

CHAPTER ONE

THE MONITORING PROCESS

Each year, the South African Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of rights concerning housing, health care, food, water, social security, education and the environment.¹

1. BACKGROUND

Section 184(3) of the Constitution obliges the South African Human Rights Commission (herein after the Commission) each year to request information from relevant organs of state on measures taken by such organs in the realisation of socio-economic rights. In pursuance of this mandate, the Commission published its first report in March 1999.

This report represents part of the second cycle of monitoring of socio-economic rights by the Commission. The period monitored by the Commission for the second socio-economic rights report is from 1 April 1998 to 31 March 1999.

2. DEVELOPMENT OF PROTOCOLS

2.1 Process

As part of the second cycle of monitoring and assessing the realisation of socio-economic rights, the Commission drafted its second monitoring instruments or questionnaires, referred to as 'protocols' (Appendix 1 contains a sample protocol). Dr Richard Shillington, a Canadian consultant specialising in the quantitative analysis of health, economic and social policy, joined the Commission on 22 June -9 July 1999 for approximately two weeks, and assisted in the further development and refinement of the protocols. He also advised on the development of information gathering and monitoring systems. This process helped to develop protocols requiring detailed information, which signalled a change of emphasis from a minimal to maximum approach for both the Commission and organs of state.

The draft protocols were sent to a number of non-governmental organisations for comments and suggestions. After further refinement, the protocols were sent to relevant Government departments at national and provincial spheres of Government on 06 August 1999. Relevant Government departments were given until 6 October 1999 to submit their responses to the Commission.

¹ Section 184 (3) of the *Constitution*, Act 108 of 1996.

2.2. Content and format of protocols

While the first set of protocols was divided into nine sections, the protocols for the second cycle only had six sections dealing with different themes. The themes were designed to monitor and assess the measures taken by organs of the state to respect, protect, promote and fulfil socio-economic rights. The protocols were thus sub-divided into the following themes:

- Policy measures
- Legislative measures
- Definition and monitoring of the minimum standards established for the realisation of socio-economic rights
- Budgetary measures
- Outcomes (results) of the measures taken
- Additional information on the realisation of economic and social rights that has not been included in the above sections.

Questions in the protocol required detailed information on measures implemented in the reporting period, as well as an explanation of how such measures provided for the respect, protection, promotion and fulfilment of the relevant socio-economic rights. Specific questions were also asked of the Departments on measures taken towards the realisation of socio-economic rights for socially and economically vulnerable groups. These groups included:

- People living in rural areas
- People living in informal settlements
- Homeless persons
- Female headed households
- Women
- Persons with disabilities
- Older persons
- Persons with HIV/AIDS
- Children
- Formerly disadvantaged racial groups (Africans, Coloureds, Indians)

An explanatory memorandum meant to assist government departments in preparing their responses was prepared and attached to the protocols. The explanatory memorandum stated the Commission's mandate, explained certain concepts, and outlined the format of the responses. The Departments were required to prepare and send the reports in both hard copy and electronic form. Suggestions on the layout, content and structure were elicited from government departments, to improve on the protocols.

The main differences between the protocols of the first cycle and the second cycle centred around the use of indicators to measure the accountability of organs of State to socio-economic rights. Although the protocols of the first cycle did pose questions on the impact of policies and legislation, specific outcomes or

results were not required. The present protocols sought to measure these outcomes by means of universally utilised indicators such as literacy rates for education and mortality rates for health. Furthermore, additional indicators were developed that were particularly applicable to the South African scenario. The rationale behind including indicators in the second set of protocols was that the information gathered would aid in assessing the *progressive realisation* of socio-economic rights. Similarly, the development of a separate section on 'Budgetary measures' sought to gather data on the *available resources* that were allocated to fulfil the different rights.

2.3. The rights targeted in the protocols

The socio-economic rights covered by the second cycle of protocols were:

- Education
- Environment
- Food
- Health care
- Housing
- Land
- Social Security and Social Assistance
- Water

Finance and the rights of prisoners in terms of adequate accommodation, nutrition, reading material/education and medical treatment were also covered by relevant protocols.

3. THE DISTRIBUTION PROCESS

3.1 Process

In order to facilitate the monitoring process, letters were written to relevant Cabinet Ministers, Premiers and Directors-General (D-Gs) in various government departments. The purpose of the letters was to inform these officials about the Commission's socio-economic rights monitoring process. The Directors-General were also required to provide names of contact persons from their relevant departments who would liaise with the Commission on various issues pertaining to the protocols.

Protocols were sent to the following National Departments:

Table 1.1: Government Departments that were sent protocols

Departments
Agriculture
Correctional Services
Education
Environmental Affairs and Tourism

Finance
Health
Housing
Labour
Land Affairs
Trade and Industry
Water Affairs and Forestry
Welfare

The protocols were also sent to relevant Departments in all nine provinces. In some of the provinces D-Gs were requested to distribute the protocols to the relevant government departments as indicated in tables 1.4-1.12 below. Follow-up telephone calls were made to confirm whether all the targeted officials and Departments had received the protocols. The contact persons were advised to contact the Research and Documentation Department of the Commission if they required clarity on the content of the protocols. Correspondence between the Commission and the organs of state was recorded and kept by the Commission.

The Departments were given a period of two months to compile appropriate responses to the protocols. The due date for the submission of the responses was 6 October 1999. Some Government departments requested extensions (verbally or in writing) for the submission of the responses. Extensions for only the written requests were granted and extended to 31 October 1999. After this date some Departments requested further extensions and 19 November 1999 was set as the final extension date for all departments that had not submitted their responses. On 10 November 1999, a letter granting the final extension was sent to all the departments that had not submitted their responses. The letter stated that government departments should respond not later than 16h00 on 19 November 1999. The letter also stated that failure to respond to the protocols before this extended due date would result in the Commission serving subpoenas against those departments that would not have submitted their reports.

Table 1.2: Due dates for submission of Government departments' responses

06 October 1999	31 October 1999	19 November 1999	23 December 1999
First deadline for the submission of the responses	First extension granted to the Departments that requested it	Second extension date granted after the final warning before the Departments could be served with subpoenae	Final date of the submissions by the Departments that appeared before the Commission for the hearings

3.2. Problems encountered during the follow-up process

The Commission discovered that most Departments had not received the protocols. Some of the problems that resulted in this situation and thus the delay in the submission of responses by the departments, included the following:

- Some D-Gs delayed in sending the protocols to the Departments in time and some Departments said they were not aware that protocols had been sent and required immediate attention. In response to this situation the Commission faxed and e-mailed protocols to those Departments, and granted the first extension of the due date.
- Other Departments claimed not to have received the protocols, and the protocols were then faxed or e-mailed again to those Departments.

4. SUBMISSION DATES FOR THE RESPONSES FROM THE GOVERNMENT DEPARTMENTS

The following were the submission dates for both the National and Provincial Departments. Most Government departments submitted their responses before the hearings scheduled for 8-10 December 1999:

Table 1.3: National Departments

Departments	Date received
1. Housing	15 October 1999
2. Environmental Affairs	28 October 1999
3. Correctional Services	05 November 1999
4. Education	08 November 1999
5. Labour	11 November 1999
6. Finance	15 November 1999
7. Water Affairs and Forestry	15 November 1999
8. Land Affairs	19 November 1999
9. Health	19 November 1999
10. Agriculture	29 November 1999
11. Welfare	29 November 1999
12. Trade and Industry	30 November 1999

Table 1.4: Eastern Cape Province

Departments	Date received
1. Welfare	26 November 1999
2. Housing and Local Government	06 December 1999
3. Finance	07 December 1999
4. Health	08 December 1999
5. Agriculture and Land	23 December 1999

Affairs	
6. Education and Training	23 December 1999

Table 1.5: Free State Province

Departments	Date received
1. Social Welfare	08 October 1999
2. Education	17 November 1999
3. Local Government and Finance	23 November 1999
4. Agriculture	24 November 1999
5. Health	24 November 1999
6. Environmental Affairs and Tourism	01 December 1999
7. Finance	09 December 1999

Table 1.6: Gauteng Province

Departments	Date received
1. Education	05 November 1999
2. Housing	12 November 1999
3. Agriculture, Conservation and Environment	18 November 1999
4. Development Planning and Local Government	19 November 1999
5. Finance	24 November 1999
6. Health	25 November 1999

Table 1.7: KwaZulu-Natal Province

Departments	Date received
1. Housing	08 October 1999
2. Local Government	13 October 1999
3. Economic/ Finance	17 November 1999
4. Education and Culture	19 November 1999
5. Health	24 November 1999
6. Agriculture	29 November 1999
7. Social Welfare	06 December 1999

Table 1.8: Mpumalanga Province

Departments	Date received
1. Social Services, Population and Development	04 October 1999

2. Economic Affairs	07 October 1999
3. Land Affairs	04 November 1999
4. Local Government	04 November 1999
5. Agriculture	08 November 1999
6. Conservation and Environment	18 November 1999
7. Health	25 November 1999
8. Education	25 November 1999
9. Finance	07 December 1999

Table 1.9: Northern Cape Province

Departments	Date received
1. Health and Welfare	25 November 1999
2. Housing	25 November 1999
3. Economic Affairs	25 November 1999
4. Education	29 November 1999
5. Finance	07 December 1999

Table 1.10: Northern Province

Departments	Date received
1. Local Government	04 November 1999
2. Health and Welfare	15 November 1999
3. Finance	08 December 1999
4. Agriculture and Environment	09 December 1999
5. Housing and Water Affairs	09 December 1999
6. Education	23 December 1999

Table 1.11: North West Province

Departments	Date received
1. Health	19 November 1999
2. Education	19 November 1999
3. Agriculture	19 November 1999
4. Local Government	25 November 1999
5. Finance	01 December 1999

Table 1.12: Western Cape Province

Departments	Date received
1. Education	12 October 1999
2. Environmental Affairs	20 October 1999
3. Economic Affairs, Agriculture and Tourism	19 November 1999

4. Environmental and Cultural Affairs	19 November 1999
5. Finance	22 November 1999
6. Planning and Local Government	06 December 1999
7. Health and Welfare	06 December 1999

5. THE SUBPOENA PROCESS

Subpoenas were issued on the 23 November 1999 to all the departments that had failed to submit their reports. The subpoenas were faxed and were also served by the Sheriffs in all the provinces.

The subpoenas required those departments that had not submitted their reports by the extended due date of 19 November 1999 to appear before the Commission in Johannesburg on 8, 9 or 10 December 1999.

Table 1.13: Hearings Scheduled for the 8 December 1999

Department	HODs/ MECs	Province
Agriculture	Dr Mohlahlane	Free State
Environment Affairs	Mr Matsebula	Free State
Finance & Expend.	Mr Barlow	Free State
Health	Prof. Househam	Free State
Trade and Industry	Mr Roberts	National
Finance	Dr Nyathi	Mpumalanga
Local Govt. & Traffic	Mr Vilane	Mpumalanga
Health	Dr Karim	Mpumalanga
Education	Mr Hindel	Mpumalanga
Welfare	Ms Bester	National
Agriculture	Mr Mbongwa	National
Social Services	Mr van Wyk	Gauteng
Finance	Mr Maharaj	Gauteng
Health	Dr Mgijima	Gauteng

Table 1.14: Hearings Scheduled for the 9 December 1999

Department	HODs/ MECs	Province
Local Government	Mr Lefatola	North West
Finance	Mr Tjie	North West
Welfare	Ms Khondlo	Eastern Cape
Health	Dr Goqwana	Eastern Cape
Education	Mr Sizani	Eastern Cape
Land Affairs	Mr Mamase	Eastern Cape

Finance	Mr Godongwana	Eastern Cape
Housing & Local Government	Mr Nkwiti	Eastern Cape
Health and Welfare	Dr Sutcliffe	Western Cape
Planning and Local Government	Mr Africa	Western Cape
Health	Prof. Green-Thompson	KwaZulu-Natal
Social Welfare	Mr Mhlongo	KwaZulu-Natal
Agriculture	Mr Kruger	KwaZulu-Natal

Table 1.15: Hearings Scheduled for the 10 December 1999

Department	HODs/MECs	Province
Local Government and Housing	Mr Govender	Northern Cape
Economic Affairs	Mr Perkins	Northern Cape
Education, Arts, Culture	Mr Nkoane	Northern Cape
Health and Welfare	Dr Kistnasamy	Northern Cape
Finance	Mr Makape	Northern Cape
Housing and Water Affairs	Mr Rantete	Northern Province
Finance	Mr Mphahlele	Northern Province
Education	Dr Nengwekhulu	Northern Province
Agriculture	Dr Tau-Mzamane	Northern Province

As a result of the subpoenas, many Departments submitted their reports before the scheduled hearing dates and were therefore released from the subpoenas.² The Department of Health in the Eastern Cape and Department of Education in the Northern Province were required to appear before the Commission, as they did not submit their reports before the hearing. There was no hearing on 8 December as all the organs of states scheduled to appear before the Commission on that date responded before the day of the hearing. On 9 December 1999, the Eastern Cape Department of Health appeared before the Commission. The hearing for the Northern Province Education Department was on 10 December 1999 and the Department was granted an extension for submission until 23 December 1999.

² Due to prior arrangements with the Commission, the Department of Education and the Department of Land Affairs in the Eastern Cape were granted a further extension until 23 December 1999.

5.1. Subpoena Hearings

5.1.1 Legal Background

According to section 9(c) of the South African Human Rights Commission Act,³ the Commission reserves the right to serve subpoenas against any person to come and provide information that may have been required of him/her as provided for in section 184(3) of the Constitution. According to section 18(a) of the South African Human Rights Commission Act, failure or the refusal to furnish the Commission with information is an offence, and legal action can be taken against the party concerned.

The purposes of the Hearings were twofold:

- To allow the respondents to present the Department's submissions.
- To provide the Commission with the opportunity of investigating the reasons given for failure to submit reports.

5.1.2. Procedure at the Hearings

For the hearing scheduled for 9 December 1999 the panel comprised Commissioner Tlakula, Commissioner Tom Manthata, Commissioner Jerry Nkeli and Commissioner Zonke Majodina. The panel for the hearing held on 10 December 1999 consisted of Commissioner Tlakula, Commissioner Jody Kollapan and Commissioner Jerry Nkeli. Commissioner Pansy Tlakula chaired both the hearings.

The respondents were advised of their right to legal representation as provided for in section 9(4) of the South African Human Rights Commission Act. The hearings were conducted as formal legal proceedings; statements and evidence were provided under oath. After formal introductions of the panel and the respondents, the Chairperson explained the purpose and procedures for the hearing. The respondents, with the assistance of their legal representatives, were questioned in relation to their failure to comply with the protocols. Witnesses were called where necessary during the hearings and were questioned accordingly. After all information and evidence had been adduced, the respondents were allowed to make their 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 decisions as discussed below.

5.1.3. Hearing for the Eastern Cape Department of Health held on 9 December 1999

³ South African Human Rights Commission Act 54 of 1994.

The Department stated the following as reasons for failure to comply with the given time frames:

There was confusion in the Department about the protocols. The protocols were given to a junior official who did not forward them to the officials in charge.

The changes and redeployment of personnel within the Department contributed towards the delay in responding to the protocols.

Numerous documents that were received daily by the Department caused confusion, which led to the protocols not being attended to timeously.

Negligence by some staff members resulted in failure to attend to the protocols on time.

After providing the above reasons the Eastern Cape Department of Health made the following submissions during the hearing:

- The report submitted at the hearing was prepared that morning before the departmental representatives came to the hearing.
- The Department apologised unreservedly for its failure to comply with the Commission's requirement.
- The Department pleaded with the Commission for an extension so as to enable it to complete its report that will supplement the incomplete report presented.

5.1.3.1. Ruling by the Commission

The Commission ruled that the Eastern Cape Department should be granted an extension to 23 December 1999 for the submission of the report. In making the ruling, the Commission took a number of factors into consideration. These included the reasons provided for non-submission of the report by the Department, and the fact that the Commission was still expected by Parliament to produce a report notwithstanding the failure by the Department.

The Commission further indicated that failure to comply with the extension would result in criminal legal proceedings instituted in terms of section 18(a) and (i) of the South African Human Rights Commission Act.

5.1.4 Hearing for the Northern Province Department of Education held on 10 December 1999

The Head of Department (HOD) for the Northern Province Department of Education did not attend the hearing as required by the subpoena. The Commission considered whether the HOD should be released from the subpoena because of failure to appear in the hearing.

The Departments' Head of Legal Services told the panel that the HOD could not attend the hearing due to other commitments in the province. He also expressed

apologies on behalf of Professor Nengwekhulu (the HOD), and indicated that he as the relevant person had been delegated by the HOD to appear for the hearing on his behalf and to deal with legal issues.

The Northern Province Department stated the following reasons for failure to comply with the time frames:

- The Department alleged that the protocols were not sent on time, as the Department claimed to only have received the protocols during the first week of December 1999.
- The lack of human resources resulted in the Department being unable to perform its assignment expeditiously.
- The Department's offices are situated in such a way that it is extremely difficult to execute its task. The Department alleged that it was unable to gather the necessary information, as the offices in the province are too far apart.

5.1.4.1. Ruling by the Commission

The Commission acknowledged the reasons provided by the Department for failure to comply with the time frames. On the basis of the given evidence, the Commission found that the respondents received the socio-economic rights protocols during the month of August 1999 and not December 1999 as alleged.

The Commission ruled that:

- the respondents be given until 23 December 1999 to submit their report.
- failure to comply with the above shall result in criminal action being instituted against the respondents on the basis of section 18(a) and (i) of the South African Human Rights Commission Act.
- the Head of Department was not released from the subpoena and still needed to appear before the Commission.

5.2. Conclusion from the Subpoena Process

The negligence and lack of commitment displayed by the government departments in question, reflects a lack of awareness and commitment towards the socio-economic rights monitoring role of the Commission. The officials in the respective government departments need to take the provisions of section 184(3) of the Constitution seriously and appreciate their constitutional function and duty to the Commission in this regard.

6. EASTERN CAPE DEPARTMENT OF HOUSING REPORT

The Eastern Cape Department of Housing and Local Government was one of the Departments that were served with subpoenas for not complying with the provisions of section 184(3) of the Constitution within the requisite time-frame.

However, the afore-mentioned Department was released from the effects of the subpoena upon the Commission receiving what was purported to be the Department's report.

The report was e-mailed to the Commission and the message accompanying the attached report from the Department read "Please find attached a copy of the response by the Department of Housing and Local Government in the Eastern Cape regarding [the] House Survey." The Department also sent a hard copy of the report signed by Andre Daniels, who purported to be the person who compiled the report. However, the MEC for the Eastern Cape Department of Housing and Local Government, Mr G. E. Nkwinti, who was meant to confirm the report, did not sign the report in question.

One of the researchers in the Commission upon reading the report discovered that the Eastern Cape Housing and Local Government Report was an exact replica of the report submitted by the National Department of Housing. The HOD of the Research and Documentation Department of the Commission compared the two reports, and apart from the titles the reports were identical. The title of the Eastern Cape report read "Province of the Eastern Cape Department of Housing and Local Government: Socio-Economic Rights Protocol April 1998 to March 1999". The HOD verified that the report received was the only report that was submitted by the Eastern Cape Department.

The Complaints Committee of the Commission discussed the matter and it was agreed that the conduct of the concerned officials in the Eastern Cape Department was dishonest and fraudulent and constituted a criminal offence in terms of section 18 of the South Africa Human Rights Commission Act. The Committee then approached the office of the Director of Public Prosecutions to institute criminal proceedings against the officials responsible for this conduct. The Committee also decided that the Premier of the Eastern Cape, the MEC responsible for the Eastern Cape Department of Housing and Local Government, the relevant Portfolio Committee in the Eastern Cape Provincial Legislature, the President, the Minister of Provincial and Local Government and the Speaker of Parliament and National Minister of Housing should be duly informed. A letter was sent to all the afore-mentioned people to inform them about the report. Affidavits were written by the HOD of the Research and Documentation Department and one of the researchers, and were sent together with the letter to the Premier of the Eastern Cape, the MEC for Housing, Director of Public Prosecutions and Chairperson of the Portfolio Committee in the Eastern Cape.

In response the MEC of Housing and Local Government in the Eastern Cape sent a letter to the Commission stating that the Department will avail the required information if still sought. The Department also requested that the Commission withdraw the charge laid against them. The Commission forwarded the letter to the Acting Director of Public Prosecutions in the Eastern Cape. The Commission informed the MEC that the matter is now being handled by the Director of Public

Prosecutions therefore it is unable to grant their wish. The Department of Public Prosecutions in the Eastern Cape sent a letter stating that the matter is still being investigated, and the Commission will be duly informed about the decision taken after the investigations have been completed. When this report was compiled the Commission was still awaiting the decision from the Acting Director of Public Prosecutions of the Eastern Cape.

7. EVALUATION OF THE RESPONSES

The process of evaluating governmental responses to the protocols began in mid December 1999. In the previous evaluation, the Commission collaborated with other organisations. However, for the second cycle, the Commission decided to employ the resources of its Research and Documentation Department to evaluate the responses from different government departments.

7.1 Methodology

The methodology involved in the evaluation of Economic and Social Rights for the reporting period is based on the protocols issued by the Commission. The government responses to the protocols formed the basis of the analysis and an attempt was also made to verify the information received. The verification of information could not be done sufficiently due to limited resources and time.

7.2 Structure of the Report

Each Economic and Social Right is contained in a separate chapter. The responses of the National and Provincial Departments are combined to present a comprehensive report on the respective right. The chapters are each divided into five major sections, following the format of the protocols. These sections are:

- Policy Measures
- Legislative Measures
- Monitoring
- Budgetary Measures
- Outcome Measures

These sections were each subdivided into the following sub-sections:

- Summary of Responses
- Commentary
- Recommendations

The sub-section on 'Summary of Responses' is a synopsis of the different measures instituted by the government departments during the period 1 April 1998 to 31 March 1999 as per response furnished by each of the relevant organs of state. The summary is presented in a uniform manner based on questions in the protocol, and describes the measures instituted to *respect, protect, promote and fulfil* the right. All of the National responses were analysed in detail. Since

some of the information provided by the provinces was a repetition of information contained in the responses of government departments of other provinces, this information was not repeated in the summary. The responses were also summarised to exclude extraneous information and to provide a consistent presentation of measures and information provided for by the respective Departments. The summary is written to provide the average reader with an idea of what measures were instituted during the reporting period.

The Commission's analysis of the government responses is encompassed in 'Commentary'. On the basis of the protocols, this sub-section analyses the following issues:

- Whether the information provided is sufficient in terms of the questions put to the relevant organs of state. What information has not been provided?
- Whether the measures taken are sufficient in meeting the constitutional obligations as informed by the relevant norms and standards including international ones. Do the measures taken achieve any *progressive realisation* of the right? Are they *reasonable and effective*? Do they cater for vulnerable and previously disadvantaged groups?
- The quality of the response in terms of the government department's appreciation and comprehension of the right.

The challenges that need to be addressed and the steps that need to be undertaken by the Departments to meet the Constitutional obligations to the right are outlined in the 'Recommendations' section. This section deals with whether organs of state have provided information in the required format as requested in the protocols and the quality of the response. Recommendations are also made on what information the Departments should report on, as well as on what measures and action need to be undertaken by the Departments to achieve the *progressive realisation* of the rights.