

## **CHAPTER ONE**

### **THE THIRD MONITORING CYCLE**

#### **1 BACKGROUND**

The Constitution requires the state to “respect, protect, promote and fulfil the rights in the Bill of Right.”<sup>1</sup> In terms of section 184(1)(c) of the Constitution, the South African Human Rights Commission (hereinafter the Commission) is required to monitor and assess human rights. Section 184(3) provides that "each year, the Human Rights Commission must require relevant organs of state to provide information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment."

The South African Human Rights Commission has established a monitoring system in respect of the above. The system has been in place since 1997 and this is the third Report covering the period 1 April 1999 to 31 March 2000. The third set of protocols was distributed from 30 June 2000 to 7 July 2000 to fulfil the requirements of section 184(3) of the Constitution referred to above. The data obtained was used to compile the Report, which has to be submitted to Parliament.

#### **2 DEVELOPMENT OF PROTOCOLS**

In preparation for the third reporting cycle the researchers in the Research and Documentation Department of the Commission developed the protocols. The Commission organised a national workshop to discuss the third reporting cycle on 29 March 2000, which was attended by relevant organs of state and organs of civil society. Organs of state were sent copies of the draft protocols beforehand in order to enable them to prepare for the workshop. The objectives of the workshop were to discuss:

- the reporting process in line with section 184 (3) of the Constitution.
- questions, comments and suggestions made by organs of state and organs of civil society on the monitoring process and the contents of the protocols.

The comments and suggestions from the workshop were incorporated into the protocols for further refinement. Thereafter the protocols were sent to relevant national and provincial government departments from 31 June 2000 to 7 July 2000. The relevant government departments were given until 31 August 2000 to submit their responses to the Commission.

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<sup>1</sup> Section 7(2) of the Constitution Act 108 of 1996.

### **3 CONTENT AND FORMAT OF THE PROTOCOLS**

The protocols for the third cycle had six sections. The sections were designed to monitor and assess the measures taken by organs of the state to respect, protect, promote and fulfil economic and social rights and the outcomes of current measures to realise economic and social rights. A copy of a protocol is included as an Appendix to this report. The protocols are divided into the following sections:

- Policy measures
- Legislative measures
- Budgetary measures
- Outcomes
- National Action Plan<sup>2</sup>
- Monitoring systems<sup>3</sup>
- Additional information<sup>4</sup>

Questions in the protocols required detailed information on measures implemented in the reporting period, as well as an explanation of the way the measures provided for the obligations to respect, protect, promote and fulfil relevant economic and social rights. Specific questions were also asked on special considerations in the measures that were given to socially and economically vulnerable groups. These groups included:

- persons living in rural areas
- persons living in informal settlements
- homeless persons
- female-headed households
- women
- children
- persons with disabilities
- older persons
- persons living with HIV/AIDS
- previously disadvantaged racial groups including indigenous groups

An explanatory memorandum meant to assist government departments in preparing their responses was prepared and attached to the protocols. The memorandum stated the Commission's mandate, explained concepts used in the protocols, and outlined the format of the responses. The departments were required to prepare and send the reports in both hard copy and electronic form.

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<sup>2</sup> The National Action Plan for the Promotion and Protection of Human Rights lists challenges, which have to be addressed by government department. Therefore indicators were developed in that regard.

<sup>3</sup> Refer to internal systems which government departments have put in place to determine progress in the realisation of economic and social rights.

<sup>4</sup> Organs of state were also required to provide additional information on the realisation of economic and social rights that the above sections have not covered.

The rights covered by the third cycle of protocols were:

- Education, including basic and further education
- Environment
- Food, including basic nutrition
- Health care, including basic health care services for children
- Housing
- Land
- Social Security and Social Assistance, including social services for children
- Water

#### **4 THE DISTRIBUTION PROCESS**

To facilitate the monitoring process, letters were written to relevant Cabinet Ministers, Premiers and Members of Executive Councils (MECs) in the provinces. The purpose of the letters was to inform Ministers, Premiers and MECs about the Commission's economic and social rights monitoring process. The Directors-General at the National level and Heads of Departments in the provinces were sent protocols and were required to provide names of contact persons from their relevant departments who would liaise with the Commission on various issues pertaining to the protocols.

Follow-up telephone calls were made to confirm whether all the targeted officials had received the protocols. The contact persons were advised to contact the Research and Documentation Department if they required clarity on the content of the protocols. Correspondence between the Commission and organs of state was recorded and kept by the Commission.

The departments were given two months to compile appropriate responses to the protocols. The due date for the submission of the responses was 31 August 2000. Some government departments requested extensions in writing for the submission of the responses. Written requests for extensions were accepted and extensions for the period up to 15 September 2000. However after this date some departments still had not submitted their reports. The Commission decided to write letters to Cabinet Ministers, Premiers and MECs of the respective departments, which had failed to meet the second deadline for the submission of the reports. Cabinet Ministers, Premiers and MECs responded that they would follow up with the relevant departments and in the interim required an extension for the submission of the reports. A third due date of 31 October 2000 was given as the last and final date for submission for all departments that had not submitted their responses.

Some departments such as the national Department of Finance reported that they did not receive the protocols. In these instances, and where such

reports were found to be valid, the protocols were then faxed or e-mailed again to those departments.

## **5 SUBMISSION DATES FOR THE RESPONSES FROM GOVERNMENT DEPARTMENTS**

Out of 68 departments that had been sent protocols, only 15 submitted their reports within the required time. The following were the submission dates for both national and provincial departments.

**Table 1** Dates of receipt of responses from national government departments

<b>National Departments</b>	<b>Date received</b>
1. Provincial and Local Government	30 August 2000
2. Agriculture	1 September 2000
3. Environmental Affairs	15 September 2000
4. Water Affairs and Forestry	15 September 2000
5. Education	19 September 2000
6. Social Development	29 September 2000
7. Correctional Services	11 November 2000
8. Health	14 November 2000
9. Housing	14 November 2000
10. National Treasury	10 January 2001
11. Land Affairs	31 January 2001

**Table 2** Eastern Cape Province

<b>Department</b>	<b>Date received</b>
1. Agriculture and Land Affairs	29 August 2000
2. Welfare	13 September 2000
3. Finance	05 October 2000
4. Environment	06 October 2000
5. Housing and Local Government	28 November 2000
6. Education and Training	15 February 2001
7. Health	22 February 2001

**Table 3** Free State Province

<b>Department</b>	<b>Date received</b>
1. Environmental Affairs and Tourism	30 August 2000
2. Finance	31 August 2000
3. Health	31 August 2000
4. Social Welfare	31 August 2000
5. Agriculture	04 September 2000
6. Housing and Local Government	04 October 2000
7. Education	26 October 2000

**Table 4** Gauteng Province

<b>Department</b>	<b>Date received</b>
1. Health	31 August 2000
2. Social Services and Population Development	04 September 2000

Department	Date received
3. Finance	06 September 2000
4. Education	02 October 2000
5. Agriculture and Land Affairs	09 January 2001
6. Environment	09 January 2001
7. Development Planning and Local Government	09 January 2001
8. Housing	31 January 2001

**Table 5 KwaZulu-Natal Province**

Department	Date received
1. Housing	30 August 2000
2. Finance	30 August 2000
3. Health	11 September 2000
4. Social Services and Population Development	25 October 2000
5. Agriculture and Environment	25 January 2001
6. Traditional Affairs and Local Government	30 January 2001
7. Education and Culture	23 February 2001

**Table 6 Mpumalanga Province**

Department	Date received
1. Health	30 August 2000
2. Finance	19 October 2000
3. Housing and Land Administration	10 October 2000
4. Agriculture, Conservation and Environment	12 October 2000
5. Education	31 October 2000
6. Social Services and Population Development	26 January 2001
7. Local Government and Traffic	26 January 2001

**Table 7 Northern Cape Province**

Department	Date received
1. Housing and Local Government	01 September 2000
2. Education	11 September 2000
3. Health	15 September 2000
4. Finance	19 October 2000
5. Agriculture, Conservation and Environment	18 January 2001
6. Welfare	19 January 2001

**Table 8 Northern Province**

Department	Date received
1. Housing and Local Government	16 October 2000
2. Finance	08 December 2000
3. Health and Welfare	16 January 2001
4. Agriculture and Environment	16 January 2001
5. Education	Matter still pending <sup>5</sup>

**Table 9 North West Province**

Department	Date received
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<sup>5</sup> The Department had made an undertaking that it will appear on the scheduled date but failed to appear or give reasons for not appearing. As a result the panel that presided over the hearing made a ruling that the matter be referred to the Director of Public Prosecution. The matter was indeed referred and is still pending.

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Department	Date received
1. Agriculture and Environment	06 September 2000
2. Social Services and Population Development	15 September 2000
3. Developmental Local Government and Housing	25 October 2000
4. Health	31 January 2000
5. Education	07 February 2001
6. Finance	12 February 2001

**Table 10 Western Cape Province**

Department	Date received
1. Health and Welfare	30 August 2000
2. Economic Affairs, Agriculture and Tourism	30 August 2000
3. Finance	31 August 2000
4. Housing and Local Government	31 August 2000
5. Environmental and Cultural Affairs	29 September 2000
6. Education	06 October 2000

## 6 THE SUBPOENA PROCESS

There were still outstanding reports after the 31 October 2000 deadline. The Commission therefore decided to issue subpoenas against the departments that failed to submit their reports by the 31 October 2000 deadline.

The subpoenas were issued on the 23 November 2000.<sup>6</sup> The subpoenas required those departments to appear before the Commission in their respective provinces. The hearings were scheduled as follows:

**Table 11 Hearings Scheduled for 09 and 10 January 2001, National**

National Department	Director-General
Land Affairs	Dr Mayende
National Treasury	Ms. Ramos

**Table 12 Hearing Scheduled for 09 and 10 January 2001, Gauteng**

Department	HODs
Development Planning and Local Government	Mr. Mavuso
Agriculture, Conservation and Environment	Ms. Hannekom
Housing	Mr. Buthelezi

**Table 13 Hearing Scheduled for 12 January 2001, North West**

Department	HODs
Health	Dr Gosnell
Education	Dr Karodia

<sup>6</sup> The Commission's messenger served the subpoenas for the Gauteng Province and those for national departments. The Commission's Provincial Co-ordinators served the subpoenas for Northern Province and KwaZulu-Natal and the Sheriffs served subpoenas for the North West, Northern Cape, Mpumalanga and Eastern Cape provinces.

Finance	Mr. Tjie
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**Table 14 Hearing Scheduled for 16 January 2001, Northern Province**

Department	HODs
Welfare	Mr. Thobejane
Education	Prof. Nengwenkhulu
Agriculture, Land and Environment	Mr. Masikwa

**Table 15 Hearing Scheduled for 19 January 2001, Northern Cape**

Department	HODs
Welfare	Mrs. Standaar
Nature Conservation, Agriculture and Environment	Dr. Nombekela

**Table 16 Hearing Scheduled for 30 January 2001, KwaZulu-Natal**

Department	HODs
Traditional and Local Government	Adv. Raubenheimer
Agriculture and Environment	Mr Strauss
Education and Culture	Mr de Bruin <sup>8</sup>

**Table 17 Hearing Scheduled for 1 February 2001, Eastern Cape**

Department	HODs
Education and Training	Mr. Qokweni
Health	Mr.Mjekevu

**Table 18 Hearing Scheduled for 6 February 2001, Mpumalanga**

Department	HODs
Social Services and Population Development	Mr Mabilo
Local Government and Traffic	Mr Vilane

As a result of the subpoenas, some departments submitted their reports before the scheduled hearing dates while others submitted on the dates of the hearings. The KwaZulu-Natal department of Agriculture and Environment was exempted from the hearing because it reported that it had submitted its report before the second deadline (15 September 2000) and produced proof to that effect. The subpoena was therefore withdrawn. The Commission concluded that all the departments that did not submit their reports on the last extended deadline and had thus been subpoenaed had to appear in the hearings, irrespective of whether they had submitted their reports prior to the hearings. The Commission's view was that failure to submit the report on the set dates constituted non-compliance with section 184(3) of the Constitution, and that those organs of state that failed

<sup>7</sup> He was not available on the scheduled date, hence the hearing was postponed to the above-mentioned date.

<sup>8</sup> Ibid.

to comply, should appear for a hearing to provide reasons for failing to submit the report on time.

## **7 SUBPOENA HEARINGS**

The reason of having the hearings was twofold:

- For departments to account for their failure to comply with the request of the Commission as set out in Section 184(3) of the Constitution of South Africa
- To submit to the Commission reports as required in terms of section 184(3) and any other relevant information

### **7.1 Procedure at the Hearings**

The hearings were held in different provinces. Commissioner McClain who is responsible for Economic and social rights was present in all the hearings. Commissioners responsible for the various provinces chaired the hearings.

**Table 19 Chairpersons for the hearings in the Provinces**

<b>Commissioner</b>	<b>Province</b>
Ms Mabusela	Gauteng
Ms Tlakula	North West
Mr Kollapen	Northern Province
Mr Wessels	Northern Cape
Mr Manthata	Eastern Cape
Mr Govender	KwaZulu-Natal
Ms McClain	Mpumalanga

At the commencement of the proceedings the chairperson outlined the procedure, aims and objectives of the hearing. The Commission through its legal team led evidence outlining the steps taken by the Commission in soliciting information or reports from government departments in terms of section 184(3) of the Constitution. The government departments were also requested to submit the full and correct report of the responses to the protocols at the hearing. After all information and evidence had been presented, the respondents were allowed to make concluding statements. The hearing was thereafter adjourned for a short break to allow the panel to deliberate on the evidence presented. After reconvening, the chairperson handed down the ruling requiring government departments to submit plans of action on measures they will take to avoid appearing before the Commission's hearing in future.

## **8 EVALUATION OF THE RESPONSES**

### **8.1 Methodology**

The actual process of evaluating responses from government departments began in April 2001. The Commission through the Research and Documentation Department evaluated responses from government departments. The government responses formed the basis of the entire

evaluation process. However prior to the evaluation of government responses to the protocols, the Commission conducted independent research. This involved the Commission finding out any relevant information for the year under review relating to the rights to be analysed. The information solicited from government and non-governmental organisation reports, journals and the websites was used to supplement and verify the information from government departments.

## **9 THE STRUCTURE OF THE REPORT**

There are some structural differences between the second and third economic and social rights reports. The third report has an overview section, which precedes the section on the analysis of responses from organs of state. The overview section serves two main purposes; the first part of the overview elucidates on the meaning of the socio-economic right under discussion. The reason for including this part is the growing realisation on the part of the Commission that there continues to be a need to shed meaning on the nature of the rights. The second part of the overview highlights key developments that took place during the reporting period.

The analysis section in the respective chapters has the following subsections:

- Policy measures, programmes and related services
- Legislative measures
- Budgetary Measures
- Outcomes
- National Action Plan
- Monitoring

Each of the above sections, with the exception of the monitoring section is further subdivided into the following subsections:

- Summary of Measures
- Critique
- Recommendations

The subsection on the summary of the measures provides a synopsis of the different measures instituted by government departments during the year 1 April 1999 to 31 March 2000. In instances where insufficient information was provided by government departments other sources were used to supplement the information.

One of the concerns raised with the second economic and social rights report was that the critique focussed heavily on reporting by organs of state, and did not provide an assessment of the measures. In this report therefore, a distinction is made between the critique that is directed at reporting by the state and critique channelled towards the policies, programmes and legislation instituted. The same is the case with the

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section on recommendations in that some recommendations relate to areas where organs of state need to improve reporting, and others concentrate on the content of measures to realise the rights.

The first part of the critique section analyses the information provided in terms of the questions asked in the protocol, and whether any information was provided. The second part of the critique analyses the measures in terms of meeting the constitutional obligations as informed by the relevant norms and standards, including international instruments. The section also examines whether the measures progressively realise the right, and the reasonableness and effectiveness of the measures.

The first type of recommendations deal with whether organs of state have provided the required information and assesses the quality of the responses. The second one outlines the challenges that should be addressed, and steps that need to be taken in order to meet the Constitutional obligations of the right concerned. The section also highlights actions that need to be undertaken by the departments to progressively realise the right.