³⁸ Western Cape Department of Local Government and Housing (note 526 above), 20.



Progress in the Provinces

Table 38 shows the number of houses that have been built, some of which are underway, by the Provincial Departments of Housing between the years 2007/08 and 2008/09. The Gauteng province has built the most housing units.

Table 38: Number of Houses Built, 2007–2009

2008/09 Financial Year*		2007/08 Financial Year		2007–2009
Province	TOTAL	Province	TOTAL	TOTAL Houses Built
Eastern Cape	22 180	Eastern Cape	12 684	34 864
Free State	14 667	Free State	12 482	27 149
Gauteng	80 469	Gauteng	90 886	171 355
KwaZulu-Natal	36 068	KwaZulu-Natal	34 471	70 539
Limpopo	16 686	Limpopo	18 970	35 656
Mpumalanga	17 626	Mpumalanga	16 569	34 195
Northern Cape	4 914	Northern Cape	8 686	13 600
North West	15 912	North West	19 945	35 857
Western Cape	31 011	Western Cape ¹⁸	34 157	65 168
TOTAL	239 533	TOTAL	248 850	488 383

* Financial year is from 01 April until the following year 31 March

Western Cape⁵³⁹

The Western Cape Department of Human Settlements was one of two provinces to make a submission on housing at the hearings.⁵⁴⁰ It reported the building of 16,093 houses in the 2007/08 year and a further 15,717 in 2008/09. In 2007/08, 18,064 plots were serviced and in 2008/09 a further 15,297 plots were serviced. In 2007/08 and 2008/09, 3 542 houses received quality improvements under the rectification programme. Unfortunately, reporting is not consistent, so figures provided for one year are not always provided for in another year, for example, 15,322 households were assisted under the Emergency Housing Programme (EHP) in 2007/08, but there are no figures for the 2008/09 year.

In terms of projects approved under the informal settlement upgrading programme, 20 projects were approved in 2007/08 and a further 19 in 2008/09.

Table 39: Housing provision in the Western Cape

	Target	Actual	Target	Actual
	Year 2007/08		Year 2008/09	
Building new houses	16 000	16093	19050	15717
Serviced plots	18000	18064	18011	15297
Informal Settlement upgrading projects approved	-	20	-	19
Rectification programme	-	2473	-	1051
Peoples housing process	-	277	-	No reporting

The department is also launching its first social housing project in Steenberg with 450 low income units.

⁵³⁹ Western Cape Department of Local Government and Housing Cape was the only provincial government department to make a substantive submission on the right to land and housing, which is the reason for the focus on this department.

⁵⁴⁰ The other was Mpumalanga, but there were no figures provided.



Challenges faced

The National Department of Human Settlements submitted that it is proud of its record of delivery in terms of the number of units provided, although it does acknowledge the numerous challenges. The key challenges raised by the department are the unavailability of suitably located land for human settlements; quality of housing contractors and adherence to specifications; urbanisation, migration and immigrant impacts; and the alignment of the powers and functions of the three tiers of government.

Unavailability of suitably allocated land for human settlements

The National Department of Human Settlements noted access to suitable land as one of the key challenges of housing provision. Specifically, the prioritisation in respect of land development procedures, land use management, and land use planning is outside the direct core control of the housing sector and “... *prioritisation in respect of these is dislocated from core housing objectives and priorities*”. The response of the department to this challenge has been the establishment of the Housing Development Agency.

The department faces other challenges related to land where communities are settled on unstable land (e.g. dolomite in Mpumalanga) yet refuse to relocate.

Quality

The quality of housing provision has become a key issue in housing delivery. Even the flagship N2 Gateway and Zanemvula have experienced quality problems and Thubelisha Homes, the state owned housing developer, has been accused of trying to cut corners by building smaller houses in the latter.⁵⁴¹

Many of the RDP housing projects over the last years have been fraught with quality issues, including building techniques and the use of sub-standard materials, particularly concrete. In their submission, the Department of Local Government and Housing from the Western Cape highlighted that as the quality of housing has increased over the years, so the costs of building have risen accordingly.⁵⁴²

The need for rapid service delivery should not take precedence over quality service delivery and community participation, as it is evident that this creates additional problems and distrust between communities, government departments and service providers.⁵⁴³ The state's response to these problems has been to enhance the functions of the Inspectorate / Building control functions at various levels, and to ensure that the National Homebuilders Registration Council enforces new norms and standards that are aligned to provincial delivery cycles.

Rapid urbanisation, migration and immigration

Rapid urbanisation, migration and immigration are further challenges raised by the Department of Human Settlements, although it recognises that the movement of people is a natural and logical process. Nonetheless, it noted that urbanisation, migration and immigration impacts on the achievement of housing targets and backlog eradication as it increases the need for new housing and planning. The submission of the department suggests a policy rethink in terms of how to respond to the needs of irregular immigrants, and calls for a new realistic and feasible approach.

Poor co-ordination within and between Government Departments and the tiers of Government

There are several blockages in the housing pipe-line which affect rapid up-scaling of housing delivery, including administrative and planning capacity. The responsibility for housing delivery is spread across the functional mandates of all three spheres of government and several line-function departments. This poses problems for the co-ordination within and between government departments and tiers of government. In the Budget Vote 26 of 2009 it was emphasised that “... *the powers and functions of the state in the three spheres of government are often complex to align towards a common objective*.”⁵⁴⁴ This was also picked up by the Special Rapporteur of the UNHRC, who observed that the realisation of the right to adequate housing in South Africa is compromised by the government's fragmented approach to the implementation of housing law and policy. He noted specifically

541 “Zanemvula in Disarray with 600 New Houses Defective,” *The Herald*, (24 January 2008), <<http://www.internafrica.org/2008/01/zanemvula-in-disarray-with-600-new.html>>.

542 Department of Local Government and Housing (note 526 above).

543 SAHRC (note 2 above).

544 Department of Human Settlements (note 524 above), 13.



the following: the lack of cooperative governance in housing development; the insufficient information sharing between levels of administration; the lack of integrated housing development which ignores the need for social services within housing projects; and poor quality construction.⁵⁴⁵

However, the signing of the Memorandum of Understanding with the Federation of the Urban and Rural Poor and Slum Dwellers International has given impetus to the provincial steering forums that provide space for key stakeholders to collaborate and support project level implementation.⁵⁴⁶

Limited budgets

The Western Cape Department submitted that the greatest limitation to delivering new housing solutions is the budget, as the subsidy scheme has not kept pace with housing costs. In 1994, the R15 000 subsidy produced a site and “starter home” of 27m². Improvements to housing quality and increased costs mean that a 40m² home with two bedrooms, bathroom, ceilings, plaster and paint costs about R75 000.

10.5. Findings on the Progress Made by the State on the Realisation of the Right

In this section the progress made by the state in the progressive realisation of the right to adequate housing is investigated and assessed. Definitions of “adequate” housing are provided in section 1 of this chapter, and when applied to the framework of the 4 As, it can be categorised as follows:

- **Appropriate:** The extent to which government policy, legislation, programmes and approaches are appropriate in terms of both content and process. The key question is whether the measures adopted by the state are appropriate for progressively realising the right to housing, taking the specific contextual and changing needs of society into account.
- **Available:** The ability of people to live somewhere without fear of eviction outside of the rule of law, and with the availability of services, materials, facilities and infrastructure.
- **Accessible:** Whether the diverse needs of people are provided for, including those with special needs, women, children, migrants and the poor. Housing must also be affordable.
- **Acceptable:** This pertains to the quality of housing provision, habitability (including adequate privacy, space, security, lighting and ventilation), and whether housing is provided in sustainable communities and ensures that people are able to access economic opportunities from where they live and are close to employment and basic amenities.

10.5.1. Appropriate – from Policy to Implementation

A study by the Centre on Housing Rights and Evictions, 2005, found that South African housing law and policy is largely compliant with the ICESCR and the Constitution. Where there are policy and programmatic gaps that inhibit compliance with Covenant requirements, the government has taken steps to address the situation. The Special Rapporteur on housing also acknowledged that South Africa has progressive legislation and policy in place regarding fulfilment to the right to adequate housing. The primary problem is that while people wait for long periods for the provision of adequate housing, they are not able to access and enjoy these rights. Significant gaps exist in the provisions for a variety of categories, namely:

- (a) People who qualify for a subsidised house and are waiting in the queue for one.
- (b) People who earn too much for a government subsidy but too little to secure a commercial bond and thus end up living in backyards or informal settlements.
- (c) People who could afford rentals but cannot rent because there is not enough rental stock at affordable prices.
- (d) Backyard dwellers.
- (e) People in rural areas.

Many problems occur while they wait. For instance, their basic housing and tenure rights remain vulnerable for as long as they are waiting, which could take many years. There are three main overarching problems that have affected housing provision. The first is when the “... *South African state circumvents or does not adequately follow the PIE Act procedures*”.⁵⁴⁷ The second is that “... *while well intentioned policies have been developed at a*

⁵⁴⁵ UNHRC (note 552 above), 36.

⁵⁴⁶ Department of Human Settlements. Housing Budget Summary Vote 26, (2009).

⁵⁴⁷ Centre on Housing Rights and Evictions. Any Room for the Poor? Forced Evictions in Johannesburg, (2005).



National level, few mechanisms seem to be in place to ensure that these policies are implemented.⁵⁴⁸ Examples are the informal settlement upgrading programme and the emergency assistance programmes, which could assist with reducing waiting times, but which have neither been adequately piloted nor implemented. Instead, the state has applied or sought to apply methods of relocation and evictions which may not have improved the lives of the slum dwellers, although they may be eradicating slums. The third is the state's attempt to introduce amendments to the PIE Act of 1998 which would have facilitated the eviction of illegal occupants. This is another indicator of the lack of understanding of a rights-based approach. These changes were not accepted in Parliament, which shows that the government still holds human rights as paramount.

Informal settlement upgrading

The progressive realisation of rights is concerned with both the content and process of the achievement of rights. Despite the quantitative progress in the delivery of housing opportunities, there is a growing critique of the discourse and methods of informal settlement upgrading, as the process of upgrading seems to be becoming increasingly synonymous with evictions. Civil society organisations and panellists at the hearings have questioned the methods and discourse of slum eradication, and highlight the slow pace of piloting in-situ-upgrading as provided for in the informal settlement upgrading programme (Chapter 13 of the National Housing Code, 2000). Civil society organisations have argued that the state is taking increasingly negative measures to do away with informal settlements or slums, which are contrary to the spirit of the legislative and policy framework on the elimination and prevention of slums or informal settlements.⁵⁴⁹ While the Department of Human Settlements emphasised that two of the proposed nine pilot sites are being implemented,⁵⁵⁰ Huchzermeyer (Associate Professor, School of Architecture and Planning, Wits University), submitted that there was no evidence that these informal settlement upgrading projects were implemented under Chapter 13 of the Housing Code.

In the case of the N2 Gateway, the state has argued for relocation as it deems in-situ upgrading to be unfeasible. The state argument that it does not have the capacity to manage in-situ upgrading because it does not have experience of it is fallacious, as the provision for pilot projects in the Informal Settlement Upgrading Programme was introduced exactly for the purpose of learning and developing best practices.

The manifestation of the more direct approach to slum eradication is the criminalisation of land invasions, and the use of apartheid-style methods of forced relocations, evictions and controlled transit camps as measures for prevention of the emergence and re-emergence of slums.⁵⁵¹ This more direct approach is having a negative impact on the relations between the state and the urban poor.⁵⁵² Further, Huchzermeyer argued that the state has failed to develop or promote broader reforms that would enable appropriate land release and servicing, other than through controlled transitional relocation areas (TRAs).⁵⁵³

In its report, the UN Special Rapporteur also noted that:

*“... there may have been a misunderstanding as to how to respect international commitments, such as the Millennium Development Goals, that may have led to efforts being directed to the eradication of slums rather than the improvement of the lives of slum dwellers.”*⁵⁵⁴

The submission from Mpumalanga Department of Human Settlements notes as progress that provincial by-laws on the eradication of informal settlements are being drafted.

Another example of legislation promoting direct outcomes is the KZN Elimination and Prevention of Re-emergence of Slums Act, 2007 which was signed into law by the Premier of KZN in 2008. Abahlali baseMjondolo⁵⁵⁵ raised this issue in the Constitutional Court and the court ruled that section 16 of the act was unconstitutional. This section

548 Ibid 37.

549 Particularly the Housing Act 107 of 1997, Chapter 13 of the Housing Code, (2000) & the Breaking New Ground Policy, (2004).

550 Cape Town Municipality (N2 Gateway Project) and in the Nelson Mandela Bay Municipality (Zanemvula).

551 North West Province. Budget 2007/08, 259.

552 Huchzermeyer, M. Eradicating slums in South Africa: The need to return to positive and indirect measures entrenched in policy and legislation. In Hofmeyr, J. (ed.), *Transformation Audit 2008: Risk and Opportunity*. Institute for Justice and Reconciliation, (2008), 94.

553 Ibid.

554 UNHRC (note 552 above).

555 Abahlali is a Social Movement of shack-dwellers that started in Durban in 2005.



reflected a provision in the 1951 Prevention of Illegal Squatting Act, which mandated landowners to evict illegal occupants irrespective of their desperation. The attempt to reintroduce this type of legislation shows regression on the part of the state, and not a progressive realisation of the right to adequate housing.⁵⁵⁶

An example of how slum upgrading has gone awry is the Joe Slovo informal settlement that is giving way to aspects of the N2 Gateway Project. The story of the upgrading of the Joe Slovo informal settlement is one of poor communication between the state and affected communities, lack of peoples' consultation and participation in planning, and broken promises resulting from poor planning. Planning and consultation are two of the criteria for measuring progressive realisation. Firstly, the state deemed in-situ upgrading to be impossible and opted for relocation of the residents to Delft. They were thus not attempting to pilot in-situ upgrading. Secondly, promises made to the residents that 70% would be able to return were broken. Thirdly, residents were moved to a temporary relocation area (TRA) in Delft with little or no access to services and which is further way from the city than their original settlement (about 15km from Joe Slovo in Langa).

The next phase of the project has been termed the “*largest judicially sanctioned eviction of a community*”⁵⁵⁷ since the end of apartheid in South Africa. Based on the experience of Phase 1, most remaining residents refused to relocate for Phase 2 of the project. “*The housing authorities then applied for and obtained an eviction order from the Western Cape High Court in terms of the PIE Act of 1998. The residents of Joe Slovo appealed to the Constitutional Court and judgment was handed down on June 10 2009. The Constitutional Court rejected the arguments of the residents that the state was not entitled to seek their eviction in terms of the Act. It also held that their eviction and relocation to Delft to enable the upgrading and development of the Joe Slovo settlement was just and equitable in the circumstances. On August 24th 2009 the Constitutional Court quietly issued a new order suspending the evictions until further notice.*”⁵⁵⁸

However, three significant legal and practical victories were won by the residents. Firstly, all five judges underscored the necessity that the state provides adequate alternative accommodation when evicting a settled community from their homes,⁵⁵⁹ and the court stipulated detailed standards for the temporary relocation units in Delft. Secondly, the government was ordered to allocate 70% of low-cost housing at Joe Slovo to the relocated communities, for people who apply and qualify and the remaining 30% would be allocated to the back-yarders of Langa. Finally, the authorities were required to “meaningfully engage” with the community on the details of the eviction and relocation, for example the provision of transport for work and school.⁵⁶⁰

Elements of the Constitutional Court judgment have been criticised by a number of commentators, predominantly because it failed to condemn the poor consultation and the reasonableness of the plan, and in fact condoned them in interests of the greater good. Hence, many of the Constitutional Court judges failed to take seriously the court's own insight that procedure and substance are inextricably connected. For example, there are serious questions whether an in-situ upgrade would have been less disruptive and more effective.⁵⁶¹ Further, the court failed to interrogate with sufficient vigour what would constitute suitable alternative accommodation for the poorest evictees.⁵⁶² Although the court did order a meaningful engagement with the residents in the future, this was more on the logistics of the relocation rather than on the plan itself.

In respect of judicial matters, a concern is the extent of the enforcement of such court orders in housing rights cases, as it is crucial to ensuring that successful litigation results in social change on the ground.⁵⁶³ Irene Grootboom died eight years after the ruling in her favour, waiting for the enforcement of the judgment in her case.⁵⁶⁴ This can only be interpreted as a huge indictment.

556 Huchzermeyer (note 569 above); “Ruling in Abahlali case lays solid foundation to build on,” *Business Day*, (4 November 2009).

557 “Joe Slovo eviction: Vulnerable community feels the law from the top down,” *Business Day*, (22 June 2009).

558 De Vos, P. *Sanity and humanity prevails for now*, Constitutionally Speaking (8 September 2009), <<http://constitutionallyspeaking.co.za/sanity-and-humanity-prevails-for-now/>>.

559 In this instance the Judges drew on other cases, beginning with Grootboom (note 17 above), when the court held that the state must make reasonable provision for those facing homelessness or living in intolerable conditions.

560 *Business Day* (note 574 above).

561 *Business Day* (note 574 above).

562 De Vos, C. L. Foundation Chair in Constitutional Governance, Department of Public Law, University of Cape Town, pers comm., (7 September 2009).

563 Dr. Lilian Chenwi. Community Law Centre, UWC, Panelist report for the SAHRC ESR public hearings: land and housing, (2009).

564 “Grootboom dies homeless and penniless,” *Mail and Guardian*, (8 August 2008), <www.mg.co.za/article/2008-08-08-grootboom-dies-homeless-and-penniless>.



The warning signs are that the state's growing impatience with the pace of service delivery is increasingly going to be a justification for a focus on the ends rather than the means.

The best practice example of in-situ upgrading is the Freedom Park programme implemented by the City of Cape Town, under the presidential Urban Renewal Programme, and supported by the Development Action Group and private donors. This example clearly shows how participatory planning (People's Housing Process), coupled with the effective use of available programmes and public-private partnerships can be used to deliver in-situ upgrading.⁵⁶⁵

Application of the Emergency Housing Programme (EHP) (Chapter 12 of the National Housing Code)

Government departments need to do more to encourage the application of the Emergency Housing Programme. A particular challenge with the programme is that municipalities are required to initiate the process, and thus many poor people faced with evictions who would have benefitted from the programme are not able to as they are not able to initiate the process as individuals.⁵⁶⁶ The programme has also been criticised for its very narrow definition of emergency and the type of housing solutions offered. The reason for this is that the programme sees the solution in temporary housing such as shacks or tents, which have to be made available on land that the municipality identifies for this purpose. In most cases, this is likely to be far from the city or otherwise poorly located. Significantly, this emergency programme is not intended for funding NGOs to set up emergency shelters.

A one dimensional housing policy

The third main problem with the pace of housing delivery has been the appropriateness of how housing delivery has been conceptualised in the policy itself. One problem with housing policy is that it is based on the concept of a household and does not recognise the multiple needs in communities, including single person households. In the post 1994 period, the focus was on the homogenous delivery of RDP houses by the state for poor people within one modality – a 40m² house based on a capital grant. The Special Rapporteur encouraged the authorities to replace the household approach with a focus on the human rights of each individual and family member from the very initial stage of policy design. However, there are slow indications that the government is realising that people's housing needs are different. Therefore there appears to be recognition to provide a variety of housing solutions, including single person households, family households, rental stock, social housing, bonded houses and so forth.

However, in the period under review, the extent to which the housing provided by the state is appropriately meeting the needs of beneficiaries is questioned. While the size of houses has increased in this period, the provision of single bedroom houses for large families cannot be considered to be adequate. In sum, there has been progression in the appropriateness of government policy in addressing the diverse housing needs of the population in South Africa. Policy is evolving and the introduction of social housing legislation is an indicator of this. However, at the same time the measures adopted by the state to implement housing policy are increasingly inappropriate within a rights-based context, and cannot be considered a reasonable means of realising the right. The state has also failed to appropriately implement important innovations in housing policy, particularly sections 12 and 13 of the Housing Code.

10.5.2. Availability

RDP houses

As highlighted in the section on the progress towards achieving the MDG, 70.6% of South Africans living in formal dwellings, and 2.3 million housing opportunities have been provided since 1994. These have mainly been in the form of RDP type houses, funded by a capital grant from the state, or serviced sites in urban areas, on the urban periphery.

Social housing for rental housing

The Special Rapporteur noted with particular concern the critical lack of availability of public rental housing stock for low income people, as current market related rental increases make this option inaccessible and unaffordable.

⁵⁶⁵ UNHRC (note 552 above).

⁵⁶⁶ Dr. Lilian Chenwi (note 580 above).



According to the Budget Vote 26, there is currently a national housing supply shortage of more than 600 000 units for households earning between R2 500 and R8 600 per month.

The National Housing Finance Corporation launched a pilot project in 2007 to test the market for a retail product and the findings will be used to inform the corporation's strategy.⁵⁶⁷

Inner city housing

Housing policy has not adequately addressed the problem of inner-city accommodation for low income groups, some earning less than R200 per day from working in the informal sector in the inner-city. The housing subsidy scheme has not been suitable for accommodating people in the inner-city and the majority of RDP houses are located on the outskirts of the cities. The problem of inner-city housing is particularly bad in Johannesburg, where a drop in property prices and invasions of buildings led to landlords abandoning buildings or no longer having any control over them. This has resulted in people living in buildings that are deemed to be unsafe, and where water and sanitation services have been turned off. Local government has also evicted people from these buildings without providing alternative accommodation. The Constitutional Court in 2008 ruled in favour of inner-city residents⁵⁶⁸ and declared that it is essential for the City of Johannesburg to engage people meaningfully before evicting them from their homes if they would become homeless following an eviction. The court also argued that although the City of Johannesburg does have an obligation to do away with unsafe and unhealthy buildings, the constitutional duty to provide access to adequate housing means that it has to consider the housing situation of people when deciding to evict people. Lastly, the court found that it is only a crime for people to remain in a building after a court has provided an eviction notice, and not after receiving an eviction notice from the City of Johannesburg. Thus, the part of the National Building Regulations and Building Standards Act that makes it a crime is deemed unconstitutional.

Insecurity of tenure and unavailability of affordable housing for the very poor in the inner city lies at the core of this problem. The Social Housing Act 16 of 2008 was introduced to address this problem but the commencement date of this Act has yet to be proclaimed.

Backyard shack dwellers

Backyard shack dwellers do not enjoy sufficient security of tenure as the regulation of the tenant-landlord relationship is not adequate or applicable. In instances where the prime tenant receives a new house (for example under the National Housing Subsidy Scheme), the backyard dwellers are often evicted.⁵⁶⁹ The submission from the Belhar Community Health Forum noted that there is a problem with the increasing numbers of backyard dwellers and that "*many times it looks like there is not light at the end of the tunnel for them*".⁵⁷⁰

As noted by the Report of the Portfolio Committee on Human Settlements on Budget Vote 26 and Strategic Plan 2009 – 2011 of the Department of Human Settlements and its Entities dated 24 June 2009, there is no national strategy to deal with backyard dwellers. This represents a serious problem, as it is in fact a vulnerable group that has been consistently excluded from policy planning.

The Western Cape Department of Human Settlements reported that it has been planning a pilot programme for backyarder assistance that will be implemented in the coming years. They are drawing on the lessons of the Gauteng Pilot Backyarder Assistance Programme. The Western Cape road map envisages formalised back-yard tenancy with access to capital subsidies and loans by landlords to upgrade living conditions and backyard homes. This implies some form of secure title and support directly to owners, including the possibility of sub-division and sale.⁵⁷¹

Hostel Dwellers

The Community Residential Unit (CRU) is unable to address challenges facing hostel dwellers due to the absence of a coherent policy.

⁵⁶⁷ Department of Human Settlements (note 563 above).

⁵⁶⁸ *Occupiers of 51 Olivia Road Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC).

⁵⁶⁹ UNHRC (note 552 above), 52.

⁵⁷⁰ Belhar Community Forum (note 101 above).

⁵⁷¹ Department of Local Government and Housing (note 526 above).



Rural Areas

It was raised in the hearings that the focus of housing development seems to be in the urban or peri-urban areas and that housing in the rural areas, especially on communal lands, has been neglected. This needs to be considered in the context of spatially redesigning the apartheid legacy.

Housing demand data base

One of the key issues with regard to the availability of housing is the housing demand data base. Much clarity is still needed on the housing data base, as it was clear from the hearings that provinces are still lagging behind in the process of doing away with the waiting list. Information is needed on what the departments are doing to speed up this process, ensure transparency of the data base, and ensure that beneficiaries are aware of (and educated on) how the data base system operates. The public needs more information on the process of transferring names from the old waiting list system to the new demand data base as this affects their expectations for housing delivery. The process of housing allocation is not transparent, and there were accusations of corruption at local level raised at the hearings. The Department of Human Settlements submitted that corruption should be reported to the corruption helpline.

Private sector

BNG and Isidima recognised that the state cannot be the sole provider of new housing. In 2008, the Department of Human Settlements concluded four memorandums of understanding with external stakeholders: Intersite, to facilitate access to certain land parcels; the Development Bank of Southern Africa, for programme and implementation capacity support; Anglo Platinum, for integrated human settlements development around large mining operations; and the Umsobomvu Youth Fund, for youth service in housing development. A project implementation agreement for the Klarinet sustainable integrated housing project in Emalahleni was concluded with ABSA Development Company.⁵⁷²

In sum, there are major gaps in housing delivery. Progress has been made in terms of social housing, with the legislation and institutional arrangements, but now there is a need to focus on developing alternative mechanisms for other types of housing and tenure security particularly for back-yarders, inner-city dwellers, hostel dwellers and those in the rural areas on communal lands. The private sector could play a greater role in housing provision.

10.5.3. Acceptability – Service Delivery

In this section the focus is on whether housing provision has been of an acceptable quality; has a basic infrastructure; is delivered in an acceptable manner (particularly with regard to participation and empowerment); and whether the locations are acceptable in terms of access to economic opportunities, amenities and schools.

Quality

As raised in the section on the progress made in terms of the MDG, the quality of housing that has been built in the last few years has been a significant problem, and has resulted in additional inefficiencies in that the government now has to pay to either demolish and rebuild, or fix up poor quality houses. Many houses built are barely habitable, with inter alia, weak foundations, cracks, inadequate ventilation, inadequate insulation and insecure roofs. This causes further delays in service provision. The Western Cape provincial government at the hearings also raised concerns about the quality of houses built through the People's Housing Processes, which they also budget to fix. The introduction of the NHBRC in 1998 was an attempt to improve quality control, as was the establishment of Thubelisha Homes, but the latter was closed due to inefficiency.

The private sector also needs to be held more accountable for sub-standard quality building. This issue is crucial as it has resulted in poor people not being able to fully enjoy their housing rights as they continue to live in inadequate housing, and if not addressed, the provision of substandard housing will continue, impacting negatively on housing rights.

⁵⁷² Department of Human Settlements (note 563 above).



Geographic location – proximity to economic opportunities and amenities

State subsidised housing is likely to be on the urban periphery which does not bode well for economic integration and maintaining fragile livelihoods. This is because the policy of greenfield sites depends on large pockets of land at low cost, which tend to be on the urban edge. The TRA's also tend to be on the urban edge, so the result of evictions and or relocations during slum eradication is that the poor are pushed further out into the periphery of the city with less access to economic opportunities and higher transport costs.

Basic service delivery

One of the main requirements in respect of acceptability for adequate housing is the provision of basic services. There are problems with both the availability of basic services and access to free basic services, and housing solutions without these services are unacceptable. According to the DCGTA submission, 215 million⁵⁷³ households, mainly in informal settlements, still require adequate and permanent water, sanitation and electricity services through the upgrade of informal settlements. The DCGTA maintained it has the budget to address the formal historic backlog by 2014 provided the bulk infrastructure is in place. The problem is that there is not enough within the budget to cover the new houses that have been built which it proclaimed would add 215 million households to the list. This has been exacerbated by the withdrawal of commitment by the Department of Human Settlements to fund the R27 billion required. At current budget allocations, it will take 40 years to deliver bulk infrastructure to carry services to all these households (the current budget is R1 billion per year, and the total estimated cost is R40 billion). The DCGTA recognised that there are vast disparities in levels of access to services across provinces and municipalities which require a national coordinated approach that is spatially differentiated. This is currently lacking. The Municipal Infrastructure Grant falls short of need by R11 billion per year. Municipalities are expected to contribute resources from self-generated income, but this is impossible for municipalities with a weak economic base.

Access to free basic services is an important question, and the DCGTA submitted that municipalities currently provide free basic water to 75% of poor households, and that 73% of indigent households are served with Free Basic Electricity. There are still 3 million households without access to a basic level of solid waste management, and 53.2% of those that do get it receive a free basic service. The DCGTA raised concerns that most municipalities have not aligned their indigent policies with the DCGTA National Indigent Policy Framework and the implementation guidelines. Critical issues were raised at the hearings about the suitability of asking families to declare themselves indigent before receiving free basic services, as this is a barrier to access. It was submitted that the number of households registered as indigent is lower than the actual number of households in need.

Further, there is a lot of mistrust by the people of pre-paid water and electricity metres, which the government maintains it needs in order to be able to manage distribution of free services. The issue of delivering free basic services to farm dwellers was also raised, and the Department said that more cooperation is needed between the municipalities and the private sector.

The DCGTA in their submission highlighted the following as key constraints to the delivery of basic services: quantum of funding required; human resource capacity to spend the funds effectively; alignment between funding streams; and management capability to deal with movement patterns, growth and urbanisation.

A Project Preparation Fund has been established by the Presidency and the DCGTA in partnership with the Business Trust to fund technical support to or for municipalities for improving infrastructure project planning and preparation.

In sum, it is evident that the poor quality of housing provision, the location of housing far from economic opportunities and the inability of the state to provide basic services currently and into the future, means that housing provision has not been acceptable. Although the government has recognised quality problems and has introduced measures to address this, the thinking around how to densify housing and how to ensure the provision of basic services is only in its early stages.

10.5.4. Accessibility – Social Exclusion

Access includes non-discrimination and when one considers special needs groups such as women and children experiencing domestic violence, non-nationals residing in South Africa and people with disabilities, then the analysis of the policies reveal gaps.

⁵⁷³ This figure differs somewhat to that of DHS submission, which says that the number of households in informal settlements is 1 675 000.



Appropriateness of housing solutions (including special needs of vulnerable groups)

The submission of the Department of Human Settlements did not indicate what it is doing in terms of adopting a comprehensive special needs housing policy and enshrining special needs housing in the housing code.⁵⁷⁴ In its absence, some provinces have implemented a variation of the Institutional Subsidy Mechanism, which will provide funds for a top structure only for group housing for people with special needs.

Regular and irregular migrants

According to the Department of Human Settlements' submission, irregular (illegal) immigrants do not qualify for housing assistance and this means that they will continue to live in informal settlements.⁵⁷⁵ It further argued that the Department of Home Affairs is not adequately dealing with the housing challenges of illegal immigrants as is expected of them according to the set procedures in the upgrading policy. Although the policy of integration is progressive, it cannot absolve the state from responsibility for providing housing solutions for non-nationals who face multiple barriers of integration. CORMSA, in their submission, maintained that the right to "adequate housing" in the Bill of Rights is extended to "everyone" living in South Africa, regardless of their nationality or legal status:

"Whilst South Africa's refugee policy encourages integration, the complete exclusion of legally resident asylum seekers and refugees from various national housing policies is an obstacle to migrants' social and economic integration into the communities in which they live."⁵⁷⁶

Other specific problems related to documented and non-documented nationals raised at the hearings were the provision of transit or emergency shelter; exploitation by private landlords who are unable to distinguish between legal and illegal migrants; the exclusion of non-nationals from the services of many non-governmental shelters for homeless persons and vulnerable women and children, including those which receive funding from government sources; and housing challenges for foreigners who were displaced due to xenophobic violence in informal settlements around the country.⁵⁷⁷

Housing and evictions of farm dwellers

The submission by the Black Association for the Agricultural Sector noted that the housing conditions for farm workers are extremely poor, often without access to regular water and electricity, insufficient sanitation, and leaking houses.

The tenure of farm workers is also insecure as farm owners either flagrantly violate eviction procedures under ESTA or use the courts to evict people when they are clearly in no position to defend their cases, and without first ensuring that alternative accommodation is available to the occupiers. The submission claimed that farmers, through their consultants and lawyers, have learned "... *to exploit the loopholes of these laws and use it against the farm workers*". Farmers dismiss farm workers and then remove their housing by using section 8 (2) of ESTA which states "*the right of residence of an occupier who is an employee and whose right of residence arises solely from employment, may be terminated if the occupier resigns from employment or is dismissed in accordance with the provisions of the Labour Relations Act (LRA)*". However, farm workers are often dismissed unfairly and not in accordance with the LRA. If they are knowledgeable enough to go to the Commission for Conciliation, Mediation and Arbitration (CCMA) with an unfair dismissal case, they are denied housing in the interim.

The Special Rapporteur also noted with concern the lack of security of tenure for farm workers, their families and children, and quoted a 2005 study⁵⁷⁸ which indicated that only 1% of evictions involved any legal process, including court judgments, illustrating that the evictees had problems asserting their rights and securing legal representation.⁵⁷⁹

574 Dr. Lillian Chenwi (note 580 above).

575 Elsewhere in the submission it says that irregular immigrants qualify for limited housing assistance.

576 CoRMSA (note 380 above).

577 Ibid.

578 Wegerif, M., Russell, B. & Grundling, I. *Still searching for security" The reality of Farm Dweller Evictions in South Africa*, (2005).

579 UNHRC (note 552 above).



The submission by Women of Farms covered a number of cases indicating the particularly vulnerable position of women and children on farms, to show that: “... *women farm workers, especially seasonal workers, are in most cases dependent on their male partners for housing as housing contracts are usually in the name of the male permanent worker. This means that women and children are most vulnerable to being evicted when the father or male partner dies or his employment is terminated*”.

Women’s reliance on men for accommodation on farms is particularly problematic in light of the high levels of abusive relationships.⁵⁸⁰

Women and children affected by domestic violence

*“South Africa currently faces a confluence of three factors – high levels of domestic violence, a dire lack of access to adequate housing and the largest HIV epidemic in the world – that demands an urgent consideration of the right of access to adequate housing of women experiencing domestic violence.”*⁵⁸¹

Combrink’s analysis of existing housing programmes is that they fall short of constitutional requirements, Grootboom requirements and international law in that the policies in respect of women experiencing domestic violence are too fragmented and they do not consider issues of substantive equality.⁵⁸² She argued that causes of eviction can be gender-specific, including cases of domestic violence or discriminatory inheritance laws or customs that result in the eviction of women from their homes and lands, and that these instances should be as “forced evictions”. Further, the emergency housing programme is not suitable for women in these crisis situations due to the locations and type of shelter provided, which is usually on the urban edge, unsafe and without services. The institutional subsidy which can be used for shelters is also based on the “household” concept, and does not apply to single women without children, but only to people over 18 years old who are lawfully resident in South Africa, thus excluding many vulnerable girls and non-national women from the subsidy benefit. The transitional housing programmes (KZN, Gauteng and Western Cape) are variations of the institutional housing subsidy yet because the rules are more “relaxed” they are more suitable mechanisms for providing women’s shelters.

The Special Rapporteur acknowledged the efforts of the South African government levels to meet its goal of delivering 30% of housing to women-headed households. However, he made a strong point about how the challenges of housing provision impact particularly negatively on women and children in situations of domestic violence as they are forced to remain in unsafe conditions, “*such situations violate not only the right of access to adequate housing but the human right to be free from violence, which is protected under the South African Constitution*”.

Older persons

The 1997 Housing Act, requires all spheres of government to promote special housing needs, including, but not limited to, the needs of people with disabilities. The White Paper for Social Welfare of the same year declares that appropriate, adaptable and affordable housing for older persons and their families is regarded as a cornerstone of any new dispensation. The latter document states that the Department of Welfare would cooperate with the then Department of Housing to develop a strategy to address this need as a matter of priority. However, there is no evidence of progress in this regard in policy or in practice.

Military Veterans

Through this government initiative to assist and integrate military veterans into society socially and economically, all military veterans were called upon to apply for government-subsidised housing before 31 December 2008. By October 2008, more than 10 000 veterans had registered for a housing subsidy and more than 1 500 subsidies had been allocated.⁵⁸³

580 Ibid.

581 Combrink, H. *Living in security, peace and dignity. The right to have access to housing of women who are victims of gender-based violence*, Community Law Centre research series, (2009).

582 ‘In this sense, it is important to note that the Constitutional Court has recognised that domestic violence in particular is a violation not only of the right to freedom from violence, but also of the right to equality and non-discrimination. p 120 At the same time, international human rights law has firmly located violence against women within an equality paradigm. An understanding of the interrelationship between women’s right of access to adequate housing and the right to freedom from violence therefore has to be approached against the backdrop of a constitutional state founded on dignity, equality and freedom, where the government has positive duties to promote and uphold these values;’ Ibid p 121.600 SA Yearbook 2008/2009 Housing.

583 SA Yearbook 2008/09 Housing.



Affordability – the role of the private sector

In order to be accessible, houses need to be affordable and the private sector has a definite role to play in this regard. None of the private sector banking institutions made submissions to the Commission but they did participate in the Public Hearings on Housing, Evictions and Repossessions in 2007. At these hearings the banks argued that evictions are an exception to the rule but this was disputed by community groups. The report of these hearings noted that not enough attention had been paid to the consumer protection of low income mortgage holders. The Banking Association categorically stated that banks will not give away housing finance without making a profit. The question is, what can the banks do to help normalise the low income housing market?

Another issue of concern raised regarding the private sector is the practices of the bulk buyers of repossessed houses who either ignore banks' requests to sell properties back to the original owners, or exploit or evict the previous owners/occupiers. According to ABSA though, it is not the low income market who default on payments, but the R800 000 – R1 million bracket.

With regard to access, the government must urgently focus on the needs of vulnerable groups in housing provision. The homogeneity of housing policy has had a negative impact on the needs of vulnerable groups. In this sense, the progressive realisation of their right to access to adequate housing is not being advanced, in particular for women and children affected by domestic violence, non-nationals residing in South Africa and people with disabilities.

10.6. Conclusions with regard to Progressive realisation of the right to adequate housing

Government understanding of the progressive realisation of the right to adequate housing

Housing legislation and policy recognises South Africa's commitments to providing access to adequate housing both in terms of the Constitution and international frameworks. The government is also engaged in a process of policy improvements in order to more appropriately address the needs of housing beneficiaries.

While the most current figure (2007) is that the percentage of the population with access to adequate tenure (defined as living in formal dwellings) is 70.6%, it is unlikely that the state will reach its desired target of providing housing for all, achieving access to land tenure and eliminating slums altogether by 2015. It is important to acknowledge that the process of refining and improving policy and legislation, setting systems and institutions in place and decentralising housing delivery by strengthening capacity at municipal level, takes time. There is also a commitment by the National and Provincial Departments to meet the MDG and the Departments' more ambitious targets. Similarly, it is equally important to recognise that setting unrealistic delivery targets can compromise quality and affect the process aspects of the rights-based principles (such as meaningful engagement and participation). However, while the right to adequate housing can be realised progressively, a steady pace of delivery is critical because as the poor and vulnerable wait, they are denied the most fundamental rights to an adequate house and to receive some relief for their urgent basic needs. For this reason, a more nuanced housing policy is needed that recognises the individual needs of beneficiaries and promotes various modes of delivery and provision.

This is vital, as there is a worrying trend, as evidenced by an increasing discourse and practice, of negative measures introduced on behalf of the state that is under pressure to deliver the eradication of slums.

Public participation and access to information

The lack of meaningful consultation and a road map for housing delivery at a community level is resulting in a breakdown in the relationship between the state and the poor and marginalised, and while such consultation and participatory planning may take more time initially, it is likely to lead to more sustainable and relevant housing solutions in the long term. One of the main challenges regarding access to information is the lack of transparency in the process of housing allocations and the move from the housing waiting list to the National Demand Data base.

Social exclusion

There are still significant gaps in policy regarding special needs and housing provision for marginalised groups such as immigrants, women and children displaced due to domestic violence, backyard dwellers, rural populations and military veterans (although there has been some progress with regard to the latter).



From strategic planning to implementation

Part of the problem with implementation has been that housing delivery has been based on a flawed analysis of the problem of housing provision which has led to a one dimensional solution. There is little evidence that the new policy direction of BNG which promotes a more sustainable approach to human settlements has been implemented, and that Chapters 12 and 13 of the housing code, regarding Emergency Housing and in-situ upgrading respectively, have been applied. Another major challenge has been the lack of accurate and reliable information on housing demand, and the government has addressed this by implementing the Informal Settlements Atlas and the National Housing Demand Data Base. These are, however, both in the early stages of development. Identifying and addressing population trends, quality, the role of the private sector and the provision of basic services have also been major challenges in this period. There are still major gaps between policy and implementation which delay the delivery of adequate housing solutions. One critical gap is the powers and functions of the tiers of government with regard to housing provision wherein municipalities view housing as an unfunded mandate.

The following recommendations are intended to help focus the priorities of the relevant Departments.

10.7. Recommendations

Government's understanding of the progressive realisation of the right to adequate housing

Informal settlement upgrading

- (a) The new Housing Minister and ministry should recommit itself to a positive and indirect approach to doing away with slums as promoted by the Housing Act and BNG. The example of Freedom Park should be considered for in-situ upgrading. Informal settlement upgrading needs to be patiently piloted in order to build the skills experience, the professional support as well as the relevant institutional mechanisms that are needed, along with far reaching urban planning and land management reform that will help reduce the need for people to resort to informal settlements.
- (b) The state needs to develop or promote broader reforms that would enable appropriate land release and servicing, other than through controlled transitional relocation areas (TRAs).⁵⁸⁴
- (c) The consistency of the KZN Elimination and Prevention of Re-emergence of Slums Act, 2007 with constitutional provisions, relevant Constitutional Court judgments, and international human rights obligations should be examined further. Implementing the EPWP in the housing sector needs to be considered and seeing how UN support can be leveraged for this, as it is currently supporting the National Department of Public Works and the Limpopo provincial government with addressing service delivery challenges.
- (d) The departments should engage with the City of Cape Town to ensure that the identification of bad building process does not result in forced evictions or violation of the rights of the poor.

Social exclusion

- (a) Policy needs to be reviewed and attention paid to special needs and vulnerable groups. The underlying notion of the household on which the housing policy is based should be reviewed. Housing policies must take diversity into account and need to be tailored to the needs of each individual, family and special needs group.
- (b) The Department of Human Settlements should adopt a comprehensive policy on special needs housing, as this has been long overdue with negative consequences for those with special needs seeking housing assistance. More consultation is needed for people with disabilities on their housing needs, considering the diversity of needs. The Department of Human Settlements and the Department of Social Development need to work together to ensure decent accommodation for people with special needs.
- (c) There is a particular need to restructure the rental housing policy for low-income groups, to guarantee security of tenure for tenants (including Backyarders).⁵⁸⁵
- (d) The review of the policy for provision of services to farm dwellers is urgent, and the modalities for delivery should be a priority area. The provincial departments should also focus on the issue of farm dwellers and their access to basic services and adequate housing.
- (e) Specific measures to address women's housing needs are necessary and should be based on a gendered analysis of housing policy. The Special Rapporteur drew particular attention to the need for the state to strengthen national legal and policy frameworks for protecting women's rights to adequate housing, and to

584 Huchzermeyer (note 569 above).

585 UNHRC (note 552 above).



provide avenues for redress where violations occur. He also drew attention to the need to bridge the gap between legal and policy recognition of women's right to adequate housing and its implementation.

- (f) A comprehensive housing development programme for women experiencing domestic violence should be developed and implemented speedily.
- (g) The Department of Human Settlements and the Department of Social Development need to work together to ensure decent accommodation for older persons.
- (h) The National Housing Code for discriminatory phrasing against asylum seekers and refugees should be reviewed.
- (i) The explicit inclusion of asylum seekers and refugees as a specific category of foreigners in existing and future housing and urban regeneration policies should be ensured.
- (j) The extension of housing assistance programmes to destitute refugees should be explored, following the example of the Department of Social Development in relation to social assistance grants for refugees.
- (k) It should be ensured that publicly funded homeless shelters do not discriminate against needy non-citizens.
- (l) Explicit consideration of non-citizens' rights along with citizens' rights should be included in any future measures to monitor and regulate private-rental housing provision.
- (m) Local government should follow the initiative of Johannesburg Metro Council in offering dedicated information services and possibly temporary housing arrangements for vulnerable migrants.

Public participation and access to information

- (a) It is imperative for South Africa to improve reporting, and the standardisation and availability of data to enable the government and civil society to track the progress in reaching its targets and to assess the gaps in service delivery and programmes aimed at meeting the MDG.
- (b) A structured process of meaningful engagement of beneficiaries in housing projects, including the monitoring thereof, should be developed. This process should take note of the guidelines on meaningful consultation that have been highlighted in the Constitutional Court's jurisprudence (see, for instance, Olivia Road case). While it is acknowledged that public participation and consultation is time consuming and expensive, so are court cases and planning errors. The most damaging result of a lack of participation, however, is the deterioration of the relationship between the state and the poor.
- (c) More information on the Housing Demand Data base and the waiting list system needs to be conveyed at a community level.

From strategic planning to implementation

Inter-governmental planning and co-ordination

- (a) The departments should intensify their efforts to ensure/strengthen cooperation/co-ordination between the national, provincial and local government in the provision of housing and land as well as basic services.
- (b) Issues of powers and functions of the various tiers of government, as defined in the White Paper on Housing, need to be reviewed to improve vertical integration and co-ordination. Housing for example is not specified as a municipal function. If this is addressed, co-ordination efforts will be unblocked.
- (c) A review of the conditional grant system is necessary to ensure that the money is allocated to integrated projects for sustainable human settlements. This will also address the issue of co-ordination. The Department of Human Settlements is intending to do this and it should be prioritised.
- (d) The departments should strengthen initiatives aimed at improving the capacity of municipalities to deliver integrated human settlements.
- (e) The DCGTA suggests the cross-subsidisation of municipalities where the utilisation of MIG cash flows should be assessed against the CIP of municipalities and approved accordingly.
- (f) The Housing Demand Data Base needs to be brought on line throughout the country and the relevant government authorities need to explain the transition from the waiting list process to people who are on the list.



Monitoring and evaluation

- (a) It is imperative for South Africa to improve reporting and the standardisation and availability of data, to enable the government and civil society to track the progress in reaching its targets and to assess the gaps in service delivery and programmes aimed at meeting the MDG.
- (b) There is a need to collect and report on disaggregated data that takes account of special needs or vulnerable groups such as women, women survivors of domestic violence, orphaned children, and people living with and affected by HIV/AIDS. Disaggregation should also include urban/rural, race and geographical location.
- (c) There is a need to standardise terminology in reporting, such as the provision of housing opportunities, households, and families.
- (d) Critical to the effective realisation of women's housing rights is proper monitoring of women's access to housing. Gender indicators should be developed in this regard.
- (e) The indigent policy, which will relieve many older persons from the burden of rates and high water and electricity charges, is not uniformly implemented. Implementation therefore needs to be monitored and the negative and positive impacts of the policy uncovered and addressed.
- (f) The Department of Human Settlements should start reporting against the following indicators as they provide a holistic picture of the housing situation and are from the ICERC reporting requirements. Therefore they are aligned to international indicator sets. These are:
 - Number of homeless individuals and families (men, women, children, orphans, immigrants and people with disabilities).
 - Number of individuals and families currently inadequately housed and without ready access to basic amenities such as water, waste disposal, sanitation facilities, electricity, postal services etc. These include the number of people living in overcrowded, damp, structurally unsafe housing or in other conditions which affect health.
 - Number of persons currently classified as living in illegal settlements or housing.
 - The number of persons evicted within the last five years and the number of persons currently lacking legal protection against arbitrary eviction or any other kind of eviction.
 - The number of persons on waiting lists to obtain accommodation, the average length of time on the waiting list and measures taken to decrease such lists, as well as to assist those on such lists to find temporary housing.
 - The number of persons in different types of housing tenure by social or public housing, private rental sector, owner-occupiers, illegal sector and others.

Chapter 11



The right to education



CHAPTER 11: EDUCATION

11. INTRODUCTION

The progressive realisation of the right to education for the period 2006 to 2009 is reviewed in this chapter. It begins with an overview of South Africa's key international commitments and constitutional obligations. The legislation and policies which were adopted for the above mentioned period are then reviewed. It also analyses the government planning in terms of monitoring and evaluation and provides an analysis of national and provincial education budgets. South Africa's progress towards meeting the relevant MDG, targets and indicators is assessed. These include MDG 2: Achieve universal primary education; Target 3: Ensure that by 2015, children, everywhere, boys and girls alike, will be able to complete a full course of primary schooling; Indicators: net enrolment rate in primary education, proportion of pupils starting Grade one who reach Grade 7, literacy of 15–24 year olds. It also includes MDG 3: Promote gender equality and empower women; Target 4: Eliminate gender disparity in primary and secondary education preferably by 2005 and in all levels of education no later than 2015; Indicators: ratio of boys to girls in primary, secondary and tertiary education, ratio of illiterate females to males among 15–24 year olds.

In this chapter it is argued that although South Africa boasts high primary school enrolment statistics and gender parity on all levels of schooling, the achievement of the education MDG does not equate to the realisation of the right to education. The MDG targets are heavily weighted towards quantitative achievements and this neglects deeper insight into the realisation of the right in qualitative terms. This is explored further in the final section of the chapter where the 4 As (availability, accessibility, acceptability and adaptability) are used as a framework for analysing the content of the right to education. Economic and physical access to schooling remains a challenge for many poor children across the country, largely because policy implementation to improve access has not been consistent at a school level. Furthermore, large groups of vulnerable children are also unable to access education and therefore remain socially excluded. Poor school infrastructure is a central theme related to access. It has impacted on the physical access to education, and proper standards of 'availability' of proper functioning educational institutions have also not been established. The poor performance of learners and teachers in literacy and numeracy and the declining numbers of Grade 12 learners who are eligible for entrance to higher education provide evidence that sufficient standards of quality are not being met. The high drop-out rates of learners after Grade nine further indicate that there is insufficient support to ensure that learners stay in school. Finally, broad access to quality education which could improve the capabilities of young people to play a meaningful role in society is not being fulfilled. Given the high levels of poverty and inequality in the country, the ability of the system to enable the equitable sharing of opportunities is also not being met. In short, the constitutional requirements of equality are not being fulfilled. At the end of the chapter, recommendations for further action are provided.

11.1. The meaning and content of the right

This section includes a review of international and South African legislation with particular focus on section 29 of the Constitution and the enabling legislation in respect of the right to education.

International legislation

The following international and regional human rights laws and treaties provide guidelines around the right to education:

- Article 28 of the United Nations Convention on the Rights of the Child recognises the right of the child to education and obliges the state to 'make primary education compulsory and available free to all.'
- Article 11 (3) (a) of the African Charter on the Rights and Welfare of the Child claims that the State '*shall take all appropriate measures with a view to achieving the full realisation of this right and shall in particular ... provide free and compulsory basic education*'.
- General Comment No. 13 of the International Convention on Economic, Social and Cultural Rights (ICESCR) states that the exact standard of the right to basic education may vary according to the conditions in a particular country but education must have four features: availability, accessibility, acceptability and adaptability (the 4 As).⁵⁸⁶ These features are useful when analysing the content of the right to basic education.

⁵⁸⁶ Khoza (note 26 above), 418.



- The Dakar Framework for Action: Education for All (EFA, 2000) was adopted by South Africa in 2000 and South Africa committed itself to achieve the goals and targets in EFA by the year 2015. The framework is helpful in setting out the purpose of a basic education, and in particular goal 6 thereof focuses specifically on the quality of education so that *'recognised and measurable learning outcomes are achieved by all, especially in literacy, numeracy and essential life skills'*.⁵⁸⁷

South African legislation

Education rights are set out in section 29 of the Constitution.

- Section 29 (1) (a) states that everyone has the right to basic education, including adult basic education.
- Section 29 (1) (b) states that everyone has the right to further education which the state must make progressively available and accessible through reasonable measures.
- Section 29 (2) provides for the right everyone has to receive education in the official languages of their choice in public educational institutions where it is reasonably practicable.
- Section 29 (3) and (4) states that everyone has the right to maintain education institutions at their own expense and provides guidance around how this is to be carried out.
- Section 29 (1) (a) is an unqualified socio-economic right and section 29 (1) (b) is qualified. The unqualified nature of the basic right to education means that it is an immediately enforceable right and therefore, when reviewing it, the 'reasonableness test' is not appropriate.⁵⁸⁸ In other words, it should have no limitation with regard to progressive realisation.⁵⁸⁹ It has therefore been argued that, given that basic education is an absolute right, it requires prioritisation in terms of government spending over other socio-economic rights.⁵⁹⁰
- The White Paper on Education and Training (1996) defines basic education as one year of pre-school up to Grade 9. The South African Schools Act 84 of 1996 defines this phase of education as compulsory for all children between seven and 15 years. A reception year, Grade R, will become compulsory from 2010. It has been argued that the definition of basic education is too narrow, because learners who have completed Grade nine are not sufficiently equipped with the knowledge and skills to reach their full potential to live and work with dignity and improve the quality of their lives. Therefore the inclusion of secondary education in the right to basic education would lead to the access to the full enjoyment of the rights and to the freedom to choose a trade, occupation or profession (section 22 of the Constitution).⁵⁹¹
- The main laws and principles that govern education are covered in the South African Schools Act of 1996 and the Education Policy Act 27 of 1996. Each province has also developed their own laws, policies and regulations based on national laws.

The following legislation and policies were adopted during the period of 2006 to 2009:

- The Policy Framework for Teacher Education and Development (2006) 'establishes guidelines for initial teacher education and continuing professional development'.⁵⁹²
- The Amended National Norms and Standards for School Funding (August 2006) introduced No-fee schools. The amended norms allow for the abolition of school fees at designated schools and the expansion of school fee exemptions to more parents. According to this act, schools are divided into five quintiles ranked from poorest (one) to least poor (five) and the funding allocation is based on this system.
- The Further Education and Training Colleges Act (2006) provides for the regulation of further education and training (FET); the establishment, governance and funding of FET colleges; and for the promotion of quality in the FET sector.
- The National Guidelines on School Uniforms was promulgated into policy (notice 173 of 2006). One of the objectives of the guidelines was to make uniforms more affordable and to encourage the adoption of school uniform policies to ensure that children are not discriminated against or otherwise excluded from school because of their inability to buy a uniform.⁵⁹³

587 Pendlebury, S. & Lake, L. (eds.) South African Child Gauge 2008/2009, (2009).

588 Khoza (note 26 above), 417.

589 Creamer (note 365 above).

590 LRC (note 107 above).

591 Ibid.

592 Pendlebury (note 604 above), 25.

593 ACCESS. *National Guidelines on School Uniforms: An Assessment of the impact of The National Guidelines on School Uniforms Notice 173 Of 2006 on making school uniforms more affordable and improving access to schools*, (2007).



- The Education Laws Amendment Act (2007) was passed in order to redress inherited inequities in school infrastructure and to ensure the provision of an enabling physical, teaching and learning environment. In 2008, two policy papers related to the implementation of the above mentioned act were implemented: The National Policy for an Equitable Provision of an Enabling School Physical Teaching and Learning Environment and the National Minimum Norms and Standards for School Infrastructure (Norms and Standards). The National Policy sets out the requirement that national and provincial departments of education need to assess existing resources systematically, identify targets for investment and write developmental plans.⁵⁹⁴
- The Occupation Specific Dispensation (OSD) for teachers which was signed on 3 April 2008, increased general salaries, introduced a performance-based system of remuneration, and provided new career opportunities.

11.2. The relevant MDG, Targets and Indicators

Millennium Development Goal 2 (MDG 2) and Millennium Development Goal 3 (MDG 3) are relevant to education and these are listed below together with corresponding indicators and targets.

Goal 2: Achieve universal primary education	
Target	Indicators
Target 3: Ensure that by 2015, children, everywhere, boys and girls alike, will be able to complete a full course of primary schooling.	<ul style="list-style-type: none"> ▪ Net enrollment rate in primary education ▪ Proportion of pupils starting Grade one who reach Grade 7 ▪ Literacy of 15–24 year olds
Goal 3: Promote gender equality and empower women	
Target	Indicators
Target 4: Eliminate gender disparity in primary and secondary education preferably by 2005 and in all levels of education no later than 2015.	<ul style="list-style-type: none"> ▪ Ratio of boys to girls in primary, secondary and tertiary education ▪ Ratio of illiterate females to males among 15–24 year olds

11.3. Main themes arising

This section provides a summary of the principal themes covered in this chapter.

11.3.1. Government's understanding of the progressive realisation of ESR

The right to education and its link to other rights is significant. As stated in the submission made by the Legal Resources Centre:

*"The denial of access to education is deemed a denial of the full enjoyment of other rights such as the right to dignity, the right to equality and the inter-related rights to food and health, all which enable an individual to develop his or her full potential to participate meaningfully in society."*⁵⁹⁵

As was outlined in the previous section, the state has promulgated the enabling legislation to the Constitution to give effect to the right to basic education and with the intent to establish an inclusive education system that is attentive to the learning conditions and outcomes. Key examples of this intent are inter alia, the abolition of corporal punishment, prohibition of discriminatory practices, codes of conduct, ethics for educators and learners and attention to the rights of children infected and affected by HIV/AIDS and those with special education needs. However, despite these comprehensive laws, many children do not enjoy these rights in practice and the reasons for this are explored in depth in this chapter. Furthermore, in the absence of '*clear norms and standards, many of the state's constitutional obligations remain loosely specified*'.⁵⁹⁶

⁵⁹⁴ Pendlebury (note 604 above), 13.

⁵⁹⁵ Veriava, F. & Coomans, F. The Right to Education. In: Brand, D. & Heyns, C. (eds.) *Socio-Economic Rights in South Africa*, (2005).

⁵⁹⁶ Pendlebury (note 604 above), 22.



11.3.2. Public participation

Maintaining a respect for and a culture of human rights is sustained by people's values, which are in turn shaped by the educational system as a primary form of socialisation. In addition, public debate is critical for securing meaningful access to education and therefore the active participation of citizens who 'understand the law and are willing to insist on their rights and mobilise when these are not forthcoming' is a necessary condition to the realisation of human rights.⁵⁹⁷ For example, the new No-fee school system needs to be closely monitored on the ground by learners, parents and communities to ensure that no learner is denied access to a school simply because of economic circumstances. If the system does not improve access, it is incumbent on these groups to mobilise to correct the imbalance.⁵⁹⁸

The need for the participation of community stakeholders has also been identified as a means to address specific issues such as food security and the safety of learners in schools. This is because *'the communities, in which schools are located, strongly influence their development and vice versa'*.⁵⁹⁹ Furthermore, this approach will ensure that the strategies chosen to address the problems will be relevant to local needs.

11.3.3. Social exclusion

Statistics reveal that South Africa has almost reached MDG 2 with a 98% net enrolment rate in primary education. Whilst this is impressive, economic and physical access to schooling remains a challenge for many poor children across the country, largely because policy implementation to improve access has not been consistent at a school level. For example, the introduction of No-fee schools and Exemption policies has the potential to guarantee access for poor and vulnerable children. However, the policy vision has not been achieved consistently for all poor learners and schools.⁶⁰⁰ Furthermore, large groups of vulnerable children are also unable to access education, including children with disabilities, refugee and non-national children, children who are infected and affected by HIV/AIDS, orphans and children who head households. This is because the principle of non-discrimination and standards of adaptability to meet their special needs are not being applied.

Education laws cannot provide protection from all forms of discrimination, especially hidden discrimination.⁶⁰¹ Unfortunately, the MDG in respect of education do not overcome this chasm. For example, the targets in respect of MDG 3 offer a narrow, first stage definition of gender equity that leads to numerical parity but leaves out the more complex problems of gender justice, that is, whether girls and boys are able to benefit equally from schooling opportunities. The MDG also do not engage in more controversial questions, such as: what is owed as a matter of justice to girls? How much inequality is to be tolerated? How much redistribution or what forms of recognition of difference are consonant? ⁶⁰²

11.3.4. Strategic planning to implementation

The relationship between the national and provincial structures impacts on the implementation of education policy and legislation. The national government has exclusive legislative responsibility for tertiary education, and concurrent responsibility with the provinces for all other levels of education. Whilst the national government works with provinces to formulate national policy, the provincial governments are responsible for the implementation of the nationally determined policy. This system has been criticised for its insufficient national-provincial alignment because provinces are not obliged to observe national priorities, particularly regarding the allocation of financial resources.⁶⁰³

Horizontal co-ordination and communication between the Department of Basic Education and other departments has also negatively affected the planning and implementation of key programmes in the past, such as the National School Nutrition Programme (NSNP) and the learner transport programme. Consequently, the impact on the learners' physical and economic access to education can be dire.

⁵⁹⁷ Ibid 23.

⁵⁹⁸ Khoza (note 26 above), 429.

⁵⁹⁹ Pendlebury (note 604 above), 52.

⁶⁰⁰ Giese, S., Hombakazi, Z., Koch, R. & Hall, K. *A study on the implementation and impact of the no-fee and exemption policies*, (2009).

⁶⁰¹ Khoza (note 26 above), 418.

⁶⁰² University of KwaZulu-Natal (UKZN) Faculty of Education, submission to the SAHRC, (2009).

⁶⁰³ DBSA. *Education Roadmap: Focus on Schooling System*, (2008).



Poor school infrastructure is a central theme related to access as it has impacted on physical access to education. Furthermore, proper standards of ‘availability’ of functioning educational institutions have also not been established. Although the release of the National Infrastructure Management System NEIMS report (2007) is a first positive step towards addressing this, the proper allocation of funding by the state to overcome these huge infrastructural backlogs remains to be seen. It is common cause that the lack of decent infrastructure infringes on children’s right to education, and educational opportunities remain bound to historical patterns of inequality.⁶⁰⁴ Besides blocking physical access it can also be argued that, according to their rights to equality (section 9) and human dignity (section 10) in the Bill of Rights, their equal entitlement to learn under conditions that respect, protect and promote the inherent human dignity of each child is not being protected.

Standards of acceptability are also not being met by current service delivery. The poor performance of learners and teachers in literacy and numeracy and the declining numbers of Grade 12 learners who are eligible for entrance to higher education provide evidence that sufficient standards of quality are not being met. The high drop-out rates of learners after Grade nine further indicate that there is insufficient support to ensure that learners stay in school.

This all means that acceptable, quality education which could improve the capabilities of young people to play a meaningful role in society is not being successfully delivered by the state. Given the high levels of poverty and inequality in the country, the ability of the system to enable the equitable sharing of opportunities is also not being met and, in short, the constitutional requirements of equality are not being fulfilled.

An overview of budgetary planning reveals that there has been a shift in expenditure on personnel and increased expenditure on non-personnel resources. For example, the budget item on infrastructural backlogs has grown substantially and is set to grow in the future. Whilst this will improve physical access to education, it does not guarantee that learners will have access to quality education. As Wildeman (2009) notes, ‘*domestic and international empirical research shows that both teaching and non-teaching inputs are important for good quality education*’.⁶⁰⁵

A solid monitoring and evaluation plan is central to good planning, and a number of systems and structures are currently being institutionalised in order to improve the monitoring and evaluation of schools and tracking of learners. However, human resource constraints have been highlighted as one of the main impediments to effective monitoring of schools, particularly at a district level. This refers to the number and consistency of visits to schools as well as the capacity of staff to gather information and monitor trends. In addition, there are concerns regarding the ability of the Department of Basic Education to provide reliable and accurate data which is necessary for assessing progress in implementation.

Overall, South Africa has a strong suite of policies to support meaningful access to education. However, as the OECD review team argued, although reform policies are of a high conceptual quality, ‘change management’ has failed and key aspects of policy reform have not reached schools and classrooms.⁶⁰⁶ In other words, whilst the state has made a policy commitment to education, there is still a large gap between policy and implementation which calls into question its ability to progressively realise the right to education.

Planning systems

The Department of Basic Education’s planning systems are reviewed in this section, including its information gathering and monitoring systems as well as its budgetary planning and oversight.

604 Pendlebury (note 604 above), 13.

605 Pendlebury (note 604 above), 3.

606 Ibid 25.



Information gathering and monitoring

The Department of Basic Education collects information at different levels of the education system with the use of different instruments and tools. The Education Management Information System (EMIS) tracks basic information about schools, ABET Centres and FET Colleges.⁶⁰⁷ However, it has been noted by IDASA (2008) that *“although official enrolment data has improved, official publications are not yet up to the challenge of providing reliable and accurate data that can be used in assessing implementation progress”*.⁶⁰⁸ However, a new system, The Learner Unit Record Information Tracking System (LURITS), has recently been initiated for collecting data on individual learners and educators. It will provide information in 2011 and will *“assist greatly in tracking, amongst others, the movement of learners and dropout from schools”*.⁶⁰⁹

Monitoring is done within provincial departments through a combination of efforts which include the directorate(s) involved in a programme together with the Directorate of Monitoring and Evaluation. According to the Education Laws Amendment Act (2007), performance measures are set for schools – with schools required to table annual performance plans with the School Governing Body (SGB) and the provincial Head of Department, and to prepare half-yearly progress reports.⁶¹⁰ At a district level, district officials regularly monitor policy compliance and school functionality. The Department of Basic Education has also appointed 87 Integrated Quality Management Systems (IQMS) moderators in August 2008 and they have already initiated the process of a school-based evaluation of teachers in over 2000 schools. The IQMS consists of three programmes aimed at enhancing and monitoring the performance of the education system. It includes Developmental Appraisal and Performance Measurement of teachers and Whole School Evaluations.

However, the effectiveness of monitoring at the district level was highlighted as a concern. In a study undertaken by ACCESS into the monitoring and implementation of HIV/AIDS policies at schools, it was revealed that monitoring and evaluation is rarely systematic and effective and that *“school visits from the Department of Basic Education to assess the implementation of policies was reportedly infrequent and often sporadic”*. In particular, human resource constraints were identified as one of the major impediments to effective monitoring and evaluation at the district level.⁶¹¹

A District Development Support Programme (DDSP) EMIS Improvement Programme has been launched to develop local capacity to gather information and monitor trends. It is in use in the provincial education departments in Northern Cape, KZN, Limpopo and Eastern Cape.⁶¹² Provincial Education Departments have also been encouraged to consider piloting a district/regional-based Education Management Information System (DEMIS) in order to collect information to inform local and regional management decisions. However, *“the Department recognises that for DEMIS to be used on a wider scale requires intensive training and support”*.⁶¹³

In 2008, the Minister established a Ministerial Committee, The National Education Evaluation and Development Unit (NEEDU), to investigate how evaluation of schools and educators could be strengthened.⁶¹⁴

In respect of the MDG, the monitoring thereof is augmented by an inclusion of the UNESCO's 6 Education for All (EFA) goals where countries are ranked in terms of the Education Development Index (EDI), a composite index of the 4 quantifiable goals (UPE, gender parity, adult literacy, quality).⁶¹⁵ Furthermore, the Presidency published the following development indicators to monitor progress related to the following: educator: learner ratio, enrolment rates, gender parity index (GPI), matriculation pass rates, mathematics higher grade passes, adult literacy rate, and graduating science, engineering and technology students.⁶¹⁶ These will be reviewed at the end of this chapter.

607 Giese, S. & Koch, R. *A review of education policy to address the active and passive exclusion of HIV- and AIDS- affected learners*, (2008).

608 Wildeman, R. & Lefko, E. *Reviewing provincial education budgets 2004 to 2010*, IDASA research paper, (2008), 35.

609 Department of Basic Education, submission to the SAHRC, (2009).

610 Giese (note 624 above), 44.

611 Ibid.

612 Ibid 603.

613 Ibid.

614 Department of Basic Education (note 626 above).

615 Global Monitoring Report Team. *Education for All: Global Monitoring Report*, (2010). <<http://www.unesco.org/en/education/efareport/>>.

616 Department of Basic Education (note 626 above).



Budgetary planning and oversight

In order for the budget to be credible it “*must give effect to sound educational policies and promote meaningful access to education*”.⁶¹⁷ National and provincial budgets are discussed below, including an outline of key shifts in spending over the past three years.

National Budget

The education sector receives just under 20% of the total government expenditure, a sum that amounted to R123 billion in the 2008 budget.⁶¹⁸ Education spending is therefore 5% of the GDP which is above the world average of approximately 4.3%.⁶¹⁹ However, it is below the oft quoted UNESCO benchmark of 6%.⁶²⁰

Final Appropriations and Expenditure from 2005/06 to 2007/08

Table 40: Final Appropriations and Actual Expenditure for 2005/06 and 2007/08⁶²¹

Year	Final Appropriations R'000	Actual Expenditure R'000	Variance (under expenditure)
2005/06	12 913 190	12 420 081	493 109
2006/07	14 299 176	14 249 805	49 371
2007/08	16 386 752	16 241 326	145 426

One can see that the increase in the budget from 2005/06 to 2006/07 was 1 385 986, a 10.7% increase. However, once adjusted for inflation, the real increase is only 7.3%. The increase in expenditure for the same period is 1 829 724, a 14.7% increase. However, once adjusted for inflation the real increase in expenditure was 11.3%.

The annual growth from 2006/07 to 2007/08 is 2 087 576, a 14.5% increase, but once adjusted for inflation the real increase is only 9.8% for that period. The increase in expenditure for this period is 1 991 521, a 13.9% increase, but once adjusted for inflation, the real increase was 9.2%.

⁶¹⁷ Pendlebury (note 604 above), 30.

⁶¹⁸ Department of Basic Education (note 626 above).

⁶¹⁹ UNESCO Institute for Statistics. *Global education spending concentrated in a handful of countries*, (2007), <http://www.uis.unesco.org/template/pdf/EducGeneral/Factsheet07_No3_EN.pdf>.

⁶²⁰ Bloch, G. *Building Education Beyond Crisis*, (2009), 9.

⁶²¹ Department of Basic Education, Annual Report 2007/08, (2008), 228-229.



Overall, this indicates that, whilst there has been an increase in annual growth of appropriations from 2005/06 to 2007/08, there has been a decrease in expenditure over the same period. Details regarding under expenditure for the periods of 2006/07 and 2007/08 are provided in Table 41 below.

Table 41: Expenditure in the Department of Basic Education 2006/07 – 2007/08⁶²²

Under expenditure 2006/07		
1. Administration	2 264	1.86%
2. Systems Planning and Monitoring	14 107	27.91%
3. General Education	13 051	5.41%
4. Further Education and Training	5 062	0.71%
5. Quality Promotion and Development	8 444	0.73%
6. Higher Education	3 814	0.03%
7. Auxiliary and Associated Services	49 371	4.43%
TOTAL	49 371	0.35%
Under expenditure 2007/08		
1. Administration	13 860	9.70%
2. Systems Planning and Monitoring	36 865	41.51%
3. General Education	16 572	6.01%
4. Further Education and Training	68 201	5.68%
5. Quality Promotion and Development	5 295	0.41%
6. Higher Education	3 289	0.02%
7. Auxiliary and Associated Services	1 389	2.04%
TOTAL	145 426	-

As one can see, the most notable area of under expenditure for both periods is Systems Planning and Monitoring. This raises concerns as to whether proper planning and monitoring is being undertaken in order to ensure the effective and efficient implementation of policy objectives.

Provincial budgets

A review of expenditure of provincial education budgets indicates that expenditure on teacher salaries and benefits is projected to decline from 83% of the total provincial education budget in 2004/05 to 76% in 2009/10. The savings will be used to spend in other areas, for example, on school buildings which will consume 7.2% of the total provincial education budget in 2009/10.⁶²³

⁶²² Ibid 211.

⁶²³ Wildeman (note 625 above), 30.



The table below provides information on the size of the consolidated provincial education budget for the period 2005/06 to 2010/11.⁶²⁴

Table 42: Provincial education budgets (R'000), 2004/05–2010/11⁶²⁵

Province	2007/08	2008/09	2009/10	2010/11	Real change between 2007/08–2008/09 (%)	Real av. Ann. Change between 2007/08–2010/11 (%)	Real av. Ann. Change between 2004/05–2010/11 (%)
Eastern Cape	14 505 263	17 810 197	18 881 136	20 238 193	15.6	6.4	5.7
Free State	5 677 502	6 598 569	7 169 708	7 748 108	9.4	5.4	4.4
Gauteng	14 649 391	16 629 082	18 461 601	19 882 314	6.9	5.2	6.9
KwaZulu-Natal	19 003 096	21 389 127	23 914 043	26 420 070	6.0	6.1	6.8
Limpopo	12 025 666	14 221 050	15 925 244	17 341 802	11.4	7.4	4.8
Mpumalanga	8 118 307	8 934 232	9 739 439	10 676 178	3.6	4.1	8.4
Northern Cape	2 286 860	2 601 238	2 902 401	3 159 825	7.1	5.9	9.1
North West	6 096 036	6 995 482	7 995 239	8 842 782	8.1	7.6	4.2
Western Cape	7 822 732	9 019 913	10 013 961	10 864 296	8.6	6.0	5.8
Total	90 184 853	104 198 890	115 002 772	125 173 568	8.8	6.0	6.0

In 2008, KZN had the largest allocation (R21.4 billion) and Northern Cape had the smallest allocation (R2.6 billion). Whilst the budget of the former will grow by 6.1% over the MTEF, the Northern Cape's budget is expected to increase by 5.9%. The province which is set to experience the largest real average growth rate is the Limpopo Province with an increase of R12 billion in 2007/08 to R17.3 billion in 2010/11. Mpumalanga will experience the smallest real average growth rate of 4.1% over the MTEF.⁶²⁶

Variations in expenditure between provinces

An overview of the size of provincial education budgets is useful. However, it is important to consider the respective service delivery needs (enrolment rates) in each as this will provide greater insight into levels of equity amongst provinces.

Table 43: Summary of key inequality measures in provincial education departments, 2004/05, 2005/06 and 2006/07⁶²⁷

	National per learner average (Rands)	Coefficient of variation	Average per learner spending of poor provinces as factor of national average	Average per learner spending of rich provinces as factor of national average
2004/05	4.930	0.09	1.01	1.10
2005/06	5.453	0.11	1.01	1.10
2006/07	5.995	0.14	1.01	0.97

Note: The provinces defined as 'poor' are the Eastern Cape, Free State, KZN, Limpopo and Mpumalanga, while the 'rich' provinces are Gauteng, the Northern Cape and the Western Cape.

⁶²⁴ Note: Data for the 2007/08 to 2010/11 period are displayed for the ease of reading of the table, although the full period, namely 2004/05 to 2010/11, was used to calculate the six-year average in the final column.

⁶²⁵ Wildeman (note 625 above).

⁶²⁶ Ibid 30.

⁶²⁷ Ibid



An overview of variations in spending reveals that provincial inequalities have been reduced. The table above indicates that in 2004/05 and 2005/06, poor provinces were spending the same amount per learner as the national average, and richer provinces spent 10% more than the national average. However, in 2006/07, the joint average spending of rich provinces dropped significantly to 3% below the national per learner average.⁶²⁸

When considering these measures at face value, it appears that children have equal access to education across provinces. However, these measures do not capture the backlogs in education spending in each province and therefore 'promote a false picture of inter-provincial equality'. Furthermore, 'provinces have different ratios of personnel and non-personnel expenditure, which means that access issues must be thought of differently in, for example, the Western Cape and the Eastern Cape'.⁶²⁹

Composition of education spending

In terms of the composition of education spending, the current budgetary framework has shifted towards a more moderate expenditure on personnel (teacher salaries) and increased expenditure on textbooks, school buildings and provision for school funding. In an analysis of provincial education allocations and expenditure, Wildeman noted that these shifts in budgetary spending away from teachers' salaries and towards a more 'balanced' expenditure framework have undoubtedly taken place.⁶³⁰ However, questions have been raised regarding the 'usefulness of this framework, especially in view of an incomplete resource transformation process and recurring poor academic outcomes'.⁶³¹ These issues will be discussed in more detail further on in this chapter. Some of the most significant shifts in spending over the past three years are detailed below.

Grade R

Funding for early childhood education for five and six year old children (Grade R) has expanded considerably over the past three years and remains the fastest growing education programme in the provinces. The budget allocation is currently R850 million.⁶³² However, concern has been raised that the projected cost of R686 per child per year and the planned budgets hold significant quality risks.⁶³³ This is largely because the current funding model relies on a low average educator cost based on School Governing Body (SGB) appointments, and it has been questioned whether such a strategy is compatible with improving quality in the long term.⁶³⁴

Infrastructure

In response to the infrastructural backlogs at schools, the NEIMS electronic and planning tool was put into operation. It provides the government with the ability to quantify and pinpoint infrastructural inadequacies at each of the 26 742 public schools across the country. Based on the NEIMS data, a capital investment plan is being developed which will be proposed to cabinet. NEIMS estimated that, "*over and above the expected allocations from National Treasury over a period of ten years starting from 2010, an additional amount of R217 billion will be required to eradicate the backlog, as well as bring other schools up to minimum standard*".⁶³⁵

No-fee schools and school-fee exemptions

In order to improve access to the poorest learners, the state has set aside R1 billion for no-fee schools and compensation for fee exemption for 2011/12 in order to cover the 60% of learners who will not be expected to pay school fees from 2010.⁶³⁶ However, "*funding allocations for no-fee schools vary both within and across provinces, raising concerns about the equitable implementation of the policy*".⁶³⁷ This will be discussed further on in the chapter.

628 Ibid 34

629 Ibid 34.

630 Ibid 8

631 Ibid.

632 Department of Basic Education (note 626 above).

633 DBSA (note 620 above).

634 Organisation for Economic Co-operation and Development. Reviews for National Policies for Education – South Africa, (2009), 2008(16), 49.

635 Department of Basic Education (note 626 above).

636 DBSA (note 620 above).

637 Wildeman (note 604 above), 32.



The National School Nutrition Programme

The National School Nutrition Programme (NSNP) also targets poor learners in many primary and some secondary schools. However, funding for this programme has been inconsistent since 2000 and in 2006/07, an increase in FET grants led to a direct trade-off with the school nutrition grant, which decreased by almost 6% in the same year. Inconsistencies in funding have therefore compromised the delivery of school feeding programmes.⁶³⁸ In terms of spending, it is reported that the NSN grant was transferred from the health sector in 2004 and that by 2007/08, provinces managed to spend 97% of their allocations. This suggests that the revised targeting lists, following the transfer from health to education, have been consolidated.⁶³⁹

Special needs

In terms of inclusive education, which refers to both special needs schools and children with disabilities in mainstream schools, a significantly large sum of money was set aside in 2008 to fast-track the implementation of inclusive education policies. However, expenditure on Grade R and Further Education and Training (FET) has outpaced expenditure on special needs from the period of 2004/05 to 2009/10.⁶⁴⁰

Learning Teaching Support Materials (LTSM)

Provinces spend nearly R1.5 billion per year on LTSM. However, considerable inefficiencies have been reported in the procurement of LTSM leading to a reported shortage of books in the classroom. The Department of Basic Education is planning for national procurement and production, and since 2008 Grade 10 to 12 textbooks have been procured through this centralised process.⁶⁴¹

Higher Education

In response to the serious financial problems experienced by a number of higher education institutions, state support has grown substantially in recent years. This funding is based on institutional redress and therefore not all universities benefitted equally. In order to expand access to higher education institutions, the state created the National Student Financial Aid Scheme (NSFAS). Currently one in four undergraduate students has a NSFAS loan. In 2008, the NSFAS allocation to universities was R1.8 billion.

11.4. Progress Made in Terms of the Relevant MDG

The state's progress in terms of meeting MDG 2 and MDG 3 and the progress on indicators for each goal are discussed in this section.

Progress on indicators

The first indicator for Target 3 is the net enrolment rate in primary education. According to the General Household Survey (GHS) conducted by Statistics South Africa in 2006, over 98% of seven to 13 year old children attended education institutions (Grade one to Grade 7) in 2006. The second indicator is the proportion of pupils starting Grade one who reach Grade 7. The completion rate is used as a proxy for 'survival rate' and according to the GHS, 98% of 18 year old children had completed Grade seven and above in 2006.⁶⁴²

*"[The] Cape and KwaZulu-Natal have all seen significant increases in attendance rates. In the Northern Cape, attendance increased by five percentage points, while attendance in KwaZulu-Natal increased by over three percentage points and attendance in the Eastern Cape by nearly two percentage points. In July 2007, four provinces had attendance rates that were slightly lower than the national average: Gauteng, Northern Cape, North West, and Western Cape each had rates of just below 96 per cent. Attendance rates among African (97 per cent) and Coloured (94 per cent) children remain lower than those for Indian (99 per cent) and White children (99 per cent). It is encouraging, however, that there has been a significant increase in attendance among African and Coloured children over the past five years."*⁶⁴³

While reception year (Grade R) is not yet compulsory, the Department of Basic Education aims to make Grade R available to all five year olds by 2010. The aim is to provide five and six year olds with the necessary pre-literacy,

638 Ibid.

639 Wildeman (note 625 above), 8.

640 Ibid 674

641 Department of Basic Education (note 626 above).

642 The Presidency (note 296 above).

643 Pendlebury (note 604 above), 83.



numeracy as well as life skills to cope with successful formal schooling. The coverage is currently 70%, and both the Western Cape and Gauteng Education Department submissions related that they have Early Childhood Development (ECD) strategies which focus on equipping ECD sites, training ECD practitioners and targeting funding towards implementation.

The third indicator is the literacy of 15–24 year olds. The GHS has found that the self-declared literacy rate for 15–24 year olds in 2006 was 96% and the functional literacy rate, based on achievement of up to Grade 7, was almost 90% in 2006. The overall percentage of 15–24 year olds that have never attended an education institution was 1% in 2006. The submission made by the Department of Basic Education indicated that illiteracy is being targeted at adults above 15 years old with the R6 billion Kha Ri Gude Campaign on illiteracy, which is expected to fast-track the achievement of halving illiteracy by 2015.

The indicator for Target 4 is the ratio of boys to girls in primary, secondary and tertiary education. At primary school level, the gender parity index (GPI) has remained consistently close to 1 from 1999 to 2006. This suggests that more boys than girls are enrolled at this level of schooling. At secondary school level, however, more girls than boys are enrolled, with the GPI being skewed in favour of girls from 1999 to 2006. At the tertiary level, gender distribution in respect of enrolment is also skewed in favour of girls, with the GPI remaining consistently greater from 2001 to 2006.⁶⁴⁴

The second indicator for this target is the ratio of illiterate females to males among 15–24 year olds. The gender parity for self-declared literacy as well as for functional literacy for 15–24 year olds has been achieved throughout the period 2002 to 2006. The GPI for illiteracy for the same age group has been less than 1 for the same period, indicating that more females than males have not attended an education institution.⁶⁴⁵

11.5. Findings concerning the progress made by the state in the progressive realisation of the right

This section discusses the state's progress in the progressive realisation of the right to education and draws on the submissions, the hearings and secondary reports. ICESCR's 4 As, namely, accessibility, availability, acceptability and adaptability will be used as a framework within which to locate this discussion.

11.5.1. Accessibility

Access to schooling is a necessary condition to achieve the right to education and should include economic access, physical access and the principle of non-discrimination. The discussion below covers some of the factors which continue to block children's access to school, and highlights some of the vulnerable groups of children who are currently excluded from the education system.

School fees

In order to improve economic access to schooling, the Amended National Norms and Standards for School Funding (August 2006) and the Exemption of Parents from the Payment of School Fees Regulation (2006) were established.⁶⁴⁶ The Ministry of Education reported that in 2009, 40% of learners attended quintile one and two schools where school fees were abolished. A new policy decision has been made to increase No-fee schools to include quintile three schools. This will cover a total of 7 million learners (60%) who will be in No-fee schools (64% of all schools).⁶⁴⁷

Policy measures to improve access to schooling have been described by children's sector organisations, represented by ACCESS⁶⁴⁸, as harbouring the potential to guarantee the right to an education for many poor children in South Africa. However, concern has been raised that the potential is not being realised to the fullest possible extent. Evidence of this is based on research undertaken by ACCESS into *"the implementation and impact of the No-fee and Exemption policies"*. Findings of the study reveal that, despite the fact that *"no fee schools are in the main better off than they were prior to the new policies in terms of the funds they receive and the resources at*

⁶⁴⁴ The Presidency (note 296 above).

⁶⁴⁵ Ibid

⁶⁴⁶ Giese (note 617 above).

⁶⁴⁷ Department of Basic Education (note 626 above).

⁶⁴⁸ ACCESS is an alliance of over 1 500 children's sector organisations committed to the realisation of children's rights to *inter alia*, education, as part of a comprehensive social security system as guaranteed by the South African constitution and various regional and international child rights' treaties.



their disposal, the policy vision has not materialised consistently for all poor learners and schools.”⁶⁴⁹ The reasons for this are because:

- The levels of administration, communication, monitoring, support and capacity building required for the effective implementation of the system are lacking, particularly in those schools with the greatest levels of poverty.
- The benchmark used to allow for the delivery of quality education and infrastructure is inadequate.
- Some provincial budgets are not sufficient to fund No-fee schools at the level equivalent to the adequacy benchmark.
- The ranking system which determines No-fee status is fundamentally flawed, because the key factor determining the status of the school is its physical location rather than the levels of poverty of the learners accommodated at the school.

The Legal Resources Centre has also highlighted inequities in the quintile system, claiming that *“it fails to acknowledge that the communities in quintile three or even quintile four are often only marginally less impoverished than those in the first two categories”*.⁶⁵⁰ The result of this is that the situation for many fee-paying schools has worsened.

School uniforms

The cost of school uniforms also blocks economic access to schooling. National guidelines regarding school uniforms were promulgated into policy in 2006 in order to reduce learner exclusion from school based on an inability to buy a uniform. However, recent research undertaken by ACCESS revealed that this policy does not make uniforms more affordable because many schools are not fulfilling their duties and obligations in terms of following the guidelines.⁶⁵¹

Travelling distance

The distance between school and home impacts on the physical access to education and research conducted by CASE revealed that in rural communities some children have to go outside their communities to attend primary school.⁶⁵² Added to this is the high transport costs and *“for children who do not have schools nearby, the cost, risk and effort of getting to school can influence decisions about school attendance”*.⁶⁵³ The 2006 Commission Report of the Public Hearing on the Right to Basic Education made a recommendation that poor learners who live far from their nearest school should receive state transport assistance to access education.⁶⁵⁴

The Department of Basic Education is expected to provide transport to those learners who have to walk further than three kilometres to school and this is based on provincial needs and budgets. Eight out of nine provinces have transport subsidy schemes and they work in partnership with the Department of Transport to provide learner transport. However, it was highlighted that the ‘funding mechanisms’ between the two departments impact negatively on the successful implementation of the learner transport programme. The Department of Basic Education is currently in the process of developing a national framework on learner transport.⁶⁵⁵

Food security

Hunger and malnutrition is another obstacle to education. In January 2009, secondary schools in quintile one were incorporated into the NSNP. This will be extended to all primary and secondary learners in quintile two schools in 2010 and to quintile three schools in 2011.⁶⁵⁶ However, there are still many learners who do not benefit from the programme. One reason is that the allocation of the scheme is based on the flawed quintile ranking system. Another is related to the lack of collaboration between the Department of Basic Education and other relevant departments (Trade and Industry, Agriculture and Health) in addressing food security. Learners in the Eastern Cape have been particularly affected because of the collapse of the NSPN in their province which is one of the provinces most affected by stunting rates in children.⁶⁵⁷

649 Giese (note 617 above).

650 LRC (note 107 above).

651 ACCESS (610 above).

652 CASE (note 207 above).

653 Pendlebury (note 604 above), 84.

654 Khoza (note 26 above), 430.

655 Department of Basic Education (note 626 above).

656 Ibid 4.

657 LRC (note 107 above), 7.



The findings related to learner transport and the NSNP call into question standards of ‘adaptability’ of the education system because of its inability to meet the current needs of learners. Furthermore, the reasonableness of both interventions is also questioned as they are not balanced and flexible, they exclude people and they do not address the needs of the most vulnerable.

School safety

Meaningful access to education can only be achieved if learners and educators are able to learn and teach in a safe environment free from all forms of violence. In 2006, the Commission conducted Public Hearings on School-based Violence. This followed the many complaints it received concerning this issue. The hearing identified the most prevalent forms of violence in schools as: bullying, gender-based violence, accidental violence, discrimination and violence, sexual assault or harassment, physical violence and psychological violence. Furthermore, it was found that a significant proportion of learners are under constant threat of violence at school. A number of factors contribute toward school-based violence and these include the effects of the immediate school environment on learners and the impact of the broader community issues on the school environment.⁶⁵⁸

An assessment of ‘site security’ conducted by the NEIMS Report (2007) found that 40.99% of public ordinary schools had no fencing or fencing in poor condition. It also found that only 5.65% of schools have a functional gate and fence together with access control.

Numerous programmes have been launched by both the government and non-governmental organisations to address violence in schools. However, no comprehensive strategy has been developed by the state to address this problem. One important point noted by the Commission is that the problem of violence in schools can only be addressed with the assistance and involvement of the communities in which they are located.⁶⁵⁹ This is confirmed by Donald, Lazarus and Lolwana who suggested that *“the communities in which schools are located strongly influence their development and vice-versa and therefore dialogue between schools and community role-players can generate innovative strategies to meet children’s needs”*.⁶⁶⁰ Two structures have been identified as key leaders in this process – school governing bodies (SGBs) and district-based support teams. In the case of the former, questions need to be raised as to whether SGBs in poorer communities are sufficiently empowered to take the lead on these types of issues. In the case of the latter, these intersectoral teams are the responsibility of the Department of Basic Education under Education White Paper six and, whilst they *“hold great promise in addressing barriers to education, the policy has yet to be translated into law, and be put into operation effectively”*.⁶⁶¹

Social Exclusion: Vulnerable groups

Whilst the MDG indicators show that the net enrolment rate in primary education is over 98%, the reality is that many vulnerable groups of South African children do not have access and continue to be marginalised. This includes children with disabilities, children who are infected and affected by HIV/AIDS and non-national children.

Children with disabilities

Epilepsy South Africa reported that some 300 000 disabled children are not in primary education and far more do not complete a full cycle of basic education.⁶⁶² The Disabled Children’s Action Group (DICAG) stated that *“despite their constitutional right to basic education and provisions in the South African Schools Act, many children with disabilities who are of age to attend are presently out of school and continue to be discriminated against and denied opportunities to education.”*⁶⁶³ The organisation highlighted numerous difficulties related to the implementation of inclusive education which are largely centred on funding and the capacity of schools and teachers to deliver.⁶⁶⁴

Neither the submission made by the Ministry of Education, nor the Provincial Department of Basic Education for the Western Cape made particular reference regarding access to education for children with disabilities. The submission made by the Provincial Department of Basic Education for Gauteng reported that over 4% of its budget

658 South African Human Rights Commission. Report of the Public Hearing on School-based Violence, (2006).

659 Ibid 32.

660 Pendlebury (604 above), 52.

661 Ibid.

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

663 Disabled Children’s Action Group (DICAG), submission to the SAHRC, (2009).

664 Western Cape Cerebral Palsy Association, submission to the SAHRC, (2009).



is spent on special schools and that it is currently redesigning its services to fully implement the government's Inclusive Education Policy.⁶⁶⁵

Children infected and affected by HIV/AIDS

There are multiple factors which lead to the active and passive exclusion of learners who are infected and affected by HIV/AIDS. A study conducted by ACCESS found four key barriers to education: HIV-related illness of learners, grief and trauma associated with illness and death of family/household members, increased domestic responsibility and risks of child labour, and HIV and AIDS-related stigma and discrimination. The study found that a number of policies and guidelines have been developed by the state to ensure access to education for all. However, much still needs to be done to ensure policy implementation.⁶⁶⁶

Orphans and child-headed households

The Community Survey conducted by Statistics South Africa in 2007 revealed that orphaned children – those who reported that either their mother or both parents were dead – accounted for 9% of the total number of children between seven and 15 years old. It also found that 32% of the children who are out of school have one or more parents who are dead.⁶⁶⁷ Another finding of the survey was that there are currently 23 000 children between seven and 15 years old who are the head or acting heads of their households and 17% of these are out of school.

Whilst schools may not be able to reach all these children, they do offer a useful starting point for identifying vulnerable and socially excluded children and addressing their needs. As Rudolph (2009) stated, “*for many children, school is the only place where they have contact with adults they can talk to*”.⁶⁶⁸

Non-national and refugee children

Despite the fact that the Bill of Rights extends the right to education to ‘everyone’ living in South Africa, regardless of their nationality or legal status, refugee children, unaccompanied minors and children of documented and undocumented asylum seekers do not have equal access. The submission made by the Consortium for Refugees and Migrants (CoRMSA) reported that close to one third of school aged non-national children are currently not enrolled in schools due to an inability to pay fees, the costs of transport, uniforms and books, or explicit exclusion by school administrators. Furthermore, non-national children in schools report that they are regularly subjected to xenophobic comments by teachers or other students. Added to this is the ongoing reluctance of the Department of Basic Education to accept undocumented children.⁶⁶⁹

For these groups of vulnerable children, their physical and economic access to education is being blocked and the principle of non-discrimination is not being applied. Furthermore, standards of adaptability are also not being applied to their right to education because the lack of implementation of policies at a school level such as those related to Inclusive Education and HIV/AIDS means that the needs of *all* learners are not being met. It is also argued that, according to section 9 of the Bill of Rights, these children’s right to equality within the education system, is not being upheld. section 9 “*sets the ethical standards for a democratic system of education in which every child - regardless of race, gender, culture, language and religion, ability or disability is equally entitled to learn*”.⁶⁷⁰

Gender

The MDG statistics suggest that, in numerical terms, South Africa has met the MDG 3 target of eliminating gender disparity in primary, secondary and tertiary education. However, the GPI is only an indicator of the presence of girls and boys at different levels of education. It is therefore not a full enough indicator of other dimensions of gender equality in education as it gives little indication of how girls and boys are treated in schools and the ways in which they are able to make use of their education.⁶⁷¹ For example, research studies conducted by the Gender, Education and Global Poverty Reduction Initiatives Project (GEGPRI) found that the ways in which gender parity

665 Gauteng Department of Basic Education, submission to SAHRC, (2009).

666 Giese (note 617 above).

667 Fleisch, B, Shindler, J & Perry, H. Children out of school: Evidence from the Community Survey, (2009), 44.

668 Pendlebury (note 604 above), 51.

669 CoRMSA (note 380 above).

670 Pendlebury (note 604 above), 20.

671 UKZN (note 619 above).



is interpreted by school communities tend to mask more thorough discussions of the nature of gender equality and forms of obligation with regard to taking this forward.

The lack of clear policy mechanisms to monitor aspects of gender in schools means that the MDG indicators for gender parity might be met, but opportunities are being missed for collaboration on developing a deeper insight into the meaning of gender equality and education through the work of the Department of Basic Education.⁶⁷²

In summation, the above discussion highlights the fact that the inequalities in the current education system are resulting in the exclusion of categories of vulnerable children from participating meaningfully in society. This calls into question the reasonableness of the measures taken by the state to progressively realise the right to education. Furthermore, there also appears to be little provision being made by the state to deal with the short, medium and long term needs of these young people who remain “*severely marginalised and caught in a cycle in which lack of integration feeds unemployment*”.⁶⁷³

Access to higher education

Accessing further and higher education continues to remain a challenge for young people. The Centre for Social Development in Africa (CDSA) at the University of Johannesburg reported that in 2008 only 20% of those who passed the matriculation examinations qualified for a university entrance. Furthermore, cuts in government spending at higher education institutions has meant that young people who do qualify for university are often unable to continue their education due to severe financial constraints and an inability to access financial support in the form of a scholarship. “*Ever increasing costs of higher education therefore contribute to the cycle of poverty and inequality.*”⁶⁷⁴

11.5.2. Availability

The Legal Resources Centre made the following statement in its submission:

*“It is not enough to say South Africa has succeeded in the MDG relating to education if the state considers that once the students get to school the goals have been reached. This is far from the case when some children still have nothing to sit on, or write with when they walk through the doors of the school”.*⁶⁷⁵

Standards of availability have been met when institutions and programmes are available in sufficient quantity to meet local needs. This also means that a range of resources are available at schools, including buildings, water and sanitation.⁶⁷⁶

School infrastructure

Whilst attendance at schools is better in urban areas, the quality of infrastructure and the level to which the schools are under-resourced in terms of textbooks, stationary and furniture still prevent children from completing a full course of primary education.⁶⁷⁷ “*Poor learning environments are linked to low levels of teacher morale, poor learner performance and high drop-out rates*”⁶⁷⁸ and according to the ICESCR’s standards of ‘availability’, the state has a duty to ensure that educational institutions are ‘functioning’. For example they should have sanitation and safe drinking water.

Backlogs and overcoming past under-investment in infrastructure is acknowledged by the Ministry of Education as ‘our greatest challenge’.⁶⁷⁹ In 2007, the first NEIMS report on school infrastructure was released and presented to Parliament in 2008.⁶⁸⁰ It reported that many schools do not have electricity, decent toilets and adequate teaching resources. Overcrowding is also commonplace and 80% of schools do not have libraries or science laboratories.

672 Ibid.

673 CASE (note 250 above).

674 Centre for Social Development in Africa (CDSA), submission to the SAHRC, (2009).

675 LRC (note 107 above).

676 Pendlebury (note 604 above), 87.

677 CASE (note 250 above).

678 Pendlebury (note 604 above), 13.

679 Department of Basic Education (note 626 above).

680 Ibid.



Access to safe drinking water ensures good health and the promotion of hygiene amongst children. As most children spend five days a week at school, it is essential that they have access to an adequate supply of potable water while at school. If they do not have access to water, their right to water is not being realised along with their right to health, as illness spreads rapidly in crowded conditions. It has also been noted that this could infringe on their right to basic nutrition because clean water is needed to prepare the nutritious drinks for the NSNP.⁶⁸¹

The NEIMS report, conducted in 2006, showed that 89% of schools have access to clean water on or near site. Nearly all the schools in Western Cape, Northern Cape and Gauteng have water on or near site. However, a fifth of the schools in both the Eastern Cape and the Free State have no access to water on or near site.⁶⁸²

The Department of Basic Education reported that it has programmes to address the water and sanitation backlogs in schools from the equitable share and reported that the Department of Water Affairs and Forestry will provide water to 521 schools in 2008/09 and 1878 schools in 2009/10. It will provide sanitation to 423 schools in 2009 and to 935 schools in 2010.⁶⁸³

Whilst a budget plan is being developed and will be presented to Treasury, the Legal Resources Centre argued that funding will still have to, in a sense, be divided and prioritised not just in terms of what is provided for but to whom it is provided. Again this challenge is embedded in the Quintile Ranking system, which affects funding allocation.⁶⁸⁴

The lack of decent infrastructure infringes on a child's right to education, and educational opportunities remain bound to historical patterns of inequality.⁶⁸⁵ Besides blocking physical access it can also be argued that, according to their rights to equality (section 9) and human dignity (section 10) in the Bill of Rights, their equal entitlement to learn, under conditions that respect, protect and promote the inherent human dignity of each child is not being protected.

11.5.3. Acceptability

According to ICESR, education programmes must be acceptable to learners and this includes the curricula and teaching methods. Furthermore, education needs to be relevant, culturally appropriate and of good quality.⁶⁸⁶

Quality of Education

Whilst the high enrolment rate (98%) into primary school education effectively translates into meeting the goal of achieving universal primary education, access to education cannot on its own lead to the progressive realisation of the right. Such realisation should have at its core the improvement of the capabilities of the rights holders to the extent that they can play a meaningful role in society. To that extent, the quality of schooling is imperative to the quality of skills in every aspect of socio-economic life and universal access to education becomes meaningless without sufficient standards of quality.⁶⁸⁷

It can therefore be argued that children should have 'meaningful access' to education. In other words, "*When basic education is meaningful and adaptable, its content and teaching methods work together to foster generative learning that extends children's capacity to think for themselves and with others, and to apply what they have learnt in different contexts. In the process, basic education should also prepare young people for a productive role in society.*"⁶⁸⁸

The Ministry of Education reported that considerable progress has been made in this area and stated that, according to the EDI, South Africa will reach the EFA goals by 2015.⁶⁸⁹ According to the Presidency's education development indicators, the following achievements have been reached:

681 Pendlebury (note 604 above), 88.

682 Department of Basic Education. *National Educational Infrastructure Management System (NEIMS)*. (2007), 19.

683 Department of Basic Education (note 626 above).

684 LRC (note 107 above).

685 Pendlebury (note 604 above), 13.

686 Ibid 87.

687 SAHRC (note 2 above).

688 Pendlebury (note 604 above), 25.

689 Ministry of Education (note 626 above).



- The national Learner-Educator Ratios (LER) dropped from 34:1 in 1999, to 31.4:1 in 2007 in public ordinary schools.
- The Senior Certificate examinations pass rate increased from 48% in 1999 to 65% in 2007. Although there has been a drop from 73% in 2007, this was attributed to a rise in standards in the quality of exams relative to preparedness of learners to write these exams.
- The performance in producing higher grade passes in mathematics began to improve in 2002. However, the number of learners studying and passing mathematics remains too low.⁶⁹⁰

Whilst these statistics indicate an improvement in the quality of education, concerns abound in South Africa that increased access to education has come at the expense of quality, and these concerns are not without merit when examining the competencies both of learners in various grades and of teachers.

Average literacy scores

In 2007, the average literacy score in Grade three was 36%, but only 15% of children passed both numeracy and literacy. Developing literacy, which includes reading, writing and numeracy skills, is a central purpose of basic education.⁶⁹¹ However, as the above scores indicate, this purpose is not being fulfilled by the current system. ICESCR levels of 'acceptability' are therefore not being met because the aims of education are not being achieved through the current curricula and teaching methods.

Senior Certificate results

Senior Certificate results reveal that the pass rate has declined since 2004. In 2006, the official pass rate was 66.5% with only 16.2% achieving an endorsement. The Senior Certificate results in 2007 showed a further decline with a 65.3% pass rate and an endorsement rate of only 15.1%. In 2008, 38% of those who wrote the matriculation examination failed, and most of those who did pass, passed with very low grades making it difficult for them to access higher education and skills training.⁶⁹² The results per province revealed that in 2007, Gauteng and the Western Cape had the highest proportion of learners with a university entrance pass, with 19% and 25% respectively. Those with the lowest proportion of learners with a university entrance pass are Eastern Cape at 9% and Limpopo and Northern Cape Provinces with 12% each.

A further disaggregation of the pass rates per race group revealed that 60% of African learners who wrote the matriculation exam in 2007 passed and only 10.9% of them passed with an endorsement. A total of 98.4% of white learners passed the matriculation exam in the same year with 52% of these being with an endorsement.⁶⁹³ These statistics provide some insight into the fact that education in South Africa is not providing the broad access to quality education that would enable the equitable sharing of opportunities. These are reflected by Graeme Bloch in the following statement regarding inequality in the education system: *"In short, the constitutional requirements for equality are not being met ... it only works for the small proportion of learners who are able to access the relevant quality institutions. For the massive majority, their poor-quality education keeps them marginalised and excluded from schools, universities and colleges that could significantly improve their lives"*.⁶⁹⁴

Performance in Mathematics

With regard to performance in mathematics, approximately one out of 40 of the children who started school in 1995 passed mathematics on the higher grade in matric. A total of 93% of mathematics passes came from 21% of schools, indicating that high levels of inequality continue to persist amongst schools. Furthermore, poor mathematics results also limit the key economic skills needed by young people to enter careers such as engineering, and this adds to the skills shortage in the country which in turn places a binding constraint on growth and employment creation.⁶⁹⁵

⁶⁹⁰ Ibid.

⁶⁹¹ Pendlebury (note 604 above), 25.

⁶⁹² SAHRC (note 2 above), 23.

⁶⁹³ SAIRR. *South Africa Survey 2008/2009: Education*, (2009).

⁶⁹⁴ Bloch, G. Township and Rural Schools continue to be marginalised as inequality in the education system persists, Paper presented to the DBSA, Knowledge Week, <<http://www.dbsa.org/Mediareoom/Documents/DBSA%20education%20article.doc>>.

⁶⁹⁵ DBSA (note 620 above), 10.



Senior Certificate question papers

Quality of education has also been compromised by a drop in standards of Senior Certificate question papers. Research conducted by Umalusi found that between 2001 and 2003 there was a significant drop in standards in question papers for six subjects. Given that the papers were 'easier', the academic and generic cognitive competencies of learners writing Senior Certificate examinations during this period were not tested. It is therefore uncertain what skills are associated with the attainment of a Senior Certificate, and many studies in South Africa have shown that many learners who enter institutions of higher learning do not have the academic, cognitive and personal competencies to cope with the pressure of higher education studies.⁶⁹⁶

Quality of teaching

Whilst a large number of factors influence children's meaningful access to education, the quality of teaching has been cited as a central factor. A baseline study conducted in 2004 assessed the knowledge of a sample of Grade three teachers drawn from 24 primary schools selected at random. Literacy and mathematics tests (Grade six learner level) were administered. The average score on the language test for 23 teachers was 13 correct responses out of 24 items (55%). The majority of teachers scored between seven and 12 marks out of a possible 24 (29%–50%)⁶⁹⁷ and these low scores confirm that children's right to quality education is not being fulfilled.

Learner-to-educator ratio

The learner-to-educator (LER) ratio also contributes directly to the quality of schooling. The Department of Basic Education statistics indicate that there has been a continued decrease in the LER since 2004, with the average LER in public schools being 32.4 in 2007. However, these statistics mask the variation in the size of schools and classes with some educators having classes of 50 learners or more.⁶⁹⁸ Furthermore, the NEIMS report (2007) found that 25% of classrooms were overcrowded with more than 45 learners per classroom.⁶⁹⁹

Curriculum

The 'acceptability' of the curriculum is also central to achieving the right to education. Following the decision made by the ministerial committee tasked with reviewing Curriculum 2005, the Revised National Curriculum (RNC) was launched in 2004. Whilst it remains grounded in outcomes-based education (OBE) principles, a number of practical adaptations were made to make it more suitable to the South African schooling context. In 2007, the Department of Basic Education reported that the RNC has been introduced gradually over a number of years. Since 2004, almost 2 100 provincial officials and 200 000 Foundation and Intermediate Phase educators, as well as 75 000 Grade 10–12 educators across all provinces have been through an orientation programme in this regard. Despite these efforts, the OECD (2008) has made the following observation: *"While the ministerial committee's recommendations have helped ease the implementation of the curriculum, there is an ongoing concern that disparities in resources and educator preparedness make this modern, high knowledge, resource intense curriculum an inappropriate model in the South African context"*.⁷⁰⁰

The problem is also exacerbated by the fact that most learners are not being taught in their home language, which makes it more difficult to engage with the curriculum.

Throughput rates of learners

Even though the MDG target for completion of primary schooling is impressive, when looking at throughput rates, a different picture emerges. An analysis of attendance rates shows a 98% attendance rate amongst 14 year olds in 2007, which dropped to 95% of 15 year olds, 88% of 17 year olds and 59% of 19 year olds attending an educational institution.⁷⁰¹ Statistics cited by Moleke (2007) and Ramphela (2009) in the CDSA submission, revealed that currently between 50% and 70% of learners starting Grade one do not complete their schooling. It is reported that these young people will be unlikely to access jobs and as a result will increase the current

696 SAHRC (note 2 above), 24.

697 DBSA (note 620 above).

698 Pendlebury (note 604 above), 86.

699 Ibid.

700 OECD (note 651 above).

701 Pendlebury (note 604 above), 83.



unemployment and poverty levels.⁷⁰² For example, the submission by the Western Cape Education Department indicated that employment rates in the province amongst 15–24 year olds (many of whom were still studying during a proportion of the years in question) for the years 2007 and 2008 is just 29.3%.⁷⁰³

Department of Basic Education initiatives

To address the issue of quality in education, a number of significant departmental initiatives have been prioritised. These include a focus on Dinaledi schools (a government/private sector partnership) that provides the basis for targeted improvements in mathematics and science outcomes. The QIDS-up (Quality Improvement and Development Strategy) programme ‘provides teacher and district support to 5000 low performing primary schools’ and ‘plans to train additional 6000 teachers over the next three years to address the current shortfalls, particularly in poor, rural schools’.⁷⁰⁴ The Foundations for Learning Campaign was launched in 2008 which targets Grade R-6 learners in all schools and aims to increase literacy and numeracy skills to 50% by 2011.

However, critics have argued that, despite these policies, *“they have been unable to come together to create an effective critical mass”*.⁷⁰⁵ This implies that, when applying the reasonableness criterion, these programme interventions may not be comprehensive enough to protect the right to quality education for all learners.

In response to the drop-out rate, the Minister established a Ministerial Committee on Learner Retention in 2007. It concluded that learner retention is high up to Grade nine but begins to decline from Grade 10 onwards. It proposed a number of recommendations to promote learner retention and the Department of Basic Education is considering a proposal to establish wider and more flexible pathways of learning for post-compulsory and post-school youth.⁷⁰⁶

The Department has also attempted to address some of the problems related to supporting young people to stay in school. The Further Education and Training Colleges Act (2006) requires that further education and training facilities are closely linked with communities so as to ensure better access for young people. The policy aims at supporting young people to stay in FET and has established learner support centres.⁷⁰⁷ However, *“until we understand, and find solutions for, the various factors that push or pull ‘disadvantaged’ youth out of school, it is impossible to state that everyone’s right to further and even basic education has been realised”*.⁷⁰⁸

It is clear that South Africa must not only commit to the minimum standard of the MDG related to education ... rather, the state must commit itself to the realisation of the right to education, which by implication means the right not just to access school, but to be provided with a quality education.⁷⁰⁹

11.6. Recommendations

Outlined below are the recommendations based on the key findings of this study.

1. Planning systems

Introduce a system of ‘poverty targeting’ as a service delivery strategy which is based on determining ‘who constitutes the prime recipients of redress’. Budget allocation for nutrition, transport and infrastructure must benefit those in dire need.⁷¹⁰

2. Definition of basic education

Include a learner’s entire schooling career in the definition of ‘basic education’ which will be consistent with international trends.⁷¹¹

⁷⁰² CSDA (note 691 above).

⁷⁰³ Western Cape Provincial Education Department, submission to the SAHRC, (2009).

⁷⁰⁴ Pendlebury (note 604 above), 28.

⁷⁰⁵ DBSA (note 620 above).

⁷⁰⁶ Department of Basic Education (note 626 above).

⁷⁰⁷ CASE (note 207 above).

⁷⁰⁸ Pendlebury (note 604 above) A De Lannoy and L Lake ‘Children’s access to education’ 2009, 83.

⁷⁰⁹ CSDA (note 691 above).

⁷¹⁰ LRC (note 107 above).

⁷¹¹ Khoza (note 26 above). (ed). Socio-Economic Rights In South Africa: Resource Book (2nd Ed.), 2007, 420.



3. Economic and physical access to education

No-fee schools

The funding, implementation, monitoring and enforcement of the school funding policies should include the following actions:

- Improve administrative capacity and processes, especially for the poorest schools most reliant on the pro-poor policies.
- Improve communication between national, provincial, district and school levels with regards to the policies in question.
- Improve support and capacity building for the agencies responsible for implementing the policies so as to ensure effective implementation in a manner that is respectful of the rights of parents and their children.
- Improve monitoring and support for implementation of the policies.
- Revise the adequacy benchmark upwards based on a thorough and targeted assessment of what is factually necessary to deliver a quality education.
- Introduce better provincial financial planning and targeting to ensure adequate provincial budgets which are able to fully support all eligible no-fee schools in quintiles one, two and three.
- Introduce better provincial financial planning and targeting to ensure adequate learner allocations at all schools, based on their learner demographics, their ability to fundraise, their ability to levy school fees and all other relevant factors.
- Introduce an accessible and well publicised administratively and legally sound procedure for the re-ranking of deserving schools which would permit no-fee status, based on a proper and consultative assessment of all relevant sources of information, including the leadership at the school in question.
- Fund the exemption policy at a minimum level per exempt learner which is equivalent to the revised adequacy benchmark.⁷¹²

School uniform guidelines

The national and provincial departments must develop concrete strategic plans which provide support to schools and governing bodies to enable them to implement the guidelines and they should include the following actions:

- Raise awareness and conduct training amongst schools, school governing bodies and parents about the guidelines and how to implement them.
- Amend the legal status of the guidelines so as to have the legal status of minimum norms and standards as opposed to being an unenforceable guideline document.
- Introduce a uniform subsidy to assist poor parents to buy uniforms.
- Provide parents with effective complaints and grievance procedures to report any contraventions of the guidelines and any related contraventions of their children's rights to education.⁷¹³

School infrastructure

- Develop measures to ensure the equitable allocation of funding and provision of infrastructure between provinces and within provinces.

Learner transport

- Provide free or subsidised transport to learners who live further than three kilometres walking distance from schools.⁷¹⁴

National School Nutrition Programme

- Provide nutrition programmes at all schools from Grade R, primary to secondary schools to realise the right to food of all children.⁷¹⁵
- Give communities a greater stake in the delivery of healthy food which builds nutrition-conscious communities whose actions stretch far beyond the programme confines of the school nutrition programme.⁷¹⁶

⁷¹² Giese (note 617 above).

⁷¹³ ACCESS (note 610 above), 11.

⁷¹⁴ LRC (note 107 above), 12.

⁷¹⁵ Ibid.

⁷¹⁶ Ibid.



School safety

The following recommendations are made which are in line with the Commission's 2006 Report on School-based Violence:

- The Department of Basic Education must develop a comprehensive, integrated strategy which focuses on making the school environment a safer place. This includes prevention strategies to ensure the physical safety of educators and learners and the provision of reporting mechanisms and care for victims.
- Provide training and support to educators to deal with violence.
- Advance a culture of peace through a curriculum of non-violence.
- Mobilise and promote the involvement of the entire school community in addressing the issue of violence, including learners, parents, families, caretakers, SGBs, NGOs and CBOs.
- Research and monitor trends of violence in South African schools.⁷¹⁷

3. Principles of non-discrimination and inclusivity

Refugee and non-national learners

- Revise the schedule relating to the Admission Policy for Ordinary Public Schools to reflect the right of children without South African birth certificates to access education.
- Ensure that all schools are trained to recognise the various forms of refugee and asylum documentation and be compelled to grant children access on the basis of these documents.
- Enhance capacity-building and training of all school staff members to address issues of xenophobia and to improve different groups of foreigners' access to education.⁷¹⁸

HIV/AIDS-infected and affected learners, orphans and children who head households

- Improve awareness of HIV/AIDS related policies amongst school staff and SGBs through the distribution of information and training.
- Increase psycho-social support services to vulnerable learners in schools through Education District Based support teams, teams of counsellors and Learner Support Educators.
- Increase financial investment in care and support related activities to address barriers to education for vulnerable learners.
- Monitor policy implementation and evaluate the intended and unintended impact of policy on learners and schools.
- Strengthen and expand partnerships and collaboration between the Department of Basic Education, other departments and the NGO sector.⁷¹⁹

717 SAHRC (note 675 above), 32-39.

718 CoRMSA (note 380 above), 8.

719 Giese (note 624 above), 118.



Learners with disabilities

- Evaluate the (lack of) progress made in the implementation of inclusive education, and address the issues of funding and capacity for implementation as a matter of urgency.
- Establish clear monitoring mechanisms (based on the UN Convention on Disability) to monitor the numbers of children with disabilities currently accessing education and the quality of education that they are receiving.⁷²⁰

4. Gender equality in education

- Formulate a clear gender policy which goes beyond the narrow confines of numerical considerations, and disseminate the policy to stakeholders at all levels of the system.
- Include a budget for the implementation of gender-based programmes at a district level which are aimed at providing girls and boys with a quality teaching and learning experience as well as building the capacity of teachers to incorporate gender meaningfully into their lessons.
- Put in place monitoring mechanisms so that qualitative achievements for gender equity can be measured and more complex manipulations of the quantitative data made.⁷²¹

5. Quality of education

General

- Improve the quality of early childhood education and primary schools, including the ongoing 'Foundations for Learning' Campaign which focuses on literacy and numeracy.⁷²²
- Monitor quality education by assessing throughput rates, matriculation pass rates and grades at which young people are passing.⁷²³

Through-put rates of learners

- Continue, support, monitor and evaluate programmes to support learners at the FET level.⁷²⁴
- Extend the Child Support Grant to caregivers of children up to the age of 18 years, or until they have completed schooling.⁷²⁵

Educators

- Provide incentives such as bursaries and occupational specific dispensation to attract and retain teachers.
- Ensure pre- and in-service teacher education which prepares teachers to teach effectively in the different contexts of South African schools.
- Put support systems in place to ensure the quality and well-being of teaching staff.⁷²⁶

720 Lawyers for Human Rights, submission to the SAHRC (2009); DICAG (note 680 above).

721 UKZN (note 619 above), 8.

722 DBSA (note 620 above), 48.

723 CSDA (note 691 above).

724 Ibid.

725 Ibid.

726 Pendlebury (note 604 above), 29.

Chapter 12



General conclusions



CHAPTER 12: GENERAL CONCLUSIONS

This concludes the 7th report on Economic and Social Rights of the South African Human Rights Commission. The findings in this report are based on written and oral submissions that were made to the Commission in the first half of 2009 for the reporting period 2006 – June 2009. This report is written in partial fulfilment of the Commission's mandate to actively monitor the measures taken by the state towards the realisation of the rights contained in the Bill of Rights, concerning environment, water, food, social security, health, land, housing, and education.

The report also assessed the government's progress in terms of meeting the targets set in the Millennium Development Goals.

The 4 As were adopted as a framework for analysis of the progressive realisation of the right and these have been used in international discourse, particularly in the General Comments to the ICESCR, for interpreting the progressive realisation of the rights to housing, health and social security. However, because the 4 As and the interpretation of them is not standardised across each of the rights, it is difficult to draw general conclusions using them as a framework. General conclusions will thus be drawn on the principal themes that have emerged from the analysis of the period under review, and which reflect a rights-based framework.

Government's understanding of the progressive realisation of ESR, human rights and its constitutional obligations

The state is working with mainly good intentions towards its constitutional obligations. However, it seems that often officials do not understand what it means to integrate rights-based approaches, and therefore revert back to hierarchical top-down decision making when faced with challenges from communities or civil society groups. In some cases, the do-no-harm principle is not applied, as in the case of informal settlement upgrading and resulting evictions of poor people to the urban periphery who are left in squalor in temporary relocation areas.

On the whole the government has comprehensive legislation, plans and policies which are an attempt to meet agreed upon targets in the realisation of rights, and there is evidence of the government's willingness to reflect on challenges that have occurred and to introduce corrective measures. However, although most of the legislation, policies and programmes of the government seem reasonable in conception, there are cases where legislation and policy is based on a flawed or incorrect paradigm. Examples of this are the one dimensional paradigms on which the housing and land policies are premised.

Flexibility is not a recognised strength of government bureaucracies, and rigidities in the system can lead to the denial of rights, such as the need to have identity documents to gain access to social security grants. On the other hand, too much flexibility could cause chaos, thus the need for balance to be introduced where inflexible processes are severely hampering the attainment of rights.

There is also a need to balance the private and public interests, and in the case of land and the environment, the private interests seem to be winning, especially when one considers mining rights and the market based policy for land reform. This is also often true for environmental protection where private land-owners and commercial interests are favoured over the public interest. This is exacerbated by corruption.

The positive attitude of the state towards progressive realisation is not always apparent. Of concern is that much of the progress towards the realisation of rights has come about as a result of litigation, which indicates that the state is not responsive enough to progressive realisation and adopts a defensive and autocratic response to pressure from civil society groups. There are also worrying tendencies where arms of the state have attempted to introduce new legislation, for example, the eradication of Slums Act in KZN and the introduction of amendments to the PIE Act, which were not adopted by the Legislature. Both of these are examples of attempts by the state to increase their power to deliver on set targets irrespective of whether the lives of the poorest were made worse. The fact that neither of these changes came to pass is a good indication that the balance of power between the arms of the state works at times in favour of human rights.

The analysis of government expenditure in most of these sectors shows a high degree of budget spending, and many of the submissions made by departments called for higher budget allocations, such as the Department of Health to manage HIV/AIDS medication and the Department of Housing to build more houses.



Inadequate Public participation

Access to information in order to either inform advocacy or to inform people about the progress of their specific cases, for example in respect of land claims, is a problem raised in all the chapters. Public participation in decision making, which is a cornerstone of participatory democracy and of a rights-based approach, has been predominantly described as pseudo participation, and without access to information as a basic minimum for meaningful participation, it will remain so. Critically, without access to key information, it is difficult to ascertain whether government programmes are reasonable.

Participatory mechanisms are said to favour those with access to resources and information and there are instances where people or social movements are marginalised or harassed if they protest against the government. This creates a climate of fear which is not conducive to citizen involvement as it is the bedrock of participatory democracy.

Social exclusion

In each of the hearings, examples were raised of significant segments of society that remain excluded from government programmes and these include; farm dwellers who are planned for in municipal delivery of services; people who need anti-retroviral medication but the government cannot afford to supply it all; children who are excluded from the social welfare system; non-nationals who do not have access to the same rights as South African citizens or who are denied rights to due administrative inefficiencies at the Department of Home Affairs; women in traditional areas who, due to the customary land traditions and the power given to traditional leaders in the legislation are denied access to land; people with disabilities and other special needs due to either a lack of special needs policy or the failure to implement such policies.

The pace of service delivery is simply too slow, and projections are not that positive. While programmes are put in place to bring services to the people, the most vulnerable are denied their most basic rights, such as the right to food, tenure security and adequate shelter.

From strategic planning to implementation

Clearly, the South African government has set ambitious goals and targets for itself, for instance the eradication of slums by 2014, yet it is clear from the progress to date that these targets are neither realistic nor reasonable. Furthermore, chasing these targets can be at the expense of quality, as in the case of education and the mediocre matriculation pass rate. The target of 30% for the redistribution of white owned farm land has been termed the holy grail of land reform. What is missing is long term planning with reasonable targets, based on reliable information, which can map a way forward and against which progress can be measured. The state has recognised the need for longer term planning, and in many instances the data is currently being gathered to be able to make informed decisions, for example, the Informal Settlement Atlas. The call for a road map is particularly strong from the social security sector, but could be equally applied in other sectors.

The government has many systems for planning with a well formulated planning cycle linked into the budgeting process and the MTEF. Quality data is essential for good planning. There is a fundamental problem with the quality of data provided by Statistics South Africa and, as a result, key statistics are contested such as child mortality in health, and planning is predicated on poor or absent data.

The quality of planning is also influenced by the assumptions which are made about the nature of the problem to be solved or the external factors which need to be considered when designing programmes. The findings also highlight that the underlying assumptions about solutions to certain problems are often untested and may be incorrect as they may not address the root causes of the problems which lie in the policies themselves. As a result minor modifications are made to policies or plans but the outcomes do not change such as in the case of land reform moving from SLAG to LRAD. A lack of quality monitoring and evaluation data inhibits drawing conclusions about the relationships between outputs, processes and outcomes of government programmes. At times, the outcomes themselves are not clearly articulated, as in land reform.



Two major crises in this period have tested the government's ability to respond to crises and emergencies. Firstly, the xenophobic attacks have shown that the state is ill prepared to deal with a national emergency and to enact the emergency housing code. Secondly, the floods in KZN proved that even though conditional grants were made to provinces to deal with the housing crisis that emerged, the response was not quick enough.

There are significant problems in vertical and horizontal co-ordination within and between government departments. Some of these problems are located structurally in the allocation of responsibilities to the three tiers of government; others are due to factors of organisational culture and protocols which govern communication within government. Even where the allocation of roles and responsibilities to the three tiers of government is clear, it is not always sufficient, and municipalities find themselves with responsibilities which they see as unfunded mandates and for which they are ill prepared to deliver. In terms of infrastructure provision and housing, the Department of Cooperative Governance and Traditional Affairs highlighted problems with the vertical allocation of responsibilities which, if they are addressed, will improve cooperation and co-ordination.

In this period it seems that national government departments are slowly coming to terms with their facilitative role in terms of policy and programme implementation at a provincial and local level. Factors that affect the capability of the government to effectively facilitate the rights highlighted in these hearings were predominantly capacity challenges (including vacancies and skills), budget restrictions, and in some cases uncaring attitudes towards the most vulnerable.

The effectiveness of many government programmes is wanting, for example, the Land Resettlement programme is only 49% effective at best, and there are many other examples of ineffective implementation of programmes.

On the whole, even if South Africa is able to report favourably on some of the MDG, such as education enrolment ratios, the focus on these quantitative targets masks hidden discrimination and qualitative problems that are best assessed using indicators for measuring progressive realisation.



Annexures



General conclusions



Annexures

General Submissions

- Submission to the South African Human Rights Commission: The Millennium Development Goals/Human Rights submitted by the **Limpopo Provincial Government**.
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- International Student Achievement in Reading (Chapter 1). By Timss & Pirls International Study Center, Lynch School Of Education, Boston College.
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Terms of reference

SOUTH AFRICAN HUMAN RIGHTS COMMISSION

TERMS OF REFERENCE

PUBLIC HEARINGS ON MILLENNIUM DEVELOPMENT GOALS AND THE REALISATION OF ECONOMIC AND SOCIAL RIGHTS IN SOUTH AFRICA

1. Public Hearings Announcement

- 1.1 The South African Human Rights Commission ("the Commission") hereby announces its intention to hold public hearings on "The Millennium Development Goals and the realisation of economic and social rights in South Africa" on **08 – 12 June 2009** at its Head Office located at **Human Rights House**, Johannesburg.
- 1.2 The Commission calls for written submissions covering the period from **April 2006 to March 2009** from relevant national and provincial government departments within these Terms of Reference as set out in paragraph 3 below. This includes those national and provincial government departments which the Commission will specifically address under separate cover and those not addressed specifically but which may express interest.
- 1.3 The Commission further calls for written submissions from the public and interested parties including institutions within these Terms of Reference as set out in paragraph 3 below.
- 1.4 The deadline for receipt of submissions by the Commission is **12 May 2009**, subject to paragraph 4 below.
- 1.5 A series of one day public hearings will be held focusing on each of the following human rights respectively:
 - 1.5.1 Environment, Water and Food (08 June 2009);
 - 1.5.2 Social Security (09 June 2009);
 - 1.5.3 Health (10 June 2009);
 - 1.5.4 Land and Housing (11 June 2009);
 - 1.5.5 Education (12 June 2009);
- 1.6 The Commission refers specifically to the rights stated in paragraph 1.5 above and entrenched in the Constitution of the Republic of South Africa Act, 108 of 1996 ("the Constitution") as follows:

"24 Environment

Everyone has the right-

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

25 Property

- (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
- (2) Property may be expropriated only in terms of law of general application-
 - (a) for a public purpose or in the public interest; and
 - (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
- (3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including-
 - (a) the current use of the property;



- (b) the history of the acquisition and use of the property;
 - (c) the market value of the property;
 - (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
 - (e) the purpose of the expropriation.
- (4) For the purposes of this section-
- (a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and
 - (b) property is not limited to land.
- (5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.
- (6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.
- (7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.
- (8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36 (1).
- (9) Parliament must enact the legislation referred to in subsection (6).

26 Housing

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

27 Health care, food, water and social security

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

28 Children

- (1) Every child has the right –
 - (b) To family care or parental care, or to appropriate alternative care when removed from the family environment;
 - (c) to basic nutrition, shelter, basic health care services and social services;
 - (d) to be protected from maltreatment, neglect, abuse or degradation; ...
- (2) A child's best interests are of paramount importance in every matter concerning the child.
- (3) In this section "child" means a person under the age of 18 years.

29 Education

- (1) Everyone has the right –
 - (a) to a basic education, including adult basic education; and



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

1.7 The Commission’s citation of the Millennium Development Goals refers to the following: In the Millennium Declaration, 189 member states of the United Nations signed and reaffirmed the commitment of the international community to eradicate poverty. The Declaration is a consolidation of eight interconnected development goals and constitute a set of agreed and measurable targets and quantifiable indicators. These are as follows:

- 1.7.1 Eradicate extreme poverty and hunger;
- 1.7.2 Achieve universal primary education;
- 1.7.3 Promote gender equality and empower women;
- 1.7.4 Reduce child mortality;
- 1.7.5 Improve mental health;
- 1.7.6 Combat HIV and AIDS, Malaria and other diseases;
- 1.7.7 Ensure environmental sustainability; and
- 1.7.8 Develop a global partnership for development.

1.8 The role of public hearings within the broader mandate of the Commission is significant. In applying a rights based approach, people become part of the process; they are active participants; and the process itself becomes a tool for empowerment. This aims to close the gap between human rights as entrenched in the Constitution and lived experiences.

In order for this to become a reality, the public hearings process itself should be as accessible as possible. Inclusivity is a core principle in ensuring the effectiveness of the process and the legitimacy and validity of any outcome.

This process should also be located within the broader public participation provisions of the Constitution, which are important components of any democratic process. These include public participation in policy making, law making and service delivery through, for example: involvement in and access to the National Assembly (section 59), provincial legislatures (section 118) and the general principle governing public administration that “[p]eoples needs must be responded to and the public must be encouraged to participate in policy-making” (section 195 (1) (e)).

Regard should also be had to the right of access to information entrenched in section 32 of the Constitution. The relevant enabling legislation is the Promotion of Access to Information Act, 2 of 2000. Apart from the objective of increased public participation, the legislation drives the aspirant objectives of transparency and increased accountability and integrates principles of sound corporate governance in both the public and private sector.

1.9 Further details are set out in paragraph 3 below concerning the Terms of Reference and paragraph 4 containing the Rules and Procedures.



2. Mandate and Powers of the Commission and Obligations of Organs of State

2.1 In terms of section 184 (1) of the Constitution, the Commission is mandated to: “ (a) promote respect for human rights and a culture of human rights;

(b) Promote the protection, development and attainment of human rights; and

(c) monitor and assess the observance of human rights in the Republic.”

2.2 The Commission has a specific mandate in terms of section 184 (3) of the Constitution to monitor and assess the realisation of economic and social rights. section 184 (3) provides that each year the Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights of the Constitution concerning housing, health care, food, water, social security, education and the environment.

2.3 In referring to the Chapter 9 institutions established to support constitutional democracy, section 181 (3) of the Constitution requires that “[o]ther organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions.”

2.4 Section 4 (1) and (2) of the South African Human Rights Commission Act, 54 of 1994 (“the Commission’s Act”), states that:

“(2) No organ of state and no member or employee of an organ of state nor any other person shall interfere with, hinder or obstruct the Commission, any member thereof or a person appointed under section 5 (1) or 16 (1) or (6) in the exercise or performance of its, his or her powers, duties and functions.

(3) All organs of state shall afford the Commission such assistance as may be reasonably required for the protection of the independence, impartiality and dignity of the Commission.”

Furthermore, section 7 (2) of the Commission’s Act provides that “[a]ll organs of state shall afford the Commission such assistance as may be reasonably required for the effective exercising of its powers and performance of its duties and functions.”

Finally, the Act states in section 18 that a person who:

“(i) fails to afford the Commission the necessary assistance referred to in section 4

(3) or 7 (2); ...

shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding six months.”

3. Terms of Reference

3.1 The Commission monitors and assesses the observance of human rights not only to comply with the dictates of the Constitution but also to achieve specific objectives, namely:

3.1.1 To determine the extent to which the organs of the State have respected, protected, promoted and fulfilled human rights;

3.1.2 To determine the reasonableness of measures including legislation, by-laws, policies and programmes adopted by organs of the State to ensure the realization of human rights in the country; and

3.1.3 To make recommendations that will ensure the protection, development and attainment of human rights.

3.2 The Commission has drafted a working document which is be available online at <http://www.sahrc.org.za> and will be attached to specifically directed requests to relevant national and provincial government departments. It is requested that interested parties access this working document to further inform their written submissions.

3.3 The purpose of the abovementioned working document is to critically assess the progress in respect of the realisation of economic and social rights in the context of South Africa’s commitment to meeting the Millennium Development Goals. The discussion also tentatively addresses what should be done to change the momentum from quantitative assessments to a qualitative improvement in the lives of human rights beneficiaries.



3.3 It is requested that all submissions be guided by the following two principles and respond to the questions raised:

3.3.1 Providing an assessment of the progress the state has made in the realisation of economic and social rights, not only from a point of access or a quantitative assessment, but in terms of qualitative improvement; and

3.3.2 Providing an understanding of the content of the obligation placed on the state to achieve the “progressive realisation” of economic and social rights. This should be illustrated by reference to policies and plans aimed at achieving

this objective and specifically demonstrated by reference to their practical implementation.

3.4 It is requested that in considering these two guiding principles that submissions respond to the following specific questions in relation to the relevant right/s:

3.4.1 What progress has been made by the state in achieving the Millennium Development Goals and in the realisation of economic and social rights;

3.4.2 What is the relevant legislative and policy framework;

3.4.3 Explain the processes of budgetary analysis, planning and expenditure;

3.4.4 Explain information gathering and monitoring systems utilised;

3.4.5 Discuss specific challenges experienced in achieving the Millennium Development Goals and in the realisation of economic and social rights; and

3.4.6 Discuss specific recommendations aimed at effectively responding to the challenges raised in 3.4.5 above.

3.5 It is requested that submissions cover the period from April 2006 to March 2009.

4. Rules and Procedures

4.1 The public hearings will be conducted in terms of the rules of procedure set out below and not in terms of the rules of procedure promulgated in terms of section 9 (6) of the Commission’s Act. These public hearings are not an investigation and inquiry carried out in terms of section 184 (2) of the Constitution as read with section 9 of the Commission’s Act. These public hearings are carried out in furtherance of the Commission’s specific mandate as stated in sections 184 (1) and 184 (3) of the Constitution.

4.2 The Commission calls for submissions from the relevant national and provincial government departments on the matters referred to in the Terms of Reference of these public hearings as set out in paragraph 3 above.

4.3 The Commission further calls for submissions from the public and interested parties including institutions, organisations and individuals on any matters referred to in the Terms of Reference of these public hearings as set out in paragraph 3 above.

4.4 The submissions must be submitted by e-mail, facsimile, hand delivered or posted to the address and contact details stated below in paragraph 5.

4.5 Submissions must be in writing and must disclose the name, address and other contact details of the person or institution making the submission. Anonymous submissions will not be entertained.

4.6 The Commission may publish all submissions.

4.7 The closing date for submissions is 12 May 2009. However, the Head of the Research, Documentation and Policy Analysis Programme may at her / his discretion consider late submissions.

4.8 The Commission may invite specific individuals, organisations, institutions and any other parties to make documentary and / or oral submissions to the public hearings.

4.9 Panels nominated specifically for each day of the public hearings by the Chairperson or CEO of the Commission will facilitate the public hearings process. The Chairperson or CEO of the Commission or a person designated by the Chairperson or CEO will chair each panel.

4.10 At the conclusion of the public hearings the Commission will finalise its report in terms of section 184 (3) of the Constitution. This report will be made public.



5. Contact Details

Submissions should be addressed to Mrs Rashida Kalake and may be posted, faxed emailed or hand delivered to the Commission as follows:

Postal Address

Private Bag X2700
Houghton
2041
Parktown
Johannesburg, 2198

Physical Address

The Human Rights House
Princess of Wales Terrace
Cnr St. Andrews and York Streets

Per e-mail: rkalake@sahrc.org.za

Per facsimile: 086 635 2331

For further information regarding submissions and/or the hearings, kindly contact Mrs Rashida Kalake on:

Tel: (011) 484 8300 Ext. 2005

Fax: 086 635 2331

Email: rkalake@sahrc.org.za





List of written submissions

Submissions from Organisations	
1	Compassion in World Farming / Humane Education Trust
2	Department of Tourism, Environment and Conservation (Northern Cape)
3	groundWork / Friends of the Earth South Africa
4	KwaZulu-Natal Subsistence Fishers Forum
5	South Durban Community Environmental Alliance
6	Animal Rights Africa
7	Centre for Applied Legal Studies
8	Legal Resources Centre
9	Department of Agriculture, Conservation and Environment (Gauteng)
10	University of Witwatersrand (Environment, Water & Food)
11	Department of Environmental Affairs and Development Planning (Western Cape)
12	The Federation for a Sustainable Environment
13	Department of Water and Environmental Affairs
14	Black Sash, Community Agency for Social Enquiry, National Welfare Forum, Studies in Poverty and Inequality Institute
15	Department of Social Environment (Western Cape)
16	Department of Health (National)
17	University of Cape Town: Department of Psychiatry and Mental Health
18	Department of Health (Western Cape)
19	South African National NGO Coalition
20	CANSA
21	University of Witwatersrand: Department of Architecture and Planning
22	Department of Local Government and Housing: Western Cape
23	Women on Farms Project
24	Department of Human Settlements (Mpumalanga)
25	National Department of Human Settlements
26	Black Association of the Agricultural Sector
27	Presentation by Department of Rural Development and Land Reform by Adv. Mngwengwe
28	Centre of Social Development in Africa
29	Department of Basic Education (National)
30	Department of Basic Education (Western Cape)
31	University of KwaZulu-Natal: Faculty of Education
32	Institute for Zero Waste
33	Department of Provincial and Local Government



34	AIDS Legal Network, Reproductive Health and HIV Research Unit, Steve Biko Centre for Bioethics, Sex Worker Education and Advocacy Taskforce
35	Consortium for Refugees and Migrants in South Africa
36	Disabled Children's Action Group
37	University of Western Cape / Belhar Community Health Forum
38	Cerebral Palsy Association
39	Legal Resources Centre
40	Statistics South Africa
41	Community Agency for Social Enquiry
42	Epilepsy South Africa
43	Office of the Premier (Western Cape)
44	Department of Mining
45	Limpopo Provincial Government





List of Organisations Invited to Present

National Government Departments		Attended
Water and Environmental Affairs		Yes
Mining		Yes
Social Development		No
Statistics South Africa		Yes
Health		Yes
Human Settlements		Yes
Rural Development and Land Reform		Yes
Cooperative Governance and Traditional Affairs		Yes
Basic Education		Yes
Provincial Departments		
Gauteng Department of Agriculture, Conservation & Environment		Yes
Western Cape - DSD		Yes
Western Cape - Health		Yes
Western Cape - Housing		Yes
Western Cape - Education		Yes
Civil Society Organisations		
Centre for Applied Legal Studies		Yes
South Durban Community Environmental Alliance		Yes
groundWork		Yes
Legal Resources Centre		Yes
Black Sash		Yes
Studies in Poverty and Inequality Institute		Yes
Consortium for Refugees and Migrants in South Africa		Yes
Steve Biko Centre for Bioethics		Yes
University of Cape Town Department of Psychiatry & Mental Health		Yes
Epilepsy South Africa		Yes
Sangoco		Yes
University of Witwatersrand: Department of Architecture & Planning		Yes
University of KwaZulu-Natal: Faculty of Education		Yes
Disabled Children's Action Group		Yes
Centre of Social Development in Africa		Yes
Community Agency for Social Enquiry		Yes
Black Association of the Agricultural Sector		Yes



**Public hearing programmes
Environment, Water and Food**

SOUTH AFRICAN HUMAN RIGHTS COMMISSION

**PUBLIC HEARINGS ON MILLENNIUM DEVELOPMENT GOALS AND THE REALISATION OF
ECONOMIC AND SOCIAL RIGHTS IN SOUTH AFRICA**

PROGRAMME: ENVIRONMENT, WATER AND FOOD

<i>Date:</i>	<i>08 June 2009</i>
<i>Venue:</i>	<i>6th Floor, Training Centre, Human Rights House</i>
<i>Facilitator:</i>	<i>Ms Christine Jesseman, Head of Programme: Research, Documentation and Policy Analysis, SAHRC</i>
08:30 – 09:30	<i>Registration and Tea</i>
09:30 – 09:45	Welcome and Opening Remarks: Dr Jody Kollapen, Chairperson, SAHRC
09:45 – 10:05	Mr Helgard Muller (Chief Director: Water Services) and Ms Tamie Mpotulo (Chief Director: National Sanitation Programme Unit): National Department of Water and Environmental Affairs
10:05 – 10:25	Questions from the Panel
10:25 – 10:45	Adv Pieter Alberts (Head of Legal Services) and Ms Stephinah Madau (Acting Chief Director: Mineral Policy): National Department of Mining
10:45 – 11:05	Questions from the Panel
11:05 – 11:20	<i>Tea</i>
11:20 – 11:40	Public engagement
11:40 – 11:55	Ms Jackie Dugard: Centre for Applied Legal Studies
11:55 – 12:10	Mr Desmond D'Sa: South Durban Community Environmental Alliance
12:10 – 12:25	Mr Bobby Peek: groundWork
12:25 – 12:40	Ms Naseema Fakir & Dr Koos Pretorius: Legal Resources Centre
12:40 – 13:00	Questions from the Panel
13:00 – 13:20	Public engagement
13:20 – 14:20	<i>Lunch</i>
14:20 – 14:50	Mr Pirate Ncube (Chief Director: Sustainable Use of the Environment) and Mr Letebele Sebitloane (Chief Director: Agriculture): Gauteng Department of Agriculture, Conservation and Environment
14:50 – 15:10	Questions from the Panel
15:10 – 15:30	Public engagement
15:30 – 15:40	Summary and Closure: Dr Jody Kollapen, Chairperson, SAHRC



Social Security
SOUTH AFRICAN HUMAN RIGHTS COMMISSION

**PUBLIC HEARINGS ON MILLENNIUM DEVELOPMENT GOALS AND THE REALISATION OF
ECONOMIC AND SOCIAL RIGHTS IN SOUTH AFRICA**

PROGRAMME: SOCIAL SECURITY

<i>Date:</i>	<i>09 June 2009</i>	
<i>Venue:</i>	<i>6th Floor, Training Centre, Human Rights House</i>	
<i>Facilitator:</i>	<i>**</i>	
08:30 – 09:30	<i>Registration and Tea</i>	
09:30 – 09:45	Welcome and Opening Remarks	
09:45 – 10:05	National Department of Social Development	
10:05 – 10:25	Questions from the Panel	
10:25 – 10:45	Statistics South Africa	
10:45 – 11:05	Questions from the Panel	
11:05 – 11:20	<i>Tea</i>	
11:20 – 11:45	Public engagement	
11:45 – 12:30	Civil society presentations:	Black Sash
		Studies in Poverty and Inequality Institute
		Consortium for Refugees and Migrants in South Africa
12:30 – 12:50	Questions from the Panel	
12:50 – 13:15	Public engagement	
13:15 – 14:15	<i>Lunch</i>	
14:15 – 14:45	Western Cape Department of Social Development	
14:45 – 15:05	Questions from the Panel	
15:05 – 15:30	Public engagement	
15:30 – 15:40	Summary and Closure	



Health
SOUTH AFRICAN HUMAN RIGHTS COMMISSION

**PUBLIC HEARINGS ON MILLENNIUM DEVELOPMENT GOALS AND THE REALISATION OF
ECONOMIC AND SOCIAL RIGHTS IN SOUTH AFRICA**

PROGRAMME: HEALTH

<i>Date:</i>	<i>10 June 2009</i>
<i>Venue:</i>	<i>6th Floor, Training Centre, Human Rights House</i>
<i>Facilitator:</i>	<i>Ms Simmi Pillay, National Coordinator: Disability, SAHRC</i>
08:30 – 09:30	Registration and Tea
09:30 – 09:45	Welcome and Opening Remarks: Dr Zonke Majodina, Deputy-Chairperson, SAHRC
09:45 – 10:15	Dr KS Chetty (Deputy Director-General): National Department of Health
10:15 – 10:35	Questions from the Panel
10:35 – 11:00	Public engagement
11:00 – 11:15	Tea
11:15 – 11:30	Ms Marlise Richter: Steve Biko Centre for Bioethics
11:30 – 11:45	Ms Sarah Skeen and Dr. Crick Lund: Dept of Psychiatry & Mental Health, UCT
11:45 – 12:00	Ms Damaris Fritz: Sangoco
12:15 – 12:30	Ms Marina Clarke: Epilepsy South Africa
12:30 – 13:10	Questions from the Panel and the Public
13:10 – 14:10	Lunch
14:10 – 14:30	Prof Keith Househam (Superintendent-General): Western Cape Department of Health
14:30 – 15:00	Questions from the Panel
15:00 – 15:30	Public engagement
15:30 – 15:40	Summary and Closure: Dr Zonke Majodina, Deputy-Chairperson, SAHRC



Land and Housing
SOUTH AFRICAN HUMAN RIGHTS COMMISSION

**PUBLIC HEARINGS ON MILLENNIUM DEVELOPMENT GOALS AND THE REALISATION OF
ECONOMIC AND SOCIAL RIGHTS IN SOUTH AFRICA**

PROGRAMME: LAND AND HOUSING

<i>Date:</i>	<i>11 June 2009</i>
<i>Venue:</i>	<i>6th Floor, Training Centre, Human Rights House</i>
<i>Facilitator:</i>	<i>Ms Christine Jesseman, Head of Programme: Research, Documentation and Policy Analysis, SAHRC</i>
08:30 – 09:30	<i>Registration and Tea</i>
09:30 – 09:45	Welcome and Opening Remarks: Dr Leon Wessels, Commissioner, SAHRC
09:45 – 10:00	Mr Martin Maphisa (Deputy Director-General), Adv Jan Tladi (Chief Director), Mr Litha Jolobe (Chief Director: Transformation): National Department of Human Settlements
10:00 – 10:15	Questions from the Panel
10:15 – 10:30	Mr Yusuf Patel (Deputy Director-General): National Department of Cooperative Governance and Traditional Affairs
10:30 – 10:45	Questions from the Panel
10:45 – 11:00	Adv Vela Mngwengwe: Department of Rural Development and Land Reform
11:00 – 11:15	Questions from Panel
11:15 – 11:30	<i>Tea</i>
11:30 – 12:15	Public engagement
12:15 – 12:30	Ms Marie Huchzermeyer: Department of Architecture & Planning, WITS
12:30 – 12:45	Mr Mohamed Motala: Community Agency for Social Enquiry
12:45 – 13:00	Mr Nosey Pieterse: Black Association of the Agricultural Sector
13:00 – 13:15	Questions from the Panel
13:15 – 14:15	<i>Lunch</i>
14:15 – 14:45	Public Engagement
14:45 – 15:00	Ms Charlene Pretorius (Deputy Director: Project Performance Assessment): Western Cape Department of Housing
15:00 – 15:15	Questions from the Panel
14:15 – 15:35	Public engagement
15:35 – 15:45	Summary and Closure: Dr Pregis Govender, Commissioner, SAHRC



Education
SOUTH AFRICAN HUMAN RIGHTS COMMISSION

**PUBLIC HEARINGS ON MILLENNIUM DEVELOPMENT GOALS AND THE REALISATION OF
ECONOMIC AND SOCIAL RIGHTS IN SOUTH AFRICA**

PROGRAMME: EDUCATION

<i>Date:</i>	<i>12 June 2009</i>
<i>Venue:</i>	<i>6th Floor, Training Centre, Human Rights House</i>
<i>Facilitator:</i>	<i>Ms Christine Jesseman, Head of Programme: Research, Documentation and Policy Analysis, SAHRC</i>
08:30 – 09:30	<i>Registration and Tea</i>
09:30 – 09:45	Welcome and Opening Remarks
09:45 – 10:15	Mr FY Patel (Deputy Director-General: System Planning and Monitoring): National Department of Basic Education
10:15 – 10:40	Questions from the Panel
10:40 – 11:00	Public engagement
11:00 – 11:15	<i>Tea</i>
11:15 – 11:30	Ms Jenni Karlsson: Faculty of Education, UKZN
11:30 – 11:45	Ms Sandra Ambrose: Disabled Children's Action Group
11:45 – 12:00	Ms Lauren Graham: Centre of Social Development in Africa
12:00 – 12:30	Questions from the Panel
12:30 – 13:00	Public engagement
13:00 – 14:00	<i>Lunch</i>
14:00 – 14:20	Mr Ron Swartz (Superintendent-General): Western Cape Department of Basic Education
14:20 – 14:50	Questions from the Panel
14:50 – 15:20	Public engagement
15:20 – 15:30	Summary and Closure



(Footnotes)

- 1 Pre-audit outcomes
- 2 South Africa has no official poverty line (a fact of significant debate at the hearings). For the purposes of addressing this indicator this report uses a figure of R365 per month in 2007 constant Rand terms.
- 3 All statistics have been rounded off. Shaded areas indicate the unavailability of data.
- 4 UNICEF. *The State of the World's Children*, (2008).
- 5 Child (up to five years of age) mortality rate as expressed per 1 000 births.
- 6 Countdown to 2015 Core Group. *Countdown to 2015 for maternal, newborn, and child survival: the 2008 report on tracking coverage of interventions*. The Lancet. 2008. 371: 1247-58.
- 7 Infants (up to one year old) mortality rate as expressed per 1 000 births.
- 8 The World Health Organisation, <<http://www.who.org/>>.
- 9 Presidency of South Africa (note 296 above).
- 10 Health Systems Trust, health statistics, <www.hst.org.za/healthstats/31/data>.
- 11 Actuarial Society of South Africa website: <<http://www.assa.co.za/>>.
- 12 Statistics South Africa (note 292 above).
- 13 Ibid.
- 14 Ibid.
- 15 Department of Health (note 273 above).
- 16 National Department of Health. *The National HIV and Syphilis Sero-Prevalence Survey 2007*, (2008).
- 17 Ranked from lowest to highest prevalence rate according to 2008 statistics. Those provinces showing a decline are colour coded blue.
- 18 It is interesting to note that in the submission from the Western Cape Department of Human Settlements, this figure is made up of new houses and serviced plots, but is reported as new houses on the website.

Notes





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