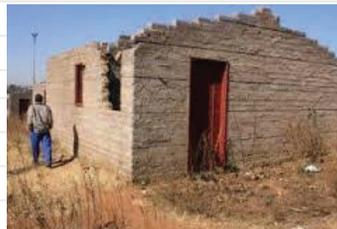


The South African Human Rights Commission Investigative Hearing Report

*Access to Housing, Local Governance
and Service Delivery*

23 – 25 February 2015



“All role players must strive for the establishment of viable, socially and economically integrated communities which are situated in areas allowing convenient access to economic opportunities, health, educational and social amenities and within which South Africa’s people will have access on a progressive basis to: a permanent residential structure with secure tenure, ensuring privacy and providing adequate protection against the elements; potable water and adequate sanitary facilities including waste disposal and domestic electricity supply.”

Joe Slovo, the former Minister of Housing at the signing of the Botshabelo Housing Accord, 27 October 1994.¹

¹ Available at http://www.dhs.gov.za/sites/default/files/documents/BOTSHABELO_ACCORD.pdf.



Report of the South African Human Rights Commission Investigative Hearing

*Access to Housing, Local Governance and
Service Delivery*

23 – 25 February 2015



In re:

South African Human Rights Commission and

Department of Human Settlements

Department of Cooperative Governance and Traditional Affairs

Western Cape Provincial Government

Kwa-Zulu Natal Provincial Government

Gauteng Provincial Government

City of Cape Town

EThekweni Municipality

City of Johannesburg

South African Local Government Association

South African Board of Sheriffs

First Respondent

Second Respondent

Third Respondent

Fourth Respondent

Fifth Respondent

Sixth Respondent

Seventh Respondent

Eighth Respondent

Ninth Respondent

Tenth Respondent

and interested stakeholders:

Legal Resources Centre

Centre for Applied Legal Studies

Studies in Poverty and Inequality Institute

Social Justice Coalition

Abahlali baseMjondolo

South African Shack / Slum Dwellers International Alliance

Local Government Action Network

Ahmed Kathrada Foundation

Prof. Jane Duncan

Prof. Marie Huchzermeyer

TABLE OF CONTENTS

ACKNOWLEDGMENTS	3
IMPORTANT NOTES	4
LIST OF ACRONYMS	5
FOREWORD	7
EXECUTIVE SUMMARY	9
STRUCTURE OF THE REPORT	12
1. INTRODUCTION	13
1.1. Background	15
1.2. Mandate of the SAHRC.....	18
1.3. Methodology and Hearing Procedure	18
1.4. Composition of the Panel	19
1.5. Terms of Reference	20
1.6. Nature and Structure of the Proceedings	20
2. LEGAL FRAMEWORK ON ACCESS TO ADEQUATE HOUSING, LOCAL GOVERNANCE, AND SERVICE DELIVERY	21
2.1. National Legal Framework	21
The Constitution.....	21
The National Housing Act.....	22
Local Government Municipal Structures Act, 1998	22
Local Government Municipal Systems Act.....	23
Prevention of Illegal Eviction from and Unlawful Occupation of Land Act	23
Policies and Regulations	23
Relevant case law.....	26
2.2. International Law.....	28
Universal Declaration of Human Rights	28
International Covenant of Economic, Social, and Cultural Rights.....	29
African Charter on Human and People's Rights.....	30
3. ANALYSIS ON ACCESS TO ADEQUATE HOUSING, LOCAL GOVERNANCE, AND SERVICE DELIVERY	31
4. CHALLENGES IN THE LEGAL AND POLICY FRAMEWORK	32
4.1. Summary of submissions	32
Emergency and Temporary Alternative Accommodation	34
Low- income Rental Housing.....	40
Upgrading informal settlements.....	42
Free Basic Services.....	44
4.2. Analysis.....	46
Analysis of the submissions on Emergency and Temporary Alternative Accommodation	46
Analysis of the submissions on Low- income Rental Housing.....	48

Analysis of the submissions on Upgrading informal settlements.....	49
Analysis of the submissions on Free Basic Services.....	50
5. BUDGET, PLANNING, MONITORING AND EVALUATION	52
5.1. Summary of submissions	52
Budget and Planning.....	52
Monitoring and Evaluation.....	54
5.2. Analysis.....	55
6. COOPERATIVE GOVERNANCE	58
6.1. Summary of submissions	58
6.2. Analysis.....	59
7. LOCAL GOVERNMENT	61
7.1. Summary of submissions	61
7.2. Analysis.....	63
8. SECURITY OF TENURE AND EVICTIONS	64
8.1. Summary of submissions	65
8.2. Analysis.....	66
9. PRIVATE PROPERTY OWNERS AND THE ROLE OF THE PRIVATE SECTOR	67
9.1. Summary of submissions	67
9.2. Analysis.....	68
10. COMMUNITY PARTICIPATION AND PROTEST ACTION	70
10.1. Summary of submissions	70
Community participation and engagement.....	70
Community protest action	73
10.2. Analysis.....	78
11. ACCESS TO JUSTICE	80
11.1. Summary of submissions	80
11.2. Analysis.....	81
12. APARTHEID SPATIAL PLANNING	83
12.1. Summary of submissions	83
12.2. Analysis.....	84
13. FINDINGS	86
14. RECOMMENDATIONS	88
14.1. Legal and Policy Framework	89
Emergency and Temporary Accommodation	89
Low income rental accommodation.....	90
Upgrading Informal Settlements	91
Free Basic Services.....	92
14.2. Budgeting, Planning, Monitoring and Evaluation	93
14.3. Cooperative Governance	94
14.4. Local Government.....	94
14.5. Security of Tenure and Evictions.....	95
14.6. Private Property Owners and the private contractors	96
14.7. Community Participation and Protest Action	97
14.8. Access to Justice	98
14.9. Apartheid Spatial Planning	98
15. CONCLUSION	99

ACKNOWLEDGMENTS

The South African Human Rights Commission (SAHRC) wishes to acknowledge the contribution of many individuals who assisted in the successful completion of this investigation.

Firstly, the SAHRC Commissioners who constituted part of the investigative panel, chaired by Commissioner Mohamed Shafie Ameermia alongside Commissioner Pregs Govender. In addition, the previous Chief Executive Officer, Mr. Kayum Ahmed, and current Chief Executive Officer, Ms. Lindiwe Khumalo, for recognising the need for the SAHRC to host a national investigation of this nature and providing strategic guidance. A vote of thanks is extended to Adv. Stuart Wilson who sat as an external panellist, for providing necessary guidance and expertise on the challenges of realising the rights under investigation.

The SAHRC's Legal Services Unit, namely Ms. Thandiwe Matthews, Ms. Eden Esterhuizen, Mr. Pandelis Gregoriou who designed and managed the research process, conducted the analysis of submissions and produced the written report.

Other staff of the SAHRC provided support to the project in various capacities such as Mr. Peacemore Mhodi and Mr. Khangelani Khubeka (Research Associates at the SAHRC), Mr. Isaac Mangena (Communications), Dr Khulekani Moyo and the Research Unit, Dr Martin Nsibirwa (Senior Manager: Operations) and Ms. Nobesuthu Cekiso, Ms. Nompumelelo Sobekwa and Ms. Sizakele Ntoyi (logistical assistance).

The SAHRC further expresses its gratitude and appreciation to all government departments and staff who submitted information or responded to questions on request, as well as to the various interested stakeholders including community based organisations, non-governmental organisations, research institutes, and academics.

Finally the SAHRC would like to thank all participants who supported the process by providing statements and the many members who contributed their time by attending the hearing to share their experiences.

IMPORTANT NOTES

The specific documentary sources cited vary and include public documents; documents provided freely and openly to the SAHRC; and specific factual quotations or excerpts from communications to the SAHRC.

It should be noted that where information was submitted to the SAHRC or otherwise made available to the SAHRC at a late stage that is after the dates of submission specified in communications with the relevant parties, such information may not be reflected in the report, or may not be reflected in its entirety.

A copy of the official hearing transcript and written submissions provided by the numerous respondents and stakeholders will also be available upon request.

ACRONYMS

AKF	Ahmed Kathrada Foundation
B2B	Back to Basics
CALS	Centre for Applied Legal Studies
CESCR	Committee on Economic, Social and Cultural Rights
CHP	Complaints Handling Procedures
CoCT	City of Cape Town
CoGTA	National Department of Cooperative Governance and Traditional Affairs
CoJ	City of Johannesburg
CRUP	Community Residential Units Programme
CSP	Consolidation Subsidy Programme
DORA	Division of Revenue Act
EHP	Emergency Housing Programme
EPHP	Enhanced People's Housing Process
ET	EThekweni Municipality
FBS	Free Basic Services
FLISP	Financed Linked Individual Subsidy Programmes
GPG	Gauteng Provincial Government
HSDG	Human Settlements Development Grant
HSMP	Human Settlements Master Spatial Plan
ICESCR	International Covenant on Economic, Social and Cultural Rights
IDP	Integrated Development Plan
IHSP	Institutional Housing Subsidies Programme
IRD	Integrated Residential Development Programme
ISP	Individual Subsidy Programme
JOSHCO	Johannesburg Social Housing Company
KZNPG	KwaZulu-Natal Provincial Government

LASA	Legal Aid South Africa
LRC	Legal Resources Centre
LGAN	Local Government Action Network
MEC	Members of the Executive Council
MLGI	Multilevel Governance Initiative
MURP	Mayoral Urban Regeneration Programme
NBRBSA	National Building Regulations and Building Standards Act
NDoHS	National Department of Human Settlements
NDP	National Development Plan
NGO	Non-governmental Organisations
NHBRC	National Home Builders Registration Council
OHCHR	Office of the High Commissioner for Human Rights
PIE Act	Prevention of Illegal Eviction from and Unlawful Occupation of Land Act
PSC	Project Steering Committee
POPS	Public Order Policing Unit
RDP	Reconstruction and Development Plan
RGA	Regulation of Gatherings Act
SABFS	South African Board for Sheriffs
SAHRC	South African Human Rights Commission
SALGA	South African Local Government Association
SAPS	South African Police Service
SASDIA	South African Shack/Slum Dwellers International Alliance
SEFP	Social and Economic Facilities Programme
SERI	Socio-Economic Rights Institute
SHP	Social Housing Programme
SJC	Social Justice Coalition
SPII	Studies in Poverty and Inequality Institute
SPLUMA	Spatial Planning and Land Use Management Act
TRA	Temporary Relocation Accommodation
UDHR	Universal Declaration of Human Rights
UISP	Upgrading of Informal Settlements Programme
USDG	Urban Settlement Development Grant
WCPG	Western Cape Provincial Government

FOREWORD

In 2013-2014 the Deputy Chairperson of the South African Human Rights Commission (SAHRC) Commissioner Pregs Govender, headed a national hearing on water and sanitation. At the conclusion of the national hearing a ground breaking report under the title “Report on the Right to Access Sufficient Water and Decent Sanitation” was released. One of the significant contribution of this national hearing was the identification of challenges faced by local government that had a negative impact on delivering basic municipal services.

The challenges identified included among others, a lack of:

- a) proper governance and budgeting, particularly in the implementation of and spending on projects
- b) co-operative governance between departments jointly responsible for municipal services
- c) capacity and skill (both in the sense of having the adequate knowledge as well as a high vacancy rate in municipalities)
- d) transparency in hiring external contractors and in holding contractors accountable for the quality of services delivered
- e) understanding or implementation of a human rights-based approach to service delivery in respect of transparency and public participation
- f) monitoring and evaluation of projects implemented by local government and
- g) monitoring and evaluation of the utilisation of funds allocated to local government

It is important to point out that even though these issues were identified within the context of access to water and sanitation, the same challenges exist in other service delivery areas, especially with regard to provision of adequate housing.

The national investigative hearing convened by the SAHRC from 23 to 25 February 2015 was intended to examine how the challenges identified above impact on provision of adequate housing. A number of issues with regard to provision of housing were explored and these included:

- » issues of urbanisation
- » town planning
- » the upgrading of informal settlements
- » the role of the private sector
- » the manner in which evictions are effected, and
- » the role of third parties in these processes

The rationale for a broad focus was primarily because the right to have access to adequate housing goes over and beyond the mere provision of bricks and mortar. As noted by the Constitutional Court in *Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC)*, access to adequate housing is intrinsically linked to a number of other cross cutting rights. These include rights such as the right to public participation, equality, human dignity, and access to information. The link between the right to adequate housing and other rights was aptly articulated by Joe Slovo, the first Minister of Housing in post-apartheid South Africa, who at the Botshabelo Accord noted that:

“Government strives for the establishment of viable, socially and economically integrated communities which are situated in areas allowing convenient access to economic opportunities, health, educational and social amenities and within which South Africa’s people will have access on a progressive basis to: a permanent residential structure with secure tenure, ensuring privacy and providing adequate protection against the elements; portable water and adequate sanitary facilities including waste disposal and domestic electricity supply.”

Unless the challenges identified above that clearly undermine service delivery in areas such as access to water, sanitation or adequate housing are addressed, the SAHRC cautions that it will be impossible to achieve the full realisation of Section 26 of the Constitution that guarantees everyone the right to housing.

The SAHRC extends its gratitude to the Deputy Chairperson of the South African Human Rights Commission, Dr Pregs Govender and all those who participated in the hearing. The SAHRC urges all the stakeholders to carefully study the findings and recommendations in this report with a view to fully implementing them to ensure that South Africa is on course to guarantee adequate housing as stipulated in the Constitution. Provision of adequate housing will ensure that the quality of life of everyone is improved, thereby upholding the inherent dignity and worth of every individual as the country forges towards the egalitarian and rights-based society that we all aspire to live in, for:

- » Without rights there cannot be freedom
- » Without freedom there cannot be development
- » Without development, there cannot be transformation



Commissioner Mohamed Shafie Ameerma

**Chairperson of the Panel
SAHRC**

EXECUTIVE SUMMARY

The right of access to adequate housing is guaranteed by a number of national, regional, and international instruments. However, despite the recognition of the importance of this right, millions of people around the world still lack adequate housing and live in conditions which fail to uphold their human rights. In South Africa it is recognised that significant progress has been made since 1994, with the provision of an estimated 3.7 million housing opportunities providing around 12.5 million people with access to housing, along with further improvements in access to other basic services including adequate water, sanitation, electricity, and refuse removal. However despite these gains, the country continues to face significant challenges in providing access to adequate housing to poor and vulnerable persons, many of whom continue to live in deplorable conditions without access to basic services or the economic opportunities required to escape from poverty.

The guarantee of the right to access to adequate housing is found in section 26 of the Constitution,² in terms of which the State is obliged to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of this right. In addition, section 26 provides for a degree of security of tenure by protecting persons against eviction or the demolition of one's home without an order of court made after considering all relevant circumstances.

The South African Human Rights Commission ("SAHRC" or "Commission"), an institution established in terms of section 181 of the Constitution to support constitutional democracy, is specifically mandated to promote the protection, development, and attainment of human rights, as well as to monitor and assess the observance of human rights in South Africa. In fulfilling this mandate, the SAHRC has long been involved in the promotion and protection of the right of access to adequate housing and basic services and continues to monitor the progressive realisation thereof. Through its work, the SAHRC has identified that a number of challenges persist and as a result, a large number of people continue to experience systematic rights violations on a daily basis.

The decision was taken to host a public hearing in order to more fully understand the challenges facing both State institutions and communities alike, with a view of making practical recommendations to enhance the ability of the State to efficiently deliver housing opportunities and to contribute to the progressive realisation of rights. In undertaking this process, a number of State respondents and interested stakeholders viewed as key role players in the delivery of housing and basic services were identified, appeared before a SAHRC hearing panel to provide submissions and answer questions of clarity that arose. This report draws from the submissions provided as well as from the legal and regulatory framework governing housing and local service delivery in general and aims to provide insight into the complex and inter-related challenges.

The enquiry found that current housing policies and programmes fail to take into account the needs of a variety of people and although mechanisms are available for ensuring that even the most destitute of individuals are accommodated, their needs are not adequately addressed. Emphasis on the "world class city" narrative as a means to attract foreign direct investment to boost the economy, has resulted in preference being granted to private investment in the development of prime land situated close to economic hubs, as opposed to prioritising the needs of the poor, thus confining poor people to land situated on the outskirts of these cities, far removed from access to economic opportunities. In this way, policies have effectively failed to reverse the historic legacy of apartheid spatial planning.

² Constitution of the Republic of South Africa, 1996.

In addition to this, existing policies are not always effectively applied and are therefore unable to achieve the purpose for which they are designed. Disparate approaches of municipalities to the interpretation and implementations of various policies have furthermore resulted in fragmentation, confusion, and varying levels of success, largely as a result of a lack of capacity and skills at a local level, as well as insufficient oversight and guidance provided at provincial and national levels of government. Moreover, the Commission's investigation revealed that a lack of sufficient levels of monitoring and evaluation takes place, negatively impacting on the ability to assess levels of success and thereby identify existing gaps and plan appropriately. Private contractors frequently deliver houses of poor quality and are not held to account. While the delivery of sub-standard housing gives rise to significant portions of wasteful expenditure, poor and vulnerable communities bear the greatest cost as their rights continue to be harshly impacted upon.

Funding mechanisms also appear to be problematic, reflecting a disjuncture between the legal obligations placed on municipalities to deliver, while access to resources is controlled at a provincial level. Overall, the State continues to face high levels of demand that greatly exceed available resources.

Although housing remains a concurrent responsibility of national and provincial spheres of government, the delivery of housing and basic services is a function of local government. Consequently effective delivery thereof is largely dependent on aligned and consistent application of policies across State departments and within the three spheres of government. However, despite the fact that structures are in place, State departments and the different spheres of government continue to act in silos. The lack of integrated planning results in the implementation of plans which are contradictory, or which are incomplete and subsequently stall development projects.

When residing in informal settlements, communities are either subjected to the threat of eviction in the name of developmental processes, or are relocated to temporary alternative accommodation that lacks basic services required to live a life with dignity. In addition the lack of infrastructure exposes residents of informal settlements to perpetual dangers such as violent crime. Security of tenure is recognised as forming an integral part of the right of access to adequate housing as well as being closely related to the enjoyment of a number of other rights. It is therefore widely acknowledged in international law that all persons should possess a degree of security of tenure that guarantees legal protection against forced eviction, harassment, and other threats. Despite this recognition, many evictions continue to be conducted in a manner which result in large-scale rights violations.

The SAHRC further found that the housing process lacks transparency and adequate access to information, denying millions of people the right to participate in the development of policies and plans which impact on their daily lives. While community engagements relating to the delivery of basic services, including housing, are held, these engagements tend to lack any substance as information is not provided in a manner which is easily relatable to communities. As a result information is not properly assessed and decisions are not well informed. Moreover, instead of engagements being held at the commencement or design stage of policies in order to allow communities to effectively contribute and drive the delivery process, such engagements are often held at a stage when relevant policies and plans have already been developed, largely by experts who lack an understanding of the specific contexts of the community. These policies and plans therefore lack credibility with the communities in which they are applied as they fail to address the specific needs and priorities. Ultimately, the process reinforces seemingly "top down" approaches that reflect how the State believes people ought to be living, rather than allowing people to inform that decision-making process on the basis of their daily lived realities.

Communities therefore face significant barriers in voicing their concerns, with local participatory structures largely superficial and at times driven by political loyalties, while access to alternative forms of expression, namely protest action, is largely denied as a result of arduous requirements, a lack of understanding, and proper application of requirements by the relevant local authorities. In adding to this, when attempts to engage with local authorities are unsuccessful, communities seek legal representation in order to protect their rights. However, access to legal services has become increasingly challenging. Donor-funded organisations have limited resources to assist in matters concerning individuals seeking redress and *pro bono* services offered by large law firms are often limited due to many of them representing State respondents as clients. A lack of representation is exacerbated in emergency situations such as evictions. However, the enquiry also illustrated that the resolution of disputes through adversarial

means such as litigation is not always necessary, and the expansion of alternative dispute resolution mechanisms can therefore contribute to resolution in a manner which maintains the relationship between communities and local governments, while also reducing the burden placed on organisations providing legal representation.

The report highlights the imperative role of the private sector in the provision of access to adequate housing in South Africa, but also identifies how private property owners at times contribute to the violation of the right to access to adequate housing and the perpetuation of inequality. While private parties ought to be aware of their own obligations in this regard, there is also room for the private sector to play a greater role in achieving the progressive realisation of the right and in reversing the effects of apartheid spatial planning in the long term.

Therefore, despite the room for creative policy options available to State respondents in realising the right of access to adequate housing which allows for solutions suitable to a variety of contexts, State respondents appear to be adopting a rigid approach to realising the right. Notwithstanding the various protections afforded to poor communities in international law, national law, and case law, poor people continue to experience daily rights violations. Consequently, approaches to housing programming are not having the desired impact of progressively realising the right to adequate housing and in some cases are in fact leading to perpetual rights violations where poor people continue to be excluded from the benefits democracy ought to be delivering to them.

What is required is a shift in mind-set of how State departments approach their housing obligations and interpret the concept of 'security of tenure' in respect to policies to ensure that rights violations are addressed. Dignity, after all, is about respecting the way in which people live without forcing one specific model of living upon them, while at the same time ensuring that living conditions are constantly improved, taking into account circumstances that may prevent them from acquiring the basics needed to live a dignified life.

STRUCTURE OF THE REPORT

In terms of articles 26 of the Commission's Complaints Handling Procedure, the Panel must:

(1) (a) consider the evidence submitted at the hearing in conjunction with all other available information and evidence obtained otherwise;

(b) make a finding on the facts and giving full reasons for the decision reached; and

(c) make a finding regarding remedial action, if necessary.

(2) The Chairperson of the Panel must, at the conclusion of the hearing, summarise the evidence contemplated in (1) (a) and state the finding, including any proposed remedial action.

(3) The finding of the Panel at the hearing is final and is not subject to an appeal as provided for in Chapter 9 of the Procedures."

The report is divided into several parts.

Section 1 of the Report provides the background and rationale behind the investigation and development of the Report on Access to Housing and Service Delivery. The aim is to explain the process and methodology utilised to generate critical information, as well as to explain the scope of the investigation.

Section 2 provides an overview of the national legal framework governing the rights of access to adequate housing and general service delivery, including reference to governing legislation, policies and regulations, case law, and applicable international law.

Sections 3 to 12 of the report provides an overview and summary of submissions received from the various State respondents and interested stakeholders, as well as an analysis of the submissions received in the context of the legal framework governing the right of access to adequate housing in the broader context of local governance and general service delivery. This portion of the report is divided under the various themes identified during the process.

Finally, **sections 13 and 14** outline the SAHRC's findings and recommendations with regard to the submissions made and analysis undertaken.

Section 15 is the conclusion of the Report.

01

INTRODUCTION

In October 1994, the historic Botshabelo National Housing Accord³ was signed by various stakeholders and organisations representing government, homeless people, communities and civil society, the financial sector, emerging contractors and established construction industry, building material suppliers, employers, developers, and the international community. The document formed the foundation of South Africa's Housing Policy, leading to the promulgation of the National Housing Act, 107 of 1997.⁴

The preamble of the National Housing Act states that in terms of section 26 of the Constitution of the Republic of South Africa (Constitution)⁵, everyone has the right to have access to adequate housing. The Preamble to the National Housing Act further recognises that:

"Housing, as adequate shelter, fulfils a basic human need;

Housing is both a product and a process;

Housing is a product of human endeavour and enterprise;

Housing is a vital form of integrated development planning;

Housing is a key sector of the national economy;

*Housing is vital to the socio-economic well-being of the economy."*⁶

However, twenty-one years into South Africa's democracy, and despite being recognised as a right in the Constitution and the relevant enabling legislation, access to adequate housing continues to be a significant challenge in the country's development processes. It has been acknowledged, through the term "*human settlements*" that housing comprises part of broader integrated development and is intrinsically linked to the provision of basic services, including water and sanitation.⁷ The National Development Plan 2030 (NDP) also recognises that apart from the right of access to adequate housing being entrenched in the Constitution, it forms a key component to the country's economic development. It recognises that due to its apartheid past, the majority of poor South Africans reside in far-flung areas away from work, with little access to basic services and efficient transport, thus limiting their ability

³ The launch of the Botshabelo National Housing Accord is considered to be a historic landmark in the country's history, when a national housing strategy was launched at Botshabelo with delegates from all walks of life. The Declaration constituted commitments by signatories to house all South Africans on a progressive basis. According to this Declaration, the provision of housing was intended to be adequate and affordable, permanent, residential structure, with secure tenure, a safe environment of peace and dignity; sufficient water; sanitation; electricity; transport facilities; and adequate land for housing development.

⁴ Department of Human Settlements "Department of Human Settlements History" available at <http://www.dhs.gov.za/content/department-human-settlements-history>.

⁵ Constitution of the Republic of South Africa, 1996.

⁶ Preamble to the National Housing Act, 107 of 1997.

⁷ "The National Development Plan 2030: Our future – make it work".

to adequately access the economy. As such, many South Africans find themselves in “poverty traps” with high unemployment reinforcing existing poverty.⁸

In terms of the NDP, therefore, planning in South Africa “will be guided by a set of normative principles to create spaces that are liveable, equitable, sustainable, resilient and efficient, and support economic opportunities and social cohesion”.⁹ Further, “South Africa will develop a national spatial framework and resolve the current deficiencies with the local system of integrated development planning and progressively develop the governance and administrative capability to undertake planning at all scales.”¹⁰

The above approach to the realisation of socio-economic rights in particular, has been reiterated internationally. The United Nations Office of the High Commissioner for Human Rights (OHCHR) has stated that people living in poverty are endangered by the places and conditions in which they reside.¹¹ People living in poverty are often exposed to precarious shelter; insecurity of person and property; remoteness; non-existent or inadequate infrastructure, including a lack of access to clean water and basic sanitation; as well as stigma. Important aspects of realising the right to housing include legal security of tenure, habitability, location, economic accessibility, physical accessibility, cultural acceptability, and adequate infrastructure.¹²

In 2004, as part of its Economic and Social Rights Report Series,¹³ the South African Human Rights Commission (SAHRC / Commission) researched progress made into realising the right to adequate housing. In its 2004 Housing Report, the SAHRC noted the commitment made by the newly elected democratic government in 1994 to build 1 million houses within its first term of office. By the end of the 2002/2003 period, the State had spent approximately R24.2 billion on the delivery of roughly 1.4 million houses. However, notwithstanding these efforts made in progressively realising the right to adequate housing, the report also recognises that “the housing situation for those living in conditions of poverty in the country serves as evidence that South Africa still has a long way to go.”¹⁴

In its Strategic Plan for 2015-2020 (Strategic Plan), the SAHRC acknowledges that this period constitutes important milestones for South Africa, including celebrating just over 20 years of the country’s democracy, as well as 20 years of the Commission’s establishment. A significant milestone in the area of socio-economic rights is the government’s recent ratification, in January 2015, of the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹⁵ The Commission therefore aims to enhance the understanding of its constitutional and legislative mandate by extending it beyond section 184 of the Constitution through monitoring State compliance with the ICESCR. It is noted that in order to achieve this objective, a holistic, contextual, and purposive interpretation of its mandate will be necessary.¹⁶

To give effect to the vision articulated in the Strategic Plan, the Commission commits to enforcing the protection of rights through alternative dispute resolution and legislative mechanisms. The Strategic Plan explicitly provides that, “[a]lternative dispute resolution will be maintained to deepen understanding and ongoing protection of human rights, while litigation will be used to enhance impact through enforcing rights and challenging systemic issues”.¹⁷

Just over ten years after the release of the SAHRC’s first housing report, poverty and inequality continue to plague South African society, with a vast number of the country’s population living in deplorable conditions. Noting that 2015 also marks the end of the Millennium Development Goal period, in addition to South Africa’s commitment to

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Ibid.*, p 259.

¹¹ OHCHR (2005) “Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies” p31-34.

¹² *Ibid.*

¹³ SAHRC (2004) “The right of access to adequate housing”, *5th Economic and Social Rights Report Series: 2002/2003 Financial Year*.

¹⁴ *Ibid.*, p1.

¹⁵ International Covenant on Economic, Social and Cultural Rights, 16 December 1966, adopted by United Nations General Assembly resolution 2200A (XXI).

¹⁶ SAHRC (2015) “Strategic Plan for the fiscal years 2015 to 2020”.

¹⁷ *Ibid.*, p22.

improving the lives of slum dwellers articulated therein through the Upgrading of Informal Settlement Programme,¹⁸ the SAHRC took the decision to host a national hearing investigating challenges pertaining to realising the right of access to adequate housing in the broader context of local governance and general service delivery.

1.1 BACKGROUND

According to the Department of Performance Monitoring and Evaluation (DPME), the National Department of Human Settlements (NDoHS) estimates that since 1994, 3.7 million housing opportunities have been provided to the poor across the country. Of this, around 2.8 million completed houses and units and over 800,000 serviced sites have been delivered, providing an estimated 12.5 million people with access to accommodation and ownership of a fixed asset.¹⁹ In addition, access to basic services has increased.

The Key Results from the 2011 Statistics South Africa Census indicated that 85% of households have access to Reconstruction and Development Plan (RDP) acceptable levels of water, 70% of households have access to sanitation that is of an RDP acceptable level, and 84.7% of households have access to electricity for lighting. However, notwithstanding the significant gains that have been made in progressively realising these rights, the NDP notes that implementation of various housing programmes has resulted in *“poor quality units; uniform and monotonous settlements on the urban edge; the concentration of the very poor in new ghettos; and poor-quality residential environments without the necessary social facilities and supportive infrastructure. Unwittingly, post-apartheid housing policy had reinforced apartheid geography.”*²⁰

Moreover, there has been a growth of informal settlements in areas of economic opportunity despite the provision of housing in terms of the RDP, which was criticised for being unable to respond to the diverse housing needs of individuals and households.²¹

The complaints received by the SAHRC reflect the reality as articulated in the NDP. Although only 5% of the SAHRC’s 5238 complaints received during the 2014/2015 financial year related specifically to the right of access to adequate housing, the SAHRC also received complaints in relation to access to health care, food, water and social security (9%), and the environment (2%). The SAHRC recognises that due to the interrelated nature of human rights, non-realisation of related rights has an effect on the progressive realisation of access to adequate housing. Moreover, many of the challenges experienced were highlighted through the SAHRC’s involvement in the Lwandle Ministerial Enquiry in 2014, as well as through the monitoring the evictions that took place in Lenasia, Gauteng in late 2013.

In terms of the complaints received, some of the common issues and trends of human rights violations identified by the SAHRC include:

- a) excessive use of force when conducting evictions
- b) the use of inadequately trained independent contractors such as the so-called “Red Ants” by Sheriffs when executing evictions orders
- c) lack of appropriate legal processes and sufficient notice
- d) disregard for the safety and well-being of children and other vulnerable groups because of disregard for the time of day or weather conditions when carrying evictions
- e) use of derogatory or racist language by those tasked with executing the eviction order
- f) damage and theft of property

¹⁸ Department of Human Settlements (2009) “A simplified guide to the National Housing Code, 2009”

¹⁹ Department of Performance Monitoring and Evaluation (DPME) (2014) “Twenty Year Review South Africa 1994 – 2014: Background Paper: Sustainable Human Settlements” p 26-28 (as accessed at <http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=16&cad=rja&uact=8&ved=0CDcQFjAFOApqFQoTCKbAroaT-8cCFY0r2wodDvsEQQ&url=http%3A%2F%2Fwww.thepresidency-dpme.gov.za%2Fpublications%2F20%2520Years%2520Review%2F20%2520Year%2520Review%2520Documents%2F20YR%2520Sustainable%2520Human%2520Settlements.pdf&usq=AFQjCNGYYHrBQcn09pLYWZfsyoqWrpbnw&sig2=r5YO9pkTm10AEJWU4sVHg&bvm=bv.102829193,d.d24>).

²⁰ “The National Development Plan 2030: Our future – make it work”, p268.

²¹ *Ibid.*

- g) the failure by local municipalities to provide alternative accommodation or implement appropriate emergency housing plans and
- h) in some instances, the eviction of large numbers of people from city buildings or informal settlements

In its 2004 Housing Report, the SAHRC identified various challenges inhibiting effective realisation of the right to adequate housing. These include:

- a) poor quality of housing because of segmentation between various departments responsible for the delivery of the right
- b) a lack of a comprehensive and coordinated response to the housing crisis for vulnerable groups
- c) a lack of capacity at municipal level, which had not been dealt with sufficiently or effectively
- d) an inability to spend budgets and
- e) a lack of adequate information provided to the SAHRC when reporting on the progress of realising the right

The 2004 Housing Report concluded that it was difficult to infer that there had indeed been a progressive realisation of the right to adequate housing as required by the Constitution. The following were some of the recommendations made:

- a) urgently establish a dedicated fund for acquiring well-located land for low-cost housing
- b) reduce policy incoherence and institutional fragmentation
- c) improve monitoring and evaluation
- d) strengthen culturally adequate housing and
- e) ensure effective participation in the delivery of housing

The 7th Economic and Social Rights Report Series of the SAHRC²² which covered the period 2006 to 2009, identified a number of issues relating to the lack of meaningful consultation with communities; the failure to make provision for the special needs of different groups in housing policy; and the lack of accountability for private sector contractors for the quality of housing units produced. Policies and practices relating to the upgrading of informal settlements indicated the fact that this process has become synonymous with evictions. This is a result of a general reluctance on the part of the State to implement *in situ* upgrading. The report emphasised the fact that communities are often moved to temporary relocation areas (TRAs), and housing developments are usually located on the outskirts of the city. Communities then have limited access to basic services and economic opportunities, negatively impacting on economic integration and the ability of families to maintain livelihoods. The shortage of low-income inner-city accommodation was also highlighted and the report cautioned that “*the need for rapid service delivery should not take precedence over quality service delivery...*”²³

The following were some of the recommendations made:

- a) policy needs to be reviewed to take account special needs and vulnerable groups
- b) the rental housing policy for low-income groups should be restructured to guarantee security of tenure for tenants (including backyard dwellers)
- c) improve reporting and standardise and improve availability of data to enable the government and civil society to track progress and assess the gaps in service delivery
- d) strengthen initiatives aimed at improving the capacity of municipalities to deliver integrated human settlements
- e) collect and report on disaggregated data and develop gender indicators and
- f) standardise the implementation of the indigent policy

²² SAHRC (2004) “7th Economic and Social Rights Report Series: Millennium Development Goals and the Progressive Realisation of Economic and Social Rights in South Africa, 2006-2009”.

²³ *Ibid* p 150.

In 2009, the Department of Cooperative Governance and Traditional Affairs (CoGTA) released a report on the state of Local Government²⁴ with a view to identifying the root causes of the state of distress in many of the country's municipalities. This was with the view to inform a National Turn-Around Strategy for Local Government. The main challenges identified in the report include:

- a) service delivery and backlog challenges: poor communication and accountability relationships with communities
- b) problems with the political administrative interface
- c) corruption, fraud, and poor financial management
- d) number of (violent) service delivery protests
- e) weak civil society formations
- f) intra- and inter-political party issues negatively affecting governance and delivery and
- g) insufficient municipal capacity due to lack of scarce skills²⁵

Building on its most recent work on access to water and basic sanitation involving national and provincial hearings, which culminated in the publication of its 2014 Water and Sanitation Report,²⁶ the SAHRC recognised that local government faced a number of challenges in the delivery of water and sanitation services. These challenges are also experienced in realising the right to adequate housing, another aspect of basic service delivery. These challenges include, *inter alia*:

- a) systemic failures in governance and budgeting, particularly in the implementation of and spending on projects
- b) alack of co-operative governance between Departments jointly responsible for municipal services
- c) a lack of capacity and skill (both in the sense of having the adequate knowledge as well as a high vacancy rate in municipalities)
- d) a lack of transparency in hiring external contractors and in holding contractors accountable for the quality of services delivered
- e) a lack of an understanding and/or implementation of a human rights based approach to service delivery in respect of transparency and public participation and
- f) a lack of monitoring and evaluation of projects implemented by local government, as well as a lack of monitoring and evaluation of the utilisation of funds allocated to local government

In its submission presented to the Lwandle Ministerial Enquiry in 2014, the SAHRC reiterated that as per constitutional jurisprudence, an individual or community can only be evicted on the basis of a court order, and that such court orders can only be made after considering all relevant circumstances and taking into account whether the granting of the order will render that individual or community concerned homeless. The SAHRC recommended that prior to an eviction, affected parties should be engaged with meaningfully with a view of identifying a solution that would not lead to multiple human rights violations, including human dignity, security of the person, and the rights of children. Moreover, it was recommended that when executing evictions, Sheriffs adhere to their Code of Conduct provided for in the Sheriffs Act²⁷ and ensure that they do not unreasonably cause damage to property. Where private companies are involved in the eviction and assist sheriffs in executing their functions, they too must adhere to the law. Importantly, the SAHRC recommended that there must be synergy amongst all relevant stakeholders so as to ensure that the law relating to evictions is followed.²⁸

²⁴ Department of Cooperative Governance and Traditional Affairs (2009) "State of Local Government in South Africa".

²⁵ *Ibid* at p 4.

²⁶ SAHRC (2014) "Report on the Right to Access to Sufficient Water and Decent Sanitation in South Africa: 2014".

²⁷ Act 90 of 1986 (as amended).

²⁸ SAHRC (2014) "Contribution to the Mandate of the Lwandle Ministerial Enquiry: A cursory note on the law and obligations surrounding the eviction of unlawful occupiers in South Africa".

It became apparent that despite progress made to date, persistent challenges face both communities and State departments in delivering access to basic services, including housing. It is on this basis that the SAHRC undertook the process of conducting a national hearing investigating the challenges in realising the right of access to adequate housing.

1.2 MANDATE OF THE SAHRC

The SAHRC is an institution established in terms of section 181 of the Constitution. Along with other institutions created under Chapter 9 of the Constitution, the SAHRC is one of the “*State institutions supporting constitutional democracy*”. In terms of section 184(1) of the Constitution, the SAHRC is specifically mandated to promote the protection, development and attainment of human rights; and to monitor and assess the observance of human rights in South Africa. Section 184(2) (a) of the Constitution empowers the SAHRC to investigate and report on the observance of human rights in the country.

The South African Human Rights Commission Act, 40 of 2013 (SAHRC Act) further supplements the constitutional powers of the SAHRC. In addition to other powers, duties and functions, the SAHRC Act confers powers on the SAHRC to carry out investigations concerning the observance of human rights in South Africa. Section 15(1) (c) and 15(1) (d) of the SAHRC Act provide that:

“15. (1) Pursuant to the provisions of section 13(3) the Commission may, in order to enable it to exercise its powers and perform its functions-

...

(c) require any person by notice in writing under the hand of a member of the Commission, addressed and delivered by a member of its staff or a sheriff, in relation to an investigation, to appear before it at a time and place specified in such notice and to produce to it all articles or documents in the possession or custody or under the control of any such person and which may be necessary in connection with that investigation: Provided that such notice must contain the reasons why such person’s presence is needed and why any such article or document should be produced; and

(d) through a Commissioner, administer an oath to or take an affirmation from any person referred to in paragraph (c), or any person present at the place referred to in paragraph (c), irrespective of whether or, not such person has been required under the said paragraph (c) to appear before it, and question him or her under oath or affirmation in connection with any matter which may be necessary in connection with that investigation.”

The SAHRC is further empowered by its gazetted Complaints Handling Procedures (CHP), particularly articles 20-27, which provide that the SAHRC is entitled, *inter alia*, to conduct hearings under a variety of circumstances. These include if:

- a) a complaint cannot be resolved by way of conciliation, negotiation or mediation
- b) a hearing will offer an appropriate solution regarding the complaint
- c) it is in the public interest
- d) the complaint cannot be fairly decided on the basis of documentary evidence or written statements submitted by the parties or any other person having information relevant to the complaint only or
- e) a party requesting a hearing supplies reasonable grounds

1.3 METHODOLOGY AND HEARING PROCEDURE

In terms of the Commission’s CHP, a variety of dispute resolution mechanisms are available to the SAHRC in order to not only ensure that a complaint is resolved, but importantly, to ensure that the SAHRC’s overarching objective of creating a culture of human rights is achieved. The CHP allows for the convening of a hearing as appropriate if it is in the public interest for the SAHRC to do so.

The SAHRC recognises that a large hindrance in South Africa's ability to realise the goals and objectives contained in the Constitution lie not in a lack of appropriate laws and policies, but rather, in the challenges relating to implementation. There are a variety of social and structural factors that could be overlooked or misunderstood when using more adversarial or accusatorial approaches to address rights violations. The purpose of the hearing was not to pronounce on the legitimacy of current legislation or policies in place to give effect to the rights under investigation, but rather to gain further insight and understanding as to why challenges in realising these rights continue to occur notwithstanding these laws and policies being in place. A hearing provided an opportunity to engage with all respondents, including the State, in an open and frank manner in unpacking these challenges.

It must, however, be noted that the SAHRC limited its focus of the current investigation to urban metropolises, namely the provinces of the Western Cape (WCPG), Gauteng (GPG) and KwaZulu-Natal (KZNPG) and the municipalities of the City of Cape Town (CoCT), City of Johannesburg (CoJ) and eThekweni Municipality (ET). The SAHRC acknowledges that rural areas in South Africa, particularly those that constitute the former 'homeland' areas remain underdeveloped and riddled with poverty.²⁹ However, the SAHRC also recognises that the phenomenon of urbanisation as people migrate to urban centres in search of work has resulted in a failure by cities to meet their needs. The NDP projects that by 2030, approximately 7.8 million more people will be living in cities, most of whom will be poor and also in need of efficient delivery of services. The rise of urban property prices has made housing unaffordable to many South Africans and the pace of job creation is not keeping up with the number of young people moving to the cities.³⁰

The above notwithstanding, in its quest to carry out its mandate as provided in the Constitution, the SAHRC commits to monitor developments in rural parts of South Africa and will commit to ensure that government is held to account in realising the rights of all South Africans.

1.4 COMPOSITION OF THE PANEL

The Panel comprised of the following members:

- a) Commissioner Mohamed Shafie Ameerma, responsible for the portfolios of the right of access to adequate housing and access to justice at the SAHRC
- b) Commissioner Pregs Govender, responsible for the portfolios of the rights to basic services and access to health care, women's rights, and access to information, presently the Deputy Chairperson at the SAHRC and
- c) Advocate Stuart Wilson, Executive Director of the Socio-Economic Rights Institute (SERI)

It must be noted that the appointment of Advocate Wilson to the Panel was challenged, based on his position at SERI and the potential conflict that could arise due to the fact that he has acted against a variety of State respondents in various matters relating to access to adequate housing. The Western Cape Provincial Government (WCPG) and City of Cape Town (CoCT) requested that it be placed on record that while Advocate Wilson had acted against them in matters pertaining to access to adequate housing, they did not view his participation in the hearing as presenting any conflict of interest.

The City of Johannesburg (CoJ), however, requested that Advocate Wilson recuse himself from the hearing Panel. After deliberating the matter, the Commissioners comprising part of the Panel denied the request on the basis that the CHP does not prohibit external members of the SAHRC to participate in the hearing process. In fact, section 13(1)(b)(iii) of the SAHRC Act requires the SAHRC to engage with any organisation and other sectors of civil society that actively promote respect for human rights, to further the objects of the SAHRC and to assist in its understanding of the human rights landscape. Further, section 15 of the SAHRC Act requires the core aspects of the Commission's investigative process to be undertaken "through a Commissioner". That does not preclude the Commissioner involved from seeking the assistance of outside experts or counsel. The Chairperson of the Panel assured the representatives of the CoJ that Advocate Wilson had been appointed to the Panel based on his expertise on housing-related matters

²⁹ According to the NDP, roughly 40% of South Africa's population lives in rural communities and economic activity has significantly decreased in these areas.

³⁰ "The National Development Plan 2030: Our future – make it work".

and to assist the Panel in identifying the relevant issues in understanding the challenges in realising the rights under investigation. Moreover, Advocate Wilson's questions were limited to the submissions made by the Respondents, which fell into the public domain once submitted to the SAHRC. After the CoJ presented its submissions to the Panel and were asked further questions of clarity by the Panel, the CoJ's legal representative confirmed to the Panel that the questions posed were impartial and fair in the circumstances.

1.5 TERMS OF REFERENCE

Terms of reference pertaining to the hearing included the following:

- a) to receive information and to hear evidence from the Respondents and other relevant parties relating to access to adequate housing, local governance, and general service delivery in South Africa
- b) to analyse evidence brought before the hearing Panel and
- c) for the Commission to make findings and recommendations

1.6 NATURE AND STRUCTURE OF THE PROCEEDINGS

As stated earlier, the hearing was inquisitorial in nature. Respondents and stakeholders identified to appear before the hearing Panel were selected on the basis that they were either responsible for service delivery generally or could provide further insights as to why challenges persist resulting in continuous rights violations in the geographical areas under investigation. It was also important that the Panel heard a wide variety of contested views and perspectives on the matter, in order to ensure the SAHRC's independence and neutrality in making its recommendations. Invited State respondents and interested stakeholders included:

- » National Department of Human Settlements
- » National Department of Cooperative Government and Traditional Affairs
- » Western Cape Provincial Government
- » City of Cape Town
- » Gauteng Provincial Government
- » City of Johannesburg
- » KwaZulu-Natal Provincial Government
- » eThekweni Municipality
- » South African Local Government Association
- » South African Board of Sheriffs
- » Legal Resources Centre
- » Centre for Applied Legal Studies
- » Studies in Poverty and Inequality Institute
- » Abahlali baseMjondolo
- » Social Justice Coalition
- » Informal Settlement Network
- » Local Government Action Network
- » Ahmed Kathrada Foundation
- » Expert: Marie Huchzermeyer and
- » Expert: Jane Duncan

Identified respondents and interested stakeholders were requested during November 2014 to make written submissions on the basis of written questions posed to each of them, by no later than 12 February 2015. This allowed respondents and stakeholders, as well as the Panel, to adequately prepare for the hearing. Although all invited State respondents appeared at the hearing to make oral presentations, the Panel raised concern that not all of the respondents cooperated with the SAHRC's request to deliver information prior to the hosting of the hearing, as this limited the Panel's ability to adequately prepare. In most instances, correspondence sent to various State respondent offices did not reach the appropriate recipient due to internal administrative inefficiencies. This was of particular concern to the Panel noting the SAHRC's status as a Chapter 9 institution mandated with the responsibility of ensuring that South Africa's democracy is strengthened and the importance for all entities to cooperate in its activities aimed at the fulfilment of its constitutional mandate.

Prior to making oral submissions, respondents were requested to take an oath or affirmation, confirming that they had the necessary authority from their principals to present their submissions. After submissions and presentations were made, the Panel was given an opportunity to pose a series of questions, seeking clarity or requesting further information arising from the submissions.

02

LEGAL FRAMEWORK ON ACCESS TO ADEQUATE HOUSING, LOCAL GOVERNANCE AND SERVICE DELIVERY

The following section provides an overview of the national laws, policies, regulations, and key principles emanating from relevant case law that currently governs the housing landscape in the broader context of local governance and service delivery in South Africa. The section also provides a brief exploration of international law relating to the right to housing.

2.1 NATIONAL LEGAL FRAMEWORK

The Constitution

The right of access to adequate housing is provided under section 26 of the Constitution, which in addition to requiring the State to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of this right, also provides that no one may be evicted from their home, or have their home demolished, without an order of court made after considering all relevant circumstances. Section 26 (3) further provides that no legislation may permit arbitrary evictions.

In terms of the Constitution, housing constitutes a concurrent national and provincial legislative competence. However, implementation of such legislation and policies including housing as well as other basic services such as electricity, water, and sanitation, is a function of local government. Section 152 of the Constitution states the following:

“(1) The objects of local government are-

- a) *To provide democratic and accountable government for local communities;*
- b) *To ensure the provision of services to communities in a sustainable manner;*
- c) *To promote social and economic development;*
- d) *To promote a safe and healthy environment; and*
- e) *To encourage the involvement of communities and community organisations in the matters of local government.*

(2) A municipality must strive, within its financial and administrative capacity, to achieve the objects set out in subsection (1).”

Section 154 of the Constitution, which addresses municipalities in cooperative government states further:

“(1) The national government and provincial governments, by legislative and other measures, must support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions...”

The National Housing Act

The National Housing Act³¹ provides the enabling framework to give effect to section 26 of the Constitution. Section 1 of the National Housing Act provides the following:

“(1) National, provincial and local spheres of government must –

- (a) Give priority to the poor in respect of housing development;*
- (b) Consult meaningfully with individuals and communities affected by housing development;*
- (c) Ensure that housing development-*
 - (i) Provides as wide a choice of housing and tenure as possible;*
 - (ii) Is economically, fiscally, socially and financially, affordable and sustainable; and*
 - (iii) Is administered in a transparent, accountable, and equitable manner, and upholds a practice of good governance;*
- (d) Encourage and support individuals and communities....in their efforts to fulfil their own housing needs by assisting them in accessing land, services and technical assistance in a way that leads to the transfer of skills to, and empowerment of, the community;*
- (e)”*

The National Housing Act further promotes “education and consumer protection in respect of housing development”; “the establishment, development, and maintenance of socially and economically viable communities and of safe and healthy living conditions to ensure the elimination and prevention of slums and slum conditions”; “higher density in respect of housing development to ensure the economical utilisation of land and services”; and “the expression of cultural identity and diversity in housing development”, amongst others.³²

At a local level, Part 4 of the National Housing Act states that every municipality, as part of the municipality’s Integrated Development Plan (IDP) must:

- a) ensure that it takes all reasonable and necessary steps within the framework of national and provincial housing legislation and policy, that its inhabitants have access to adequate housing on a progressive basis
- b) set housing delivery goals
- c) identify and designate land for housing development
- d) create and maintain a public environment conducive to housing development which is financially and socially viable
- e) promote the resolution of conflicts arising in the housing development process
- f) initiate, plan, co-ordinate, facilitate, promote, and enable appropriate housing development in its area of jurisdiction
- g) provide bulk engineering services and revenue generating services and
- h) plan and manage land use and development

Local Government Municipal Structures Act, 1998

The obligations of municipalities relating to the provision of basic services are further enunciated in the Local Government Municipal Structures Act.³³ In terms of section 19:

“(1) A municipal council must strive within its capacity to achieve the objectives set out in section 152 of the Constitution.

(2) A municipal council must annually review-

³¹ Act No.107 of 1997.

³² Section 2(1) (e).

³³ Act No.117 of 1998.

- (a) the needs of the community;*
- (b) its priorities to meet those needs;*
- (c) its processes for involving the community;*
- (d) its organisational and delivery mechanisms for meeting the needs of the community; and*
- (e) its overall performance in achieving the objectives referred to in subsection (1).*

(3) A municipal council must develop mechanisms to consult the community and community organisations in performing its functions and exercising its powers.”

Additionally, section 83 of the Local Government Municipal Structures Act provides that:

“(3) A district municipality must seek to achieve the integrated, sustainable and equitable social and economic development of its area as a whole by-

- (a) ensuring integrated development planning for the district as a whole;*
- (b) promoting bulk infrastructural development and services for the district as a whole;*
- (c) building the capacity of local municipalities in its area to perform their functions and exercise their powers where such capacity is lacking; and*
- (d) promoting the equitable distribution of resources between the local municipalities in its area to ensure appropriate levels of municipal services within the area.”*

Local Government Municipal Systems Act

In addition to the Local Government Municipal Structures Act, further responsibilities are assigned to municipalities in terms of the Local Government Municipal Systems Act³⁴ which states the following:

“Section 5: Rights and duties of members of local community

- (1) Members of the local community have the right-*
 - a) through mechanisms and in accordance with processes and procedures provided for in terms of this Act or other applicable legislation to-*
 - i) contribute to the decision-making processes of the municipality; and*
 - ii) submit written or oral recommendations, representations and complaints to the municipal council or to another political structure or a political office bearer or the administration of the municipality;*
 - b) to prompt responses to their written or oral communications, including complaints, to the municipal council or to another political structure or a political office bearer or the administration of the municipality;*
 - c) to be informed of decisions of the municipal council, or another political structure or any political office bearer of the municipality, affecting their rights, property and reasonable expectations;*
 - d) to regular disclosure of the state of affairs of the municipality, including its finances;*
 - e) to demand that the proceedings of the municipal council and those of its committees must be-*
 - i) open to the public, subject to section 20;*
 - ii) conducted impartially and without prejudice; and*
 - iii) untainted by personal self-interest;*

³⁴ Act No. 32 of 2000.

f) to the use and enjoyment of public facilities; and

g) to have access to municipal services which the municipality provides, provided the duties set out in subsection (2)(b) are complied with.

(2) Members of the local community have the duty-

a) when exercising their rights, to observe the mechanisms, processes and procedures of the municipality;

b) where applicable, and subject to section 97(1)(c), to pay promptly service fees, surcharges on fees, rates on property and other taxes, levies and duties imposed by the municipality;

...

Prevention of Illegal Eviction from and Unlawful Occupation of Land Act

Evictions are regulated by the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act³⁵ (PIE Act), which states in its preamble that no one may be evicted from their home or have their home demolished without an order of court after having considered all relevant circumstances. Significantly, the PIE Act regulates the evictions of unlawful occupiers from land to ensure that such evictions are carried out in a fair manner, while at the same time recognising the right of land owners to apply for an eviction order in appropriate circumstances. In terms of this Act, special consideration should be given to the rights of the elderly, children, disabled persons and particularly households headed by women.

Policies and Regulations

The National Housing Code of 2009³⁶ encompasses a plethora of policies and regulations which govern the housing sector and general service delivery in South Africa. A brief summary of these policies will be provided below.

a) Integrated Residential Development Programme

The Integrated Residential Development Programme (IRDP) aims to address settlement inefficiencies through the development of integrated human settlements, emphasising a more compact settlement form and providing access to a “*range of housing and social economic opportunities*” to suit the needs of different income categories. It aims to provide for subsidised as well as finance linked housing, which includes, *inter alia*, social and rental, commercial, and institutional housing. The IRDP further aims to reverse the legacy inherited from apartheid, by covering the acquisition of land and the servicing of stands for a variety of purposes including commercial, recreational, schools, clinics, and residential units for low, middle, and high-income groups.

b) Upgrading of Informal Settlements Programme

As part of the Government’s commitment to realising the United Nation’s Millennium Development Goal (MDG) to improve the lives of at least 100 million slum dwellers, the Upgrading of Informal Settlements Programme (UISP)’s primary objective is to cater for the upgrading of informal settlements. The grant attached to the UISP is intended to “*assist municipalities in fast tracking the provision of security of tenure, basic municipal services, social and economic amenities, and the empowerment of residents in informal settlements to take control of housing development directly applicable to them*”. As a last resort and in exceptional circumstances, the policy provides for the possible relocation and resettlement of people on a voluntary and cooperative basis in order to implement upgrading projects.

c) Emergency Housing Programme

Noting that South Africa is affected by natural disasters that destroy and damage homes, rendering residents homeless and destitute, the Emergency Housing Programme (EHP) was implemented to address the need for housing in instances where the lack of housing poses a threat to life, health and safety. It was further developed to address

³⁵ Act No.19 of 1998.

³⁶ DHS (2009) “The National Housing Code: Simplified Guide to the National Housing Code.”

the needs of those who have been evicted, or face imminent eviction. It aims to provide temporary relief to people in both urban and rural areas and provides for the relocation of people on a voluntary and cooperative basis in appropriate circumstances.

d) Social Housing Programme

The Social Housing Programme (SHP) was conceptualised with a view to regenerating the country's inner cities and the development of well-located land to accommodate higher density development and increase the demand for rental housing in urban areas. The SHP is geared at areas where bulk infrastructure such as water, sanitation, and transport is readily available, thus contributing towards urban efficiency. Its primary objectives are to contribute to the restructuring of South Africa's social landscape and address structural, economic, social, and spatial dysfunctions to create a more integrated society living in sustainable human settlements. It also aims to contribute towards the rental component of housing, widening the range of housing opportunities available to the poor. The social housing rentals cater for people earning between R1 500 – R7 500 per month.

e) Community Residential Units Programme

According to the Department of Human Settlements,³⁷ there are approximately 2000 public hostels and 200 000 residential units owned by provinces and municipalities. The Community Residential Units Programme (CRUP) therefore aims to provide a framework to deal with the various forms of existing public-sector residential accommodation. It targets low-income individuals and households earning between R800 – R3500 per month.

f) Institutional Housing Subsidies Programme

The Institutional Housing Subsidies Programme (IHSP) was developed to accommodate individuals who may prefer short-term rental to ownership housing options. The IHSP also allows for the sale of rentals to tenants four years after the initial occupation, while tenants are allowed to be actively involved in the administration and management of rental stock. While it complements the CRUP, the IHSP is not limited to existing State-owned rental housing stock. The Programme targets people earning R3500 and below.

g) Social and Economic Facilities Programme

Since the inception of the Housing Subsidy Scheme in 1994 there has been little provision of social and economic amenities provided in new housing developments. The Social and Economic Facilities Programme (SEFP) therefore aims to fund the provision of basic social and economic amenities and facilities. It aims to provide facilities such as parks, playgrounds, community halls, sports fields, crèches, taxi ranks, clinics, and informal trading facilities.

h) Consolidation Subsidy Programme

In terms of this Consolidation Subsidy Programme (CSP), beneficiaries of government housing assistance schemes who received stands in ownership, may apply for further assistance to construct a house on such stands or upgrade or complete houses that have been constructed from the individual's own resources.

i) Financed Linked Individual Subsidy Programme

The Financed Linked Individual Subsidy Programme (FLISP) was developed to enable first time home-ownership opportunities to individuals earning between R3 500 and R15 000 per month, who make up the "gap market" of those earning too little to qualify for bank-sponsored home loans or too much to qualify for a RDP house. The objective of the FLISP is to reduce the initial mortgage loan amount to a level where the monthly loan instalments are affordable over the loan repayment term, or to compensate for any shortfall between the qualifying loan amount and total price of the product, subject to the conditions of the programme.

³⁷ South African Government (2015) "Community Residential Unit Programme", available at <http://www.gov.za/about-government/government-programmes/community-residential-unit-cru-programme>.

j) Individual Subsidy Programme

These subsidies are available to individuals who want to buy an existing house or stand, linked to a housing construction contract and through an approved mortgage loan.

k) Enhanced People's Housing Process

The Enhanced People's Housing Process (EPHP) is intended to assist households that wish to actively contribute to the building of their own homes. It further allows for the establishment of a housing support organisation that provides the necessary organisational, technical, and administrative assistance. It also aims to provide for greater participation by the recipient with the benefit of saving in labour costs, avoiding additional costs accrued to developers, and having control over decisions regarding the housing product to be delivered.

l) National Framework for Municipal Indigent Policies / Free Basic Services

The National Framework for Municipal Indigent Policies / Free Basic Services (FBS) policy is aimed at providing free basic services to those considered indigent. The policy states that its “*overall objective is to substantially eradicate those elements of poverty over which government has control by the year 2012...all should have access to basic water supply, sanitation, energy and refuse services by this date...*”. The policy further recognises that apart from the delivery of these services being a municipal function, they have traditionally only been provided to those who can pay for them, thus highlighting the relationship between access to basic services (enshrined as rights in the Constitution) and poverty. In the South African context, apart from the social, environmental, political, and economic dimensions of poverty, the policy also recognises an institutional dimension of poverty. This dimension relates to the fact that poor people continue to be marginalised from the core administrative systems and resources of government which leads to chronic poverty. This is largely a result of institutional exclusion experienced by the majority of South Africans during apartheid, as institutions were not geared to servicing the needs of poor South Africans. Consequently, through the provision of affordable basic services, the policy further aims to address the problem of institutional exclusion by facilitating the reform of systems of local government.³⁸

m) Norms and standards in terms of the National Housing Code

The National Housing Act provides for the adoption of norms and standards to guide housing development, which are applicable in respect to permanent residential structures but are not limited thereto. The objective is to ensure sustainable housing development, with access to economic opportunities, health education and social amenities in which “*all citizens and permanent residents of the Republic will, on a progressive basis have access to a) permanent residential structures with secure tenure, ensuring internal and external privacy and providing adequate protection against the elements; and b) potable water, adequate sanitary facilities and domestic energy supply*”.³⁹

Relevant case law

The policies provided above have largely been informed by principles emanating from some landmark court judgments providing the necessary content to the rights enshrined in the Constitution and its enabling legislation.⁴⁰ The principles outlined by the courts will be briefly explained below.

- a) **Reasonableness:** The Constitutional Court has held that all evictions are to be executed in a humane manner, and that housing “*entails more than bricks and mortar*”, but also requires land, appropriate services including the provision of water and removal of sewage, in addition to the financing of the building itself. Although the courts have held that enforcement of socio-economic rights will be assessed on a case-by-case basis, the State must demonstrate that the legislative and other measures undertaken to progressively realise the right to adequate housing were ‘reasonable’ both in terms of conception and implementation. To pass the ‘reasonableness test’, an initiative must be comprehensive and well-coordinated; must facilitate the realisation of the right in

³⁸ Department of Provincial and Local Government (2006) “National Framework for Municipal Indigent Policies.”

³⁹ National Housing Code, 2009.

⁴⁰ Summaries of the cases referred to are available at “Community Law Centre: Summary of Cases” <http://communitylawcentre.org.za/projects/socio-economic-rights/Cases/South%20African%20Cases/Constitutional%20Court%20Cases/summary-of-cases>

question, albeit on a progressive basis; it must be balanced and flexible and not exclude a significant segment of society; and importantly, must respond to the urgent needs of those in desperate circumstances.⁴¹ The Constitutional Court has further expressed that “*a home is more than just a shelter from the elements. It is a zone of personal intimacy and family security.*”⁴²

- b) **Alternative Accommodation:** Realising the right to adequate housing includes the provision of temporary relief for people. Such temporary relief would be applicable for those who were living in intolerable conditions or who were in crisis due to natural disasters such as fire or floods, or facing imminent threat of eviction or demolition of their homes.⁴³
- c) **‘Just and equitable’ evictions:** In recognising the complexities in realising the right to adequate housing and balancing the rights of both landowners and unlawful occupiers, the courts have found that prior to granting an eviction order, and for that eviction to be considered ‘just and equitable’ as required by the PIE Act, all ‘relevant circumstances’ must be taken into account. ‘Relevant circumstances’ include the circumstances under which the land has been occupied; the period of unlawful occupation; and the availability of suitable accommodation or land. Moreover, what is ‘just and equitable’ also involves discussions with those affected in order to achieve an agreed to solution, prior to instituting eviction proceedings.⁴⁴
- d) **Meaningful engagement:** The Constitutional Court has also developed principles relating to a municipality’s obligation to meaningfully engage with communities facing eviction, both individually and collectively, prior to taking the decision to institute eviction proceedings. While recognising that engagement is a two-way process and that there is no closed list of objectives, the Court has expanded on this obligation by declaring that even in instances where people about to be evicted refused to participate in the engagement process, the municipality cannot simply walk away but must take reasonable efforts to engage.⁴⁵ Engagement must be undertaken without secrecy and should focus on meeting the reasonable needs of an affected community with an overarching goal to find a mutually acceptable solution.
- e) **Non-discrimination of non-nationals:** The courts have found that the exclusion of permanent residents from the welfare scheme is not a reasonable manner to achieve the right to social security. Although case law has been limited to the rights of permanent residents, it must be noted that all non-nationals, regardless of their status are protected under the Promotion of Equality and Prevention of Unfair Discrimination Act⁴⁶ from any form of discrimination on the grounds listed therein.⁴⁷
- f) **Role of private property owners:** The Constitutional Court has considered how the constitutional prohibition against arbitrary deprivation of property, rights of access to adequate housing, and the obligation of local municipalities to provide alternative accommodation interrelate. While the Court has held that private property owners can evict unlawful occupiers if the eviction is ‘just and equitable’, the State, and municipality in particular, is obliged to provide temporary accommodation, even in instances where private property owners execute evictions. It is therefore not enough for the municipality to only provide alternative accommodation to those relocated from hazardous buildings but not to those who would be rendered homeless if evicted by a private owner.⁴⁸

⁴¹ *The Government of the Republic of South Africa & Others v Grootboom (Grootboom) 2001 (1) SA 46 (CC)*. This matter involved the eviction of a community from private land that it was unlawfully occupying after leaving an informal settlement owing to unsavoury conditions. At para 35.

⁴² *Port Elizabeth Municipality v Various Occupiers 2005 (1) SA (CC)* at para 17.

⁴³ *Minister of Public Works & Others v Kyalami Ridge Environmental Association & Others 2001 (7) BCLY 652 (CC)*.

⁴⁴ *Port Elizabeth Municipality v Various Occupiers 2005 (1) SA (CC)*.

⁴⁵ *Port Elizabeth Municipality v Various Occupiers 2005 (1) SA (CC)* and *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others 2008 (3) SA 208 (CC) (Olivia Road)*.

⁴⁶ Act No.4 of 2000.

⁴⁷ *Khasa and others v Minister of Social Development and others, Mahlaule and another v Minister of Social Development 2004 (6) SA 505 (CC)*. This case concerned whether or not non-South African citizens, but permanent residents, qualify for social grants.

⁴⁸ *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Limited 2012 (2) SA 104 (CC)*. (*Blue Moonlight*). This case concerned the lawfulness of evicting people off private property and whether such action would be considered ‘just and equitable’.

- g) **Access to basic services:** Prior to disconnecting basic municipal services such as electricity for non-payment of the service, procedural fairness requires the municipality responsible for the delivery of such services to provide recipients with a pre-termination notice, which will still allow recipients to approach the municipality to challenge the proposed termination or tender arrangements to pay off arrears within the notice period.⁴⁹
- h) **Policy review to demonstrate progressive realisation:** Concerning the right to access free basic water, the courts have acknowledged that due to the nature of the right being progressive, it will take time before everyone has access to sufficient water. Also, it is not the role of the court to determine what constitutes “sufficient water”, as this remains in the realm of government. However, it has also been noted that municipalities often repeatedly review their policies to ensure that they promote the progressive achievement of the right of access to sufficient water. All socio-economic rights are subject to progressive realisation, including the right of access to adequate housing and the importance of continuous policy review by the State to ensure that the progressive realisation of the right to adequate housing has therefore been demonstrated.⁵⁰
- i) **Minimum level of basic services:** The Courts have held that section 73(1) (c) of the Municipal Systems Act requires a municipality to provide “the minimum level of basic services”, which includes the provision of sanitation and toilet services.⁵¹

It is clear that a number of factors must be taken into consideration when determining the content of the right of access to adequate housing and basic services, as well as the correlating obligations on the State, particularly on municipalities, in fulfilling the objective of progressive realisation. The section that follows will examine the applicable international law instruments which have further developed the content of the right.

2.2 INTERNATIONAL LAW

A number of international legal instruments further guarantee the right of access to adequate housing and to an adequate standard of living, while General Comment 4 of the Committee for Economic, Social and Cultural Rights (CESCR General Comment 4)⁵² specifically seeks to give content and meaning to the right. In this regard, it is important to note that a number of rights are closely inter-related to the right to access to adequate housing and to an adequate standard of living, and the impact of the provision of housing cannot therefore be considered in isolation.

This section will briefly discuss the content of the Universal Declaration of Human Rights (UDHR);⁵³ the International Covenant of Economic, Social and Cultural Rights (ICESCR)⁵⁴ and the African Charter on Human and People’s Rights,⁵⁵ while the guidelines for the content of “adequate housing” as contained in CESCR General Comment 4 will also be explained.

Universal Declaration of Human Rights

Article 17 of the Universal Declaration of Human Rights (UDHR) states that everyone has the right to own property alone as well as in association with others and that no one shall be arbitrarily deprived of his/her property. Additionally, article 25 of the UDHR provides that everyone has a right to a standard of living adequate for the health and well-being of themselves and their family, including food, clothing, housing, medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age, or other lack of livelihood in circumstances beyond their control.

⁴⁹ *Leon Joseph and others v City of Johannesburg and others 2010 (4) SA 55 (CC).*

⁵⁰ *Lindiwe Mazibuko and others v City of Johannesburg and others 2010 (4) SA 1 (CC).*

⁵¹ *Beja & Others v Premier of the Western Cape and others 2011 (10) BCLR 1077 (WCC).*

⁵² UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*, 13 December 1991, E/1992/23.

⁵³ 10 December 1948, General Assembly resolution 217 A (III).

⁵⁴ International Covenant on Economic, Social and Cultural Rights, 16 December 1966, adopted by United Nations General Assembly resolution 2200A (XXI).

⁵⁵ 1981 (as accessed at <http://www.achpr.org/instruments/achpr/>).

International Covenant of Economic, Social and Cultural Rights

Article 11 of the International Covenant of Economic, Social, and Cultural Rights (ICESCR)⁵⁶ recognises the right of everyone to an adequate standard of living, including adequate housing, and to the continuous improvement of living conditions. This is further enunciated in the Committee for Economic, Social and Cultural Rights General Comment 4 (CESCR General Comment 4),⁵⁷ which emphasises that because of the link drawn in the ICESCR to an adequate standard of living, the right to adequate housing is of central importance for the enjoyment of all economic, social and cultural rights.

Additionally, the CESCR General Comment 4 states that “*individuals, as well as families are entitled to adequate housing regardless of age, economic status, group or other affiliation or status...*”⁵⁸ It further states that the right to adequate housing should not be interpreted narrowly to encompass only shelter that provides a roof over one’s head or shelter exclusively as a commodity, but rather that the right should be interpreted as the “*right to live somewhere in security, peace, and dignity*”.⁵⁹

Importantly, CESCR General Comment 4 provides detailed guidelines as to what ought to constitute “adequate housing”, and includes the following factors:

- a) **legal security of tenure** (including rental accommodation, cooperative housing, lease, owner-occupation, emergency housing, and informal settlements), where all persons should be guaranteed legal protection against forced eviction, harassment, and other threats
- b) **availability of services, materials, facilities, and infrastructure** that are essential for health, security, comfort and nutrition. This includes access to “*safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage, and emergency services*”⁶⁰
- c) **affordability**, in that the costs associated with housing should not threaten or compromise other basic needs, and should be commensurate with income levels. Where rental models are used, tenants should be protected against unreasonable rent levels or increases
- d) **habitability**, where inhabitants are provided with adequate space and protection from cold, damp, heat, rain, wind, or other threats to health and well-being
- e) **accessibility** to those entitled to it, marginalised groups in particular, who should be ensured some degree of priority consideration in the housing sphere
- f) **location**, which allows access to employment opportunities, health care services, schools, child-care centres, and other social facilities. Housing should also not be developed on polluted sites or any sources that threaten the health of inhabitants and
- g) **cultural adequacy**, which ensures that the housing provided enables the expression of cultural identity and diversity of housing needs

In addition, in recognising that forced evictions frequently give rise to other rights violations, General Comment 7⁶¹ sets out both procedural and substantive factors to be taken into consideration during the conducting of forced evictions, which include the following, amongst others:

- a) “*an opportunity for genuine consultation with those affected;*
- b) *adequate and reasonable notice for all affected persons prior to the scheduled date of eviction;*

⁵⁶ As ratified by the South African Government.

⁵⁷ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*, 13 December 1991, E/1992/23.

⁵⁸ UN CESCR (1991) “The right to adequate housing (Art.11 (1)):13/12/91.”

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 7: The right to adequate housing (Art.11.1): forced evictions*, 20 May 1997, E/1998/22.

- c) *information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected;*
- d) *especially where groups of people are involved, government officials or their representatives to be present during an eviction;*
- e) *all persons carrying out the eviction to be properly identified;*
- f) *evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise;*
- g) *provision of legal remedies; and*
- h) *provision where possible, of legal aid to persons who are in need of it to seek redress from the courts.*⁶²

African Charter on Human and Peoples' Rights

Article 14 of the African Charter on Human and Peoples' Rights (African Charter) guarantees the right to property, stating that this right shall only be encroached upon in the interest of public need or in the general interest of the community, and in accordance with the provisions of appropriate laws. It also states, in Article 24, that all people shall have the right to a general satisfactory environment favourable to their development.

Based on the international framework highlighted above, it is evident that South African laws and policies guiding the State's provision of adequate housing are closely aligned to the rights-based requirements articulated in international law. It is also evident from the plethora of legislation, case law, and policies giving effect thereto, that due consideration has been given to ensuring that rights-based approaches are incorporated into every aspect of programmatic development and governance. Challenges in realising this right and those related to it in the provision of service delivery in general, therefore, are largely linked to the approaches adopted by the State in interpreting and implementing these laws and policies.

The next section will provide a broad overview of the submissions received from State respondents and other interested stakeholders, which will be followed by a short analysis of the current legal framework and submissions received, leading to the identification of key findings emanating from the analysis.

⁶² *Ibid* at para 15.

03

ANALYSIS ON ACCESS TO ADEQUATE HOUSING, LOCAL GOVERNANCE, AND SERVICE DELIVERY

On the basis of the submissions received from State respondents and interested stakeholders, contextual themes were identified that provide further insight into why the challenges in the provision of adequate housing and general service delivery persist. Within each theme, the report includes a summary of submissions⁶³ received from the stakeholders identified in the Terms of Reference, while these sections will further provide an analysis. When analysing the submissions, common challenges faced have been identified in realising the right of access to adequate housing, local governance, and general service delivery, albeit from varied perspectives as to the causes thereof.

The submissions are structured and themed as follows:

- a) an overview of the legal and policy framework and challenges identified by the national, provincial, and local spheres of government in realising the right of access to adequate housing
- b) approaches to budgeting, planning, monitoring and evaluation, and challenges identified in relation thereto
- c) approaches in relation to cooperative governance and related challenges
- d) challenges relating to local governance
- e) security of tenure and the process of carrying out evictions
- f) the role of and challenges relating to private property owners and the private sector
- g) challenges relating to effective community participation and circumstances that give rise to protest action
- h) access to justice and
- i) apartheid spatial planning

⁶³ While the themes identified and information provided below are a summary of the submissions made during the hearing, a full transcribed record of the hearing, in addition to the presentations made by all who participated, is available upon request by any member of the public. This information will also be accessible on the SAHRC's website.

04

CHALLENGES IN THE LEGAL AND
POLICY FRAMEWORK

4.1 SUMMARY OF SUBMISSIONS

As per its constitutional obligations, the role of the NDoHS is to negotiate the housing budget with Treasury in order to accommodate and develop the various housing programmes and thereafter apportion the budget to Members of the Executive Council (MEC) to implement the programmes in their respective provinces. The MEC's control the implementation and administration function of the programme, as well as funding allocation to municipalities. Municipalities, in turn, have a responsibility to apply for project funding in order to deliver on their constitutional mandate.

In following its obligations in terms of the National Housing Act and in order to adequately identify housing needs and develop appropriate housing plans, the NDoHS provides a supportive role to municipalities that do not have the capacity to execute their constitutional obligations regarding housing development by:

- a) conducting policy workshops on an annual basis
- b) offering bursaries to housing officials to enrol in various academic programmes relating to housing policy development
- c) analysing and evaluating annual business plans received from the nine provinces before distributing the Human Settlement Development Grant (HSDG) and
- d) allocating funding to municipalities to prepare for the housing chapters of the Integrated Development Plan (IDP)
- e) Noted as a key success, the NDoHS lauds itself for the creation of one uniform Housing Subsidy Scheme for all South Africans, involving various interventions that include financial, incremental, rental, and social housing, in addition to rural interventions. These interventions have led to the delivery of 3.7 million housing opportunities since 1994. However, during discussions with the representative of the NDoHS it emerged that although 3.7 million housing opportunities have been granted, only 2.7 million units have actually been built.

One of the main challenges which became apparent relates to the disparities in the figures mentioned by various State respondents in providing access to housing and the delivery of actual housing units. According to Studies in Poverty and Inequality Institute (SPII),⁶⁴ the confusion arises in the overlap between service sites, housing opportunities, houses under construction, and planned projects. It suggests that focus should be on units completed each year, which should not include those carried over from previous years because they are not yet completed.

Gauteng forms the centre of South Africa's economic hub and has a population of 12 million making it home to almost one quarter of the country's total population. It is 97% urban, with a land mass of under 2% of South

⁶⁴ SPII is a non-profit research and advocacy think-tank focusing on the drivers to poverty and inequality in South Africa and the sub-region.

Africa's total land surface. As such, the demand for housing in the province remains high, and a primary concern is that the full extent of the housing demand continues to be unclear due to an unreliable Demand Database, resulting in the demand either being over or underestimated.

In terms of policy approaches to facilitate varied needs of the housing market, the Gauteng Provincial Government (GPG) has developed:

- a) the Special Needs Policy, focusing on households affected by HIV/AIDS, in addition to a Transitional Housing Subsidy to cater for people dying of AIDS and leaving children without any means of support
- b) the Women in Housing Policy, ensuring that 10% of the capital budget is set aside to address the needs of women in the sector
- c) stabilisation of the Rental Housing Sector, which provides for the establishment of the Rental Housing Tribunal with a view of regulating disputes between landlords and tenants and
- d) the Protection of the Housing Consumer Policy established to address complaints pertaining to consumer matters

The City of Cape Town (CoCT), on the other hand, currently implements its projects according to a database, which has 261 000 names awaiting access to housing.

In responding to the question posed by the SAHRC relating the “world class city” trend in development and the perception that this advocates for the elimination of informal settlements and poorly maintained buildings, Professor Huchzermeyer pointed out that local and provincial governments have treated strategies for developing “African World Class Cities” as necessary to attract foreign direct investment. Economic policy has considered this necessary for economic growth and as a means of generating resources required for redistribution. This may have been at the detriment of developing and supporting internal industrial activity.

With the objective of attracting investment, the State has embraced private investment in the development of prime land where housing to accommodate South Africa's poor population could have been located. This has been in spite of State objectives to restructure the apartheid city and to bring low income households closer to economic opportunities. The State's approach has been largely that where land is privately held, there is little it can do about plans for up-market development. In addition, the Spatial Planning and Land Use Management Act (SPLUMA)⁶⁵ has a limitation in that the Minister of Rural Development and Land Affairs can override a municipality's decision in respect to development approvals if it is deemed to be in the national interest. In the absence of a definition of ‘national interest’, economic growth may be framed as a legitimate reason to prioritise upmarket development over low income housing on strategically located land. Further, if private property holders are given equal opportunities to provide inputs to developmental decision-making processes, little can be done to bias spatial decision-making in favour of the excluded. According to Huchzermeyer, within the current framework it is difficult to prevent development decisions on strategic land from being made in the interests of the private sector, rather than those of the poor.

Huchzermeyer's recommendations in addressing the challenges posed by the conundrum of the “world class city”, are based on the philosophy and strategy put forward by French sociologist Henri Lefebvre, who coined the idea of a “Right to the City”. This promotes (1) prioritising the urban question in political deliberations, (2) enabling and prioritising self-management and the resuscitation of a strong participatory democratic process which were evident in the initial RDP framework up to 1996, (3) reviewing and adjusting regulatory and legal frameworks to dismantle exclusion and ensure that poor households are able to enjoy the benefits of the urban economy and urban life.

The Legal Resources Centre (LRC)⁶⁶ described its experience in representing communities and individuals residing in informal settlements who have either applied for housing from their municipality, have been relocated to a housing development, or have experienced informal settlement upgrading. Some of the main challenges identified during this process related to a lack of transparency and access to information, including:

⁶⁵ 16 of 2013.

⁶⁶ The LRC is a public interest law firm providing free legal services to indigent individuals and poor communities.

- a) a lack of clarity for the application to be placed on a housing list
- b) a lack of transparency regarding the process of housing allocation and State-driven housing plans and
- c) confusion as to whether an informal settlement will benefit from *in situ* upgrading and the consequences related thereto

Consequently, information about the housing process is not always available and an inability to access information results in the following:

- a) people who have applied for housing cannot view the waiting list to establish where they are in the housing queue
- b) confusion as to who bears the onus in providing bulk infrastructure on privately owned land, particularly with long-standing informal settlements, where inconsistent approaches have been adopted throughout the country
- c) a process of *in situ* upgrades often results in difficulties due to a lack of information regarding the criteria for the selection of beneficiaries
- d) information relating to subsidies for upgrades is not made readily available to communities for these benefits to be adequately accessed; and
- e) people relocated to temporary relocation accommodation (TRAs) find themselves being placed there more permanently rather than temporarily as intended, with TRA's often being located far away from the initial informal settlement from which occupiers were relocated or evicted, or far from accessing their places of work or schools.

The NDoHS had noted that one of its key challenges remains sustaining the provision of housing as the demand continues to increase which is coupled with the inflation of costs while resources remain limited. Other challenges which have also been experienced with the allocation of housing units include project administration and the transfer of properties to beneficiaries immediately upon occupation. A number of stakeholders including the NDoHS, the Western Cape Provincial Government (WCPG), and the CoCT raised concern that when people who have a low income, or none at all, are provided with a brick and mortar house, it is not always valued as an asset and is often sold outside of the legislative requirements for a low price without the requisite title deed. This makes it difficult to locate the original beneficiary who may relocate to another informal settlement.

Despite noting significant investment in State-subsidised housing, State respondents and stakeholders referred to numerous other challenges in the legal and policy framework which negatively impact on broadening access to adequate housing. Challenges identified include the legacy of the apartheid spatial design, rapid urbanisation and migration, the initiation of mass evictions initiated by both private and State-owned entities and the increase in the number of informal settlements. The prevalence of a fragmented property market, a complex set of affordability needs, service delivery protests, the 2008 economic recession, housing security, and housing construction methodology were identified as further challenges.

Overall, the result is that the housing backlog persists, demand for well-located low cost housing in urban areas remains unmet and the development of settlement locations far from economic opportunities results in the perpetuation of apartheid spatial patterns. Worryingly, a similar percentage of people live in informal settlements now as was the case in 1994.

Emergency and Temporary Alternative Accommodation

According to the South African Local Government Association (SALGA),⁶⁷ South African courts have indicated that municipalities must:

- a) have housing policies, plans and budgets for alternative accommodation

⁶⁷ In terms of section 163 of the Constitution, there must be recognition of national and provincial organisations representing municipalities. SALGA is an autonomous association of the 278 municipalities and as per the mandate afforded to in terms of the Constitution, represents local government in its interactions with parliament, the National Council of Provinces and provincial legislatures.

- b) provide alternative accommodation if evictions from private or State land renders evictees homeless and
- c) provide a report on personal circumstances of the occupiers and the availability of alternative arrangements and emergency housing

In this respect, SALGA has developed guidelines for municipalities to provide advice on how to proactively address these issues to avoid the granting of eviction orders. Municipalities are advised to:

- a) undertake research on potential evictions and incorporate this into human settlements plans and
- b) develop early warning systems
- c) develop capacity and strategies for meaningful engagement with households faced with possible eviction and
- d) ensure internal coordination between their respective planning, human settlements and legal services departments

Providing alternative and emergency housing accommodation remains a challenge for the NDoHS. Emanating from the floods that occurred in Limpopo, North West, and Mpumalanga during 2000, and further informed by the *Grootboom* case, the Emergency Housing Programme (EHP) was developed to assist people who were destitute, and with no roof over their heads, and is provided to both South Africans and non-nationals.

It was widely acknowledged that the EHP applies to both accommodation to be provided as a result of a natural disaster and evictions, and that no distinction is made in terms of the EHP. However, while the WCPG does not refute that in terms of the legislation the State has a duty to provide temporary accommodation in both instances, it submitted that it appears that the legislation was drafted to accommodate for emergencies that involve “natural phenomenon” such as floods and earthquakes, for example, and not evictions from private property to the extent that it occurs now, which becomes difficult to plan and budget for. Adding to this, the NDoHS has noted that the EHP does not adequately address inner city evictions. In this respect, the NDoHS is in the process of either adjusting the current EHP or developing a new programme that will allow municipalities to provide high-rise accommodation on a temporary basis within the inner city.

The eThekweni Municipality (ET) also cited the “limitation of legislation” in terms of the requirement to acquire a court order to evict newly established informal households, specifically when land that has been earmarked for development is occupied. In addition, the requirement to provide emergency or alternative accommodation on the scale required exceeds available resources to meet the demand. At a rate of at least 12 000 new houses required annually with an occupation growth rate estimated at 1.3 per cent per annum, the ET estimates it will take at least 50 years to meet the current demand.

Numerous State respondents alluded to the fact that, in implementing the EHP, it has become difficult to administer and has resulted in perceived preferential treatment (commonly referred to as “queue jumping”) of those who have been affected by natural disasters or cases of eviction, and they have raised concerns the impact this may have on the housing database.

In its written submissions to the SAHRC, the WCPG stated that:

“In our view the massive increase in land invasions, of a concerted, orchestrated nature are causing both government and private landowners to resort to court ordered evictions on a far bigger scale and more frequently than has been seen in the past and it is a result of this intentional occupation of land that is the cause.

In addition, I point out that in terms of the Constitution as read with the relevant case law, evictions do not inevitably lead to homelessness as the State is obliged to provide emergency accommodation to any person evicted from land... This obligation has become so onerous on the State that it is threatening to swamp both the budget and the land capacity of both the city and the Province, e.g. In the Temporary Relocation Areas that are being required now for people who wilfully invaded private or State land with the intent to benefit from the State’s emergency housing obligations in this regard.”

The term “queue jumping”, according to a number of State respondents, is intended to refer to people who “strategically” position themselves on land earmarked for development or areas prone to disaster, in order to benefit from housing projects ahead of others who may have been waiting for some time. “Orchestrated invasions”, on the other hand, was described by the WCPG as instances where people sell pieces of land to informal settlement or backyard dwellers, who then move onto land which is owned by a private property owner.

In terms of the language used, concern was raised by the Panel regarding the use of words such as “building hijacking” or “invasion” referring to the unlawful occupation of buildings or land by people who are in desperate situations. Both the KwaZulu-Natal Provincial Government (KZNPG) and the CoCT agreed that a distinction ought to be made between those occupying a piece of land because they are desperate, as opposed to those that have been occupied by individuals exploiting desperate people to their advantage, and the use of the word “invasion” is not always appropriate. Context is therefore important in determining what language gets used.

When a question was raised by the Panel whether it would amount to “queue jumping” if there is a budget allocated to emergency housing and provision is made from resources that have already been set aside, the CoCT responded that in the normal course, transitional housing is provided for smaller scale evictions and if it is a manageable size of people relocated to a temporary relocation area, it would not pose a great problem. The problem is largely in relation to large scale evictions where the perception is that an entire community has been accommodated on land identified for development at the expense of another community. The problems experienced therefore primarily relate to the shortage of land, and the fact that in the event of a large scale eviction, land allocated for development may then have to be used to provide temporary accommodation at the expense of longer term plans to provide housing opportunities.

The WCPG further submitted that in order to accommodate people who have been evicted in an emergency situation in temporary relocation accommodation, it currently has around 500 000 units which have been assigned to 500 000 awaiting housing opportunities. In aiming to address the challenges relating to perceived preferential treatment and the delay of planned housing development, the WCPG has tried to move away from responding first to people who have been subjected to emergencies and moving them into formal housing ahead of other families who may have been waiting to access a housing opportunity for many years. There is a sense that if it always focuses on the provision of emergency accommodation, people may willingly put themselves into emergency situations such as moving onto low lying areas or being subjected to fires or floods with a view of getting ahead by being afforded a housing opportunity. In these cases, people will be accommodated in temporary accommodation until their turn for a housing opportunity arrives, based on each municipality’s database of people waiting for such an opportunity.

In terms of the challenges faced by municipalities in ensuring the transition from temporary emergency accommodation to permanent housing, the integration of evictees into the generally referred to “queue” for permanent subsidised housing is problematic. According to SALGA, a number of factors contribute to this, including the following:

- a) some people may not qualify for subsidised housing as provided for in national policy
- b) municipalities cannot create perceptions of incentives for “queue jumping” by prioritising the evictees’ need for permanent housing over those who have been on the waiting list for years and may still be residing in informal settlements, backyards, or overcrowded rooms in formal locations and
- c) the needs of all parties must be balanced by municipalities in their allocation practices

SALGA further submitted that the recent conduct of the NDoHS suggests a shift towards the centralisation of allocation policy, thus limiting the municipalities’ authority to use their own “waiting lists” and allocation policies, despite the fact that such policies may speak to the particular realities of communities and the nature of housing need in their locality.

In addition to perceived instances of “queue jumping” and “orchestrated land invasions”, submissions were received which indicated that the occurrence of “shack lords” and “shack farming” remains a challenge, where the provision of shacks can result in the acquisition of significant rentals in areas close to the central building district.

The current approaches to the provision of alternative accommodation were identified to be problematic, where dormitory-styled accommodation is provided and the duration of such accommodation remains unspecified. Due to the fact that the provision of emergency housing is intended to be of a temporary nature, housing norms and standards are not applicable because it is not meant to be an alternative to housing development projects and ought to be an option of last resort. In the event that the EHP is used to construct a new development, the intention of the programme is to provide temporary assistance to residents and relocate residents back to the initial site once the development is completed. Ideally, temporary accommodation should be for a period of not more than 12 months.

However, the NDoHS and other State respondents acknowledged that implementation of the EHP has become more permanent than the temporary nature intended, largely due to the limited supply of permanent accommodation available. During discussions with the Panel, it was submitted that while provinces such as the Western Cape have structured programmes in place to implement EHP, this does not apply to all provinces. This, in turn, affects the ability of municipalities to provide further temporary accommodation to those in need. In recognising this reality, the NDoHS acknowledged that perhaps housing norms and standards should be adhered to in order to ensure that residents have a healthy quality of life.

In terms of funding under the EHP, at a provincial level MEC's are advised to ring-fence funding for emergencies on an annual basis and municipalities are required to apply to the MEC for the allocation of such funding. However, the NDoHS notes that not all provinces are providing adequately for the provision of emergency housing due to budgetary implications and the unpredictable nature of circumstances that lead to the need for emergency accommodation. Consequently, when municipalities apply for the requisite funding, it is not always available. During discussions it emerged that in instances where funding for emergencies had not been ring-fenced, a province would have to re-prioritise and negotiate with other municipalities where development contract commitments had not as yet been implemented to redirect such funding to a specific emergency. This, it emerged, is not an easy task to undertake, as the community who should have benefitted from the initial funding will need an explanation as to why projects are being redirected. In instances where the EHP is implemented, the programme allows for the circumvention of normal procurement policies to allow for quicker delivery to accommodate people in emergency situations. However, the ET submits that the provision of funding from the provincial legislature to accommodate emergency housing can be slow, taking at least three weeks.

When asked whether a municipality needs to apply for emergency funding on a special project basis or if it would be possible for the municipality to foresee the amount of money it may require and plan accordingly, the representative of the NDoHS submitted that in his view, the only province that would be able to do so would be the Western Cape because of its history regarding floods and fires. Other provinces may find this more difficult to do because they cannot predict when a disaster may actually occur. While acknowledging that there are indeed different types of "emergencies" informed through policy, legislation, and case law, the WCPG advised that it is impossible to adequately plan for all of these. While it may be possible to plan for historically disaster prone areas, it cannot effectively do so for private land eviction resulting from what it terms "planned/orchestrated land invasions", which may result in large numbers of people potentially deemed to be eligible for emergency accommodation.

The GPG further highlighted challenges relating to funding where planning for emergency accommodation becomes difficult because the causes that lead to emergencies differ from year to year and the development of temporary units tends to be more expensive than an RDP house. The costs required for the provision of temporary structures is also not provided for in the grants available. The GPG is therefore seeking to address this by providing for emergencies through its HSDG budget.

Submissions received illustrated a number of different approaches to the allocation of temporary allocation of housing in terms of the EHP. Firstly, the WCPG indicated that a primary challenge in the provision of basic services relates to the spending of budgets. In the context of the provision of emergency housing, if a province underspends on its budget allocated to emergency housing, it stifles the implementation of other projects that may have been implemented had the funds reserved for emergency housing been allocated to these projects instead. Concern was raised that should the monies allocated for various programmes, and the EHP in particular, not be spent due to the

unpredictable nature of circumstances leading to their use, provinces are open to penalisation by the NDoHS for under spending. Consequently, the budget allocation for the subsequent financial year may be adversely impacted. As such, the WCPG has opted to establish a separate operating account, consisting of funds generated through the sale of assets. In this way, where a municipality requires emergency funding it would request permission from the MEC to access money from this separate account to pay that service. It is then required to pay the money back at a later stage.

Further to this, the WCPG runs the Upgrading of Informal Settlements Programme (UISP) and Emergency Housing Programme (EHP) in parallel, with a view to upgrading informal settlements as a mitigation strategy to any emergency that may arise. While the WCPG submits that it cannot predict the occurrence of fires and floods, through the UISP it tries to address densities within informal settlements by first attempting to clear families out of the settlement in order to provide basic services. The intention is to provide the necessary infrastructure required, such as roads, so that should a natural disaster occur, the requisite services are able to reach the affected community. The intention is that by creating the necessary infrastructure, the risk of such emergencies in the long term is reduced and the WCPG is still able to provide the necessary services to communities.

The WCPG regards its role pertaining to EHP as being primarily one of support, both financial and technical, to municipalities. However, should the affected municipality require what it terms “actual emergency” relief, the WCPG will assist in such provision of funding. Consequently, two emergency housing projects have been implemented in the past 12 months, the Oudtshoorn ESP to assist with repairs to storm damaged houses and the Qolweni TRA (27 units) to assist with the relocation of beneficiaries while various phases of UISP projects are being implemented. R10 million per annum has also been set aside for “Fire Kits” for the City of Cape Town. In acknowledging that not all municipalities have the necessary technical and staff capacity to meet their constitutional obligations, the WCPG provides resource assistance to assist with planning and technical support for the development of human settlements. Regarding transitional housing in the CoCT, individuals accommodated have to wait until they are identified as a beneficiary in terms of the housing database and temporary and incremental development areas are either within or easily accessible to established urban areas, according to the CoCT.

When engaging in development processes, the KZNPG submits that it forms “social compacts” with communities, creating a list of beneficiaries to be allocated to each project, which is then segmented into priority categories that include disaster and emergency cases, those that require the refurbishment of old stock, and those that have been evicted from privately owned properties and land. Transitional accommodation is provided by the ET to those communities that are temporarily moved due to fires or disasters, and in the case of developing informal settlements, residents are placed in temporary accommodation as part of a “rollover approach”.

According to SALGA, municipalities face serious financial constraints in providing temporary emergency accommodation to those who would be rendered homeless by an eviction and access to the HSDG requires provincial approval. SALGA made two important submissions in this regard. Firstly, because urbanisation is a national trend, the burden should be shared by all spheres of government, or more adequate financing and tools need to be provided to local government in order to assist it in meeting its obligations. Secondly, it submitted that the current legislative and fiscal framework is based on housing as a concurrent function. As a result there is a disjuncture between court rulings relating to access to adequate housing, which place considerable legal and financial obligations on municipalities with respect to housing evictees, while programme planning and funding remains controlled at a provincial level. In order to ensure that court decisions are adhered to in situations requiring emergency housing for example, greater oversight would be required to ensure that provinces do set aside the funds required. In addition, a review of the EHP is required and the processes to be followed by municipalities would need to be simplified, facilitated, and sped up so that they have easier access to funds when required.

The unavailability of suitable land or housing opportunities remains a challenge in meeting emergency accommodation requirements, particularly in a context of declining budgets and resource constraints and it was suggested that certain State land gets released to accommodate the land shortage. According to the CoCT, an estimated 60 per cent of land in the CoCT is privately owned, while 40 per cent is State owned and belongs to national government.

In subsequent submissions it became apparent that there is a significant lack of clarity surrounding the amount of vacant and/or available land for development. According to SPII, what constitutes “vacant” is contested and differing definitions are used to describe residential, business, industrial or farm land amongst others, whereas what constitutes “available” land also requires further clarification as land may be available but for a variety of purposes. Data relating to the amount of State owned land therefore appears to be incomplete and a large amount of land remains unaccounted for.

In adding to difficulties in adequately planning and accessing adequate resources, the NDoHS submitted that the EHP is viewed by private property owners as a means to force the government to resettle people currently occupying private buildings. In these instances, use of the EHP has been inappropriate because the situation of homelessness has not been created through an emergency, either natural or as a result of development processes, but rather by property owners. However, the NDoHS recognised that the primary implementer of the EHP remains at municipality level.

The Panel suggested that within the current policy framework it may be viable for a private property developer, interested in unlocking the commercial value of an occupied property, to make a payment contribution directly to the municipality to provide alternative accommodation. This proposal appeared to be supported by a wide number of stakeholders, noting that there appears to be nothing in law to stop such an arrangement.

A further suggestion was made relating to the perception that there is a lot of vacant land in South Africa, with landowners not doing much to secure it. It was suggested that private property owners should take greater responsibility in securing such land, or alternatively, be liable for alternative accommodation by the State or make a financial contribution to the municipality to provide such accommodation.

Adding to this, the KZNPG submitted that a failure to take reasonable steps to adequately secure land should result in applications for evictions being dismissed by the courts in appropriate cases. This approach was supported by SALGA, arguing it may be beneficial for the courts not to grant eviction orders, which may result in land owners taking greater responsibility for their properties and not place the additional burden on municipalities to provide alternative accommodation as and when the property owner decides to institute eviction proceedings. In addition, SALGA indicated that a possible solution may be that, instead of evicting people from pieces of land, the land on which they currently reside should rather be considered as temporary accommodation. This will allow the State sufficient time to plan the provision of permanent alternative accommodation, provided that the State provides a substantive plan. In the event that the State does not produce such a plan, eviction proceedings can be launched.

Similarly, the State should secure and block off land earmarked for development in order to ensure that it is adequately developed without individuals prematurely occupying the land, which often leads to the mushrooming of informal settlements as people refuse to move once they have begun the process of occupation. Notably, the KZNPG acknowledged that even in these instances, occupation may not be “orchestrated” but rather poor people desperately requiring a place to stay.

Stakeholders submitted that these solutions would allow municipalities to execute their constitutional obligation to provide temporary accommodation, would assist municipalities in acquiring more time to implement a programme, and would assist with the development of planning and budgeting that allows for a more expanded approach to emergency housing requirements.

In terms of limiting its ability to adequately execute its mandate, the KZNPG submitted that while it has an inherent sympathy for the plight of the poor, there have to be effective measures to counter so-called “land invasions”, which needs to be achieved in the context of a “*seriously limiting legal environment.*” The KZNPG therefore submitted that in order to achieve this, a new legal framework is necessary. In this respect, when clarity was sought by the Panel during discussions, the KZNPG submitted that it is not the obligations that arise from the current legal framework that remains problematic *per se*, but rather, the amount of time necessary to effectively plan to accommodate those who require alternative accommodation due to eviction. If municipalities were provided with adequate time as determined by the court in such cases, they would be able to adequately execute their mandate. Where eviction

orders have been granted, the KZNPG advised that in instances it has rented occupied land from the owner while alternative accommodation was being sourced.

Low- income Rental Housing

In its submissions, SALGA noted the major urbanisation trend that has created an increased demand for accommodation for people migrating to cities in search of work. Due to the shortage of low income accommodation in urban areas, people are forced to make use of informal housing options, usually in the form of shacks in backyards or informal settlements, or abandoned and dilapidated buildings. According to SALGA, the current national housing policy framework does not have adequate housing instruments available to address the low-income rental need of the urban inner cities. Although the Community Residential Units Programme (CRUP) was designed for this purpose, it is not delivering at the scale required, as it has primarily been used to refurbish apartheid-legacy State rental stock and hostel redevelopment, with few new developments taking place. The CoCT, for example, is in the process of upgrading old rental stock, with approximately 7 000 households being maintained as part of its “redress” initiative to ensure that people do not lose their homes due to maintenance costs, while the KZNPG, in terms of its CRUP programme, has reportedly spent in excess of R700 million in upgrading hostels to family accommodation. It was further noted that the “working poor” remain confined to relying on volatile and informal living environments and that 70-90% of household income is spent on housing related costs such as utilities, food and transport. While it noted that a review of the CRUP is underway, SALGA advised that the government’s entire approach to low-income rental needs to be overhauled, including *inter alia* approaches to policy, funding, institutional arrangements, and delivery.

Various policies have been drafted around the issue of accommodating low-income rental tenants. The Social Housing Programme (SHP), in particular, was implemented to accommodate higher density development and increase the demand for rental housing in urban areas, catering for individuals earning between R1 500 – R7 500 per month. It is also geared at areas where bulk infrastructure already exists, with a view to contributing toward urban efficiency and addressing existing structural, economic, social, and spatial dysfunctions. Complementing the SHP, the CRUP provides a framework governing apartheid-legacy State-owned rental stock, catering for individuals earning between R800 – R3500 per month.

In terms of social housing, the WCPG’s policy is to apply a sliding scale where an individual’s income has increased over time, capped at an amount of R7 500 per month. If an individual earns more than R7 500 per month, market related rental rates are charged. If an individual becomes unemployed, a nominal rate of R100 is charged and people are not evicted if they pay the nominal rate.

According to the CoCT, there are 43 500 “public housing rental opportunities” for low income earners available to it and a unit can be leased from the CoCT for as little as R10.00 per month. These units are allocated in accordance with the CoCT’s database in terms of its Allocation Policy: Housing Opportunities.

The CoJ’s approach to developing the low-cost rental sector includes:

- a) subsidising or incentivising the private sector to provide low cost rentals which are price competitive within that specific market
- b) rental units managed by the Johannesburg Social Housing Company (JOSHCO), a fully owned municipal entity of the CoJ mandated to manage city housing stock, convert and manage single-sex hostels, rehabilitate and manage certain inner city buildings, and develop and manage new social housing projects and
- c) rental stock inherited from the apartheid era, the bulk of which is expected to be transferred to current tenants; and hostels converted into residential units in terms of the CRUP

During discussions with the Panel it was submitted that in instances where persons with very low or no income are provided with a house, it is not always valued as an asset and is often sold at a low price without the requisite title deeds, as mentioned earlier in the report. In addition, although basic services are provided as a bare minimum, it does not necessarily translate into any form of construction. For the WCPG therefore, in instances where people may have irregular incomes, a solution to this problem could be the implementation of saving schemes derived from irregular or informal income, which could later be demonstrated as an example of one’s earning capacity.

Regarding the prioritisation of those who require access to affordable housing, the CoJ has developed databases maintained regionally and per ward and prioritisation is geographic and on a project by project basis. For apartheid-legacy housing stock, opportunities are allocated on a waiting list basis and in terms of JOSHCO rentals, these are allocated on a first-come first-served basis dependent on the subsidy requirements as per the national human settlements policy.

A number of State respondents indicated that the collection of rental remains a serious challenge along with the illegal occupation of units and illegal water and electricity connections. The CoCT, which has a recovery rate of roughly 40 per cent, submits that while there are people who are indigent and cannot afford to pay for their units, there are also those that can afford to pay but do not do so and the collection of rental impacts on its ability to provide for maintenance and repairs. This places municipalities in a difficult position when deciding whether to recover the costs by using alternative routes or litigation as a last resort. Private property owners, on the other hand, frequently seek eviction orders as a result of significant losses occurring from the non-collection of rent. While encouraging people who pass the affordability test to pay rent, the CoCT also assists in determining which grants such individuals are entitled to and provides “reasonable opportunities” for defaulting households to remedy a breach which may lead to eviction, while the KZNPG has never evicted tenants due to the non-payment of rentals.

State respondents advised that presently, national subsidies only cover capital costs and not operational costs for the maintenance of buildings, resulting in social housing institutions having to absorb these costs from beneficiaries who may not be able to afford the rental. This, the GPG submitted, is largely because funds provided to social housing institutions are not always spent on adequately improving buildings to an acceptable standard which results in protests because, despite the payment of rent, buildings are not maintained. In addition, while the CoJ submitted that if additional operational costs were provided for in national subsidies which would improve the ability of municipalities to deliver to the informal market, the GPG advised that there is no guarantee that even if funds were provided for operational maintenance, that it will be spent as intended. The CoCT advised that its recent policy of establishing CRU committees is currently being monitored by the Human Settlements Portfolio Committee, and is a key initiative aimed at restoring strained relationships between the CoCT and tenants where these may have been strained or broken down.

One of the key challenges that municipalities face is the acquisition of prime urban land to accommodate this market, especially because properties are beyond the affordability of municipalities as private property owners seek to retain their market value. Further challenges identified by a number of State respondents include catering for the “gap market”, which includes people who earn more than the threshold of R3 500 per month, people who may have previously had a loan or owned fixed property, or people who are single and do not have a family dependent on them.

Furthermore, urban housing is unable to provide for a wide variety of residents with specific needs, for example housing opportunities in the urban areas appear to be aimed more at single individuals rather than at accommodating families. During discussions with the Panel, the CoCT submitted that the current rental housing policy needs to be revisited, and that it could possibly be used as a means to cater for the gap market. According to the KZNPG, internal issues experienced at the Social Housing Regulatory Authority, whose mandate includes the approval of grants and restructuring zones, also raise challenges in the implementation of policy documents in respect of the delivery of rental housing.

In the CoJ’s inner-city, the informal housing market is run by those who are not legal owners of a building but are merely occupants themselves and who do not maintain the property. According to the CoJ, while problem properties may provide for this market, it also violates a range of health and safety standards. Also, these buildings not paying service charges to municipalities results in a non-recoverable use of bulk infrastructure.

The GPG suggested that these buildings should be completely State owned, with beneficiaries acquiring sectional titles. In this manner, it believes that it will avoid tenants being exploited by private property owners or so-called criminal “building hijackers”, in addition the State will be able to monitor payment processes and conduct financial enquiries to determine beneficiary income. If the State is effectively able to monitor the status of beneficiaries, it can better ensure that beneficiaries have access to subsidies.

However, SPII explained that despite a shift in policy direction, the State has found it difficult to shift away from a model of subsidised housing and private ownership, which is unlikely to meet the overwhelming demand, particularly in relation to affordable rental accommodation in urban areas.

Upgrading informal settlements

Regarding the upgrading of informal settlements, the NDoHS submitted that there are currently a total of 2 700 informal settlements throughout the country, the majority of which are located in the provinces forming part of this hearing, namely Gauteng (489), KwaZulu-Natal (635) and Western Cape (445) and consequentially the UISP is one of government's key priority areas. Through the application of the Human Settlements Development Grant (HSDG) and the Urban Settlement Development Grant (USDG), a total number of 447 780 households are reported to have been assisted for the period commencing 1 April 2010 to 31 December 2014. Between 1 April 2014 and 31 December 2014, 49 763 households were assisted. From 2014, and in terms of the government's Medium Term Strategy Framework (MTSF), a further 750 000 households residing in informal settlements are expected to be assisted over a five-year period.

The UISP has two aspects, either to provide *in situ* upgrading, or when this is not possible, to relocate residents to a site where it is intended that housing delivery is accelerated to accommodate the need. The policy is intended to fast track the provision of security of tenure and to empower residents in informal settlements to take control of housing development directly applicable to them. The NDoHS submits that with the current individual housing subsidy of R160 000 and a backlog of approximately 2.3 million family households, it would cost the government a total of R368 billion to build each family a house on a serviced stand over a period of 16 years. However, due to constant population shifts, migration, and rapid population growth, policies as they currently stand may need to be reviewed to accommodate such shifts.

In discussions with the Panel, the NDoHS's representative acknowledged the criticism often levelled at government regarding the upgrading of informal settlements is that RDP type subsidies or "Greenfield" projects are inappropriate for the limited size of informal settlements, thus excluding many people from accessing housing opportunities. However, it was further submitted that this was never the intention of the UISP. According to the NDoHS, because norms and standards do not apply to the UISP in the same manner that they would for an RDP or "Greenfields" project, town planners can be more creative – for example, not every road needs to have a vehicle access point and can allow for higher density accommodation.

With regard to the planning for the upgrading of informal settlements, the Social Justice Coalition (SJC)⁶⁸ submitted that policy and implementation regarding informal service delivery and upgrading in South Africa is ambiguous and lacks substantive coordinated planning. This means that local government are failing in their obligations to progressively realise the rights of poor and working class communities. Planning is done in a haphazard manner in a context where government views even those informal settlements that have existed for many years as temporary or transitory. For example, IDPs do not appear for the upgrading of all informal settlements within the CoCT's jurisdiction through formal programmes and it is also unclear how many have moved beyond the planning to actual implementation phases of development. Consequently, there is no detailed, integrated, time-bound plan in place to progressively realise the right to basic sanitation for those living in informal settlements.

In acknowledging that many people occupy land earmarked for development because they are in desperate need of housing, the GPG explained that there needs to be an effective beneficiary scheme that first understands the exact number of beneficiaries within an informal settlement and then demarcates informal settlements into blocks, with spaces adequately protected to ensure that the correct beneficiary receives the house. The GPG admitted that:

⁶⁸ The SJC based in the informal settlement of Khayelitsha, works with over 80 partnership organisations and comprises of members who are largely poor and live within Khayelitsha.

“We have got human settlements where...even when you look at the look and feel of those human settlements, they just look depressing the way they put them there. They look the same actually as if the people themselves are the same, as if they have got the same needs. There is no diversity...”

Currently underway, the CoCT has developed an Informal Settlement Development Matrix, which enables the CoCT to obtain an overview of its informal settlements and map them accordingly; assists in indicating the appropriate type of development response for each one; and enables strategic prioritisation of informal settlements for different development responses. In addition, the CoCT submitted that the City is committed to achieving service level targets set by the NDoHS for the period 2018/19, which will ensure that the majority of households in informal settlements have access to basic municipal services on a one-on-one level.

Regarding mechanisms in place to forecast urban migration and avoiding overcrowding or the mushrooming of informal settlements, the Department of Social Development (DSD) in collaboration with municipalities’ attempts to, *inter alia*:

- a) monitor and control all informal settlements and take necessary steps to prevent land invasions within its regions
- b) keep a register of residents residing in informal settlements and ensure that they are registered in the demand database and
- c) ensure that no new shacks are erected in informal settlements: in this regard, efforts must be made to deliver sectional titles and other forms of security of tenure to beneficiaries, as perpetual evictions has the impact of reinforcing the mushrooming of informal settlements and the inability to adequately track beneficiaries

The KZNPG submitted that incremental upgrading of informal settlements in terms of service provision tries to address living conditions in informal settlements and that settlements are upgraded *in situ* where ever possible. Relocation is therefore only undertaken in instances where the land is not suitable for habitation or development, while the prioritisation process takes account of public transport and economic opportunities. While the ET includes the private sector to the extent that it can in development projects and existing informal settlements to ensure that they do not expand, monitoring the emergence of new informal settlements remains a challenge. Monitoring is also limited by the existence of “*various criminal and illegal activities such as shack lords, shebeens, drug dealers and taxi wars, people are moving from one area to another for whatever reason*”, limiting the ET’s ability to monitor the growth of existing settlements or the emergence of new ones.

In the interim, temporary accommodation and other alternatives must be provided to beneficiaries who both qualify under the UISP and those who do not (such as non-nationals). The right to housing as articulated in the Constitution applies to “everyone” and the LRC therefore submitted that any attempt by the State to exclude non-nationals to housing benefits, and emergency housing in particular, cannot operate at the discretion of government officials. In instances where evictions lead to homelessness, distinctions cannot be drawn on the basis of one’s nationality.

As highlighted above, the WCPG approaches development through various programmes in addition to UISP. When upgrading informal settlements, the WCPG’s approach is to decant families from the informal settlement, develop the area and then return those who qualified for housing subsidies to those areas.

According to the CoJ, and based on the most recent 2011 census, 18% of Johannesburg’s dwellers reside in informal living conditions such as backyard and free standing shacks in informal settlements. When measuring poverty, the CoJ has developed a geographic poverty index, which encompasses income, employment, health, education, and living environment (including access to basic amenities and infrastructure), and acknowledges that all aspects of these are interrelated. However, it notes that even when people are able to access work, it does not always translate into more formal living arrangements. Many people who constitute the “working poor” are reliant on an increasingly volatile and legally unstable set of informal rental conditions in informal living environments. Census figures show that 87% of people residing in the city access services directly at household level, while 13% use communal arrangements for access to water and sanitation and use non-electrical sources of energy for heating and cooking. The three biggest

costs experienced by consumers, which amount to between 70-90% of household income on average, include housing and housing related costs such as utilities, food and transport.

In terms of the upgrading of informal settlements, the CoJ submitted that:

- a) there are 181 informal settlements that it is currently responsible for
- b) 15 informal settlements have been prioritised, as they do not have access to basic services such as water and sanitation, refuse removal, electricity, and road access
- c) 3 informal settlements are earmarked to be relocated by the end of June 2015 and
- d) 15 informal settlements are to be electrified over the next three financial years commencing 2014/2015, subject to available budgets

A number of submissions spoke to the lack of adequate funding in terms of the UISP. When enquiries were made as to the CoJ's ability to and experience in upgrading informal settlements on dolomitic land, which the UISP provides for in the form of additional funding, the CoJ submitted that the amount provided is not sufficient for the type of development required. In this respect the CoJ informed the Panel that it may be more financially viable to relocate people to alternative areas. The CoJ further advised that it did not know of any other examples in the country where upgrading on dolomitic land had proven successful with the amount of funding currently allocated. As such, either the quantum of the subsidy would have to increase or new technology would have to be introduced that would lower the costs and make it more feasible to build on dolomitic land.

The ET estimates that it has responsibility for 400 informal settlements comprising of roughly 253 000 households. However, due to limited resources not all settlements are provided with full services or low income housing. ET advised that if it were provided with more funding by the provincial legislature, it could provide more houses. SPII further supported this by stating that that housing programmes such as the UISP are not being implemented at scale as a result of implementation challenges relating to spending and procurement challenges.

Another important issue raised is the fact that informal settlements on land that is not owned by the State cannot be dealt with using public funds in terms of the Municipal Finance Management Act. The high prevalence of private informal rental housing means that people may remain without access to basic services.

Submissions received also noted that a significant challenge remains accommodating the "gap market", namely the large percentage of people who do not qualify for housing programmes. In order to supplement this gap, the WCPG proposes that a solution may be to only provide formally serviced sites, upon which people are able to build their own homes. The KZNPG also highlighted this solution, noting that it intends for this policy shift to assist both the "gap" market and poorer segments of its population. The CoCT, on the other hand, submitted that the Roadmap for the implementation of the Integrated Human Settlement framework (IHSF) gives strategic direction on a transversal approach to upgrading informal settlements in the future which will address many of the current challenges being experienced.

The inadequate approach currently adopted for the UISP has the effect of reproducing informal settlements as opposed to eradicating them. Moreover, implementation of the UISP has not broken networks of informal landlords or "shack lords" on whom beneficiaries may be dependent, nor have transitional housing centres served their purpose as intended, as many transitional housing centres have in fact become permanent. The LRC submits that little information is provided to communities about how beneficiaries are selected and information relating to UISP subsidies is not readily accessible. These factors, amongst many others, have led to many poor communities feeling frustrated.

Free Basic Services

According to the National Department of Cooperative Governance and Traditional Affairs (CoGTA), the National Indigent Policy Framework guides the implementation of policies aimed to give effect to the provision of Free Basic Services (FBS) at the provincial and local government level, which must complement national policies. Through its research, CoGTA has identified numerous reasons for the insufficient delivery of FBS, which include its own departmental

restructuring in 2009 resulting in the weakening of established structures. However, in the absence of a nationally approved poverty baseline in the country, the National Indigent Policy Framework requires all 278 municipalities to develop their own tailor-made indigent policies taking into consideration their own local conditions. Consequently, effectiveness implementation of municipal indigent policies varies from one municipality to another and impacts on the quality and delivery of FBS.

CoGTA further submitted that there exists a general public misconception that FBS is a community subsidy targeted at the poor, and in some instances all citizens. However, FBS was never intended to be a general benefit but rather a strategic intervention to assist indigent households out of the poverty trap by removing the financial burden of having to choose between paying for essential services and committing their time and resources to uplifting themselves out of poverty. A study conducted by CoGTA found that municipalities still do not understand the provision of FBS as a poverty alleviation intervention and that the provision of services have been operating in silos, focusing on more mature services rather than assessing the FBS impact as a whole, thus creating a lopsided approach to the provision of FBS. A further challenge was raised in instances where FBS is required on land owned by private property owners, where their consent is required to provide such services and noting that in some instances such consent is withheld.

Also, municipalities find the current indigent registers cumbersome and complex, thus limiting the amount of information available to provide FBS effectively to all who require it. CoGTA is proactively ensuring that municipalities adequately complete registers in this regard, in addition to addressing other problem areas identified by task teams that have been dispatched by CoGTA to develop effective troubleshooting mechanisms.

During discussions with the Panel, the current management of indigent registers relating to the range of conditions attached to them, including the documents that are required to be produced or the levels of income required to qualify for indigent assistance was criticised. Consequently, most indigent registers are not considered credible because they exclude many poor households that should be on the register or they include households that are able to pay for municipal services but have been included on the register. The result is that poor people still pay user fees for basic services. In response to this criticism, CoGTA submitted that the new approach to the provision of FBS will involve standardisation across municipalities regarding the requirements for one to be placed on the indigent register, with new databases and systems that will be the same across provinces.

The WCPG submitted that in terms of FBS, although all municipalities have FBS policies in place, challenges in implementing such policies include insufficient funding, the high cost of staffing the indigent unit and the lack of staff, which makes managing the indigent register difficult. Municipalities appear to implement different approaches to determine who qualifies as indigent, which involves either a household income threshold, or property valuation where those owning property valued below R150 000 automatically qualify for the indigent subsidy. In a study conducted by the Department of Local Government during 2009/2010, it was found that all municipalities had applied for the indigent subsidy and had access to FBS but that municipalities were finding it difficult to keep track of backyard dwellers that required FBS. In farming communities, because the work is seasonal, the status of indigent households when applying for the subsidy is affected. Households with a total income of R2 700 (the equivalent of two pensions) get access to 100% of the FBS package, while households with a total income of between R2 701 and R5 400 get 50% of the FBS package. In “high capacity” municipalities, FBS is provided to all households capped at R5 400.

The CoCT has two approaches when identifying indigent individuals. Firstly, its ‘blanket approach’ considers those owning a municipal property with a value of R200 000 or less automatically indigent, while those owning property valued between R200 000 – R300 000 are managed in terms of the CoCT’s policy. Alternatively, a household can apply to be registered as indigent if it has a gross household income of R5 000 or less, based on meeting the qualification criteria.

As submitted by the CoJ, its indigent policy for providing basic services to indigent individuals is at an advanced stage as it is the only municipality that seeks to extend indigent discounts to all poor individuals living in Johannesburg with South African identity numbers. People do not have to be account holders with the CoJ to apply, as the CoJ submits that it recognises that over 826 000 people live informally in Johannesburg. In addition, as opposed to catering for

indigent property owners, the CoJ attempts to provide for indigent individuals per household and a higher discount is provided to poorer individuals. In terms of the provision of FBS, the ET states that it is “*meant for law abiding indigent customers*” and therefore excludes indigent citizens who have “tampered” with their supplies.

In conclusion, the submissions made relating to the challenges presented by the legal and policy framework highlighted concerns around the apparent disconnect between the way in which courts have interpreted the State’s obligations in progressively realising the rights under investigation, without due regard for the practical implications emanating from judgments. Communities and the lawyers representing them have raised concern about the manner in which policies aimed to realise rights have been interpreted and implemented by the State contrary to the overarching goals of the Constitution, subsequently resulting in further rights violations. Experts and research institutes have cautioned that the disconnection between the legal framework governing access to housing and general service delivery, and the lack of effective implementation of policies giving effect thereto, has led to the cycle of poverty and inequality, in addition to reinforcement of marginalisation and exclusion of poor people.

4.2 ANALYSIS

The current legal framework assigns housing as a concurrent responsibility of national and provincial government, while local government acts as an implementing agent responsible for the actual delivery of housing opportunities and other basic services. However, it is also recognised that in some instances, provincial departments develop and deliver housing projects directly within the jurisdiction of municipalities.

Research on the issue of ‘waiting lists’ conducted by the Socio-Economic Rights Institute (SERI) revealed that although there are numerous State policies, systems, tools, databases, and processes in place to determine the housing demand and assist with the allocation of subsidised housing, there remains a strong element of confusion and misinformation amongst affected communities, which often leads to protest action. People end up waiting a considerably long time to be afforded access to housing, despite being informed of being placed on a waiting list. SERI argues that this is primarily due to the fact that policies as currently implemented do not adequately account for the multiple ways in which poor people can access the housing system.⁶⁹

Moreover, as highlighted by Huchzermeyer, current approaches to housing development still sees private investors receiving preference for development rights on prime land situated close to urban centres, while the homes of poor people remain largely on the outskirts. This approach perpetuates apartheid city spatial arrangements which meant inaccessibility for the poor majority to the employment market and other social amenities. As livelihoods require poor households to seek better located places to live, they often occupy precarious land. Thus it also confines poor people to the dangers of living on land not suitable for occupation. Poverty and inequality is thus reinforced.

The Constitution, however, is clear: everyone has the right to have access to adequate housing, and no one may be evicted from their home or have their home demolished without an order of court.

Analysis of the submissions on Emergency and Temporary Alternative Accommodation

It is apparent from submissions received that the administration and implementation of the EHP has led to confusion and the perceived preferential treatment of those who have been affected by natural disasters or evictions. While most State respondents do not appear to take issue with the provision of emergency housing in the face of a natural disaster such as a fire or flood, there does appear to be resistance from State respondents in viewing some evictions as an emergency situation. In this regard there are widely held perceptions that such situations are orchestrated by individuals to take advantage of housing opportunities undeservedly, but this perception appears to be held largely by the State.

Although the position of perceived opportunism by indigent individuals was echoed by the respondent municipalities, the shortage of available land, particularly in urban areas, appears to be the primary reason for the apparent reluctance on the part of the State to provide temporary accommodation in instances of eviction. As expressed

⁶⁹ SERI & CLC (2013) “Jumping the Queue, Waiting Lists and other Myths: Perceptions and Practice around Housing Demand and Allocation in South Africa”.

by all municipalities, particularly in the case of large scale evictions, land earmarked for permanent development becomes required for the provision of temporary accommodation in instances of emergency and subsequently, longer term plans to provide housing opportunities are stalled. Contrary to the belief that emergency situations are “orchestrated”, poor people are desperately searching for a place to stay. The challenge, therefore, appears to be not that State respondents’ view the principle of providing temporary housing in emergency situations is problematic, but rather that the ability to plan for such circumstances has been severely limited by court judgments informing policy frameworks.

Apart from the availability of land and the inability of municipalities to plan for emergency situations, access to adequate funding poses additional challenges. Where funding is not ring fenced to accommodate emergency situations, municipalities have to apply for funding on a case-by-case basis to provide alternative accommodation. Even when funding is ring fenced, discretion lies with the provincial authority to determine whether or not such circumstances do in fact constitute an emergency. Additionally, acquiring requisite emergency funds can take weeks which delays the ability of municipalities to react quickly.

To accommodate emergencies, provincial authorities have been creative in their approaches in trying to strike a balance between providing the relief as intended by law and ensuring that budgets are appropriately spent. The WCPG has, for example, created an emergency fund for the provision of “Fire Kits”, which municipalities can apply for on a case by case basis. However, caution must be raised that in so doing, the same requirements for the allocation of funding as per the EHP may not be applicable to this fund, providing the provincial authority with much discretion as to what constitutes an emergency. The approach taken by the WCPG that municipalities have to repay the amount allocated for emergency spending could also be potentially problematic. Not only is the very nature of an emergency not willingly created on the part of the municipality, but poorer municipalities may be disproportionately indebted, thus impacting on their ability to comply with other service delivery responsibilities.

In order to avoid the risk of a loss of funding through under-spending on the allocated budget and in seeking to proactively mitigate any disasters, the WCPG runs the EHP and the USIP in parallel. While the reasoning behind this approach appears to be reasonable, conflation of the EHP and the UISP can create significant confusion within affected communities. Likewise, the approach taken by the GPG in seeking to secure emergency funding through its HSDG budget may also lead to reprioritisation and subsequent confusion.

The cost of providing temporary accommodation is also claimed to exceed that of permanent housing, which is not always provided for in allocated budgets. Many articulated the exorbitant cost and time it would take to meet the backlog currently experienced, taking into account rapid urbanisation, high unemployment and population growth. For State respondents, demand appears to exceed supply and municipalities are consequently battling to balance the needs of all affected parties in the allocation practices.

Importantly, the EHP is also applicable to non-nationals. As such, programmes need to be in place that assist all affected parties equally, without creating the impression that non-nationals are being preferred for alternative accommodation at the expense of poor South Africans, or vice versa. As the most recent outbreak of violence alleged to be “xenophobic”, the incorrect interpretation or application of policies can exacerbate existing tensions within poor communities as opposed to contributing towards social cohesion as intended. A transparent process and meaningful community engagement is therefore imperative in these situations.

Grootboom reminds us that when assessing progressive realisation of socio-economic rights, in order to pass the ‘reasonableness test’, an initiative must be reasonable both in terms of conception and implementation and initiatives must respond to the urgent needs of those in the most desperate of circumstances. The EHP states that the relocation of people should be on a voluntary and cooperative basis, and only in appropriate circumstances. If people are living in accommodation intended to be temporary for an extended period of time, where the norms and standards are not applied, it will result in confusion regarding the quality of housing provided and the assumption that such housing is intended to be permanent, albeit an incorrect assumption to be made. The locations at which people are placed temporarily are often a far distance away from the initial settlement from which they were evicted, thus causing further fragmentation of established communities, while the eventual relocation to permanent housing

structures will once again uproot communities which may have been settled for a long period of time, fracturing communities and disrupting living patterns even more. The policy implications therefore not only create significant difficulties for municipalities bearing the responsibility to deliver housing opportunities, but also significantly impact on the daily lives and experiences of communities. The creation of these circumstances therefore runs contrary to what was intended by the enabling legislation.

The SAHRC acknowledges that the realisation of rights will continue to pose significant challenges. However, current policies and guidelines in place do not adequately address the practical difficulties faced by both local government and communities. The lack of adequate data reflecting vacant and available State-owned land which can be used for the provision of temporary accommodation contributes to the difficulties faced by municipalities in being able to adequately plan and to take action quickly following an emergency situation. This results in displacement while funding mechanisms are unable to ensure an appropriate and uniform approach, potentially causing confusion and a delay in the obtaining of funding required on an urgent basis. A fragmented approach therefore may potentially result in dissatisfaction between communities which are treated differently in different municipalities along with varying levels of success.

Greater oversight and guidance by provincial government is needed and further measures need to be developed to ensure that municipalities are provided with adequate time to enable them to plan for alternative accommodation, as well as timely access to adequate resources to enable them to fulfil their obligations in an efficient and adequate manner.

Analysis of the submissions on Low- income Rental Housing

As earlier mentioned, the NDP projects that by 2030, roughly 7.8 million more people will be living in urban metropolises, many of whom will be poor and unable to afford to buy property. Low-income rental housing is therefore becoming a more crucial aspect of realising the right to adequate housing, but significant challenges persist in the acquisition of prime urban land to accommodate for this market. In light of the submissions received, it appears that the current national housing framework does not adequately provide for the low-income rental required in urban inner cities.

However, notwithstanding private ownership, buildings are abandoned, resulting in urban migrants illegally occupying these buildings primarily to gain easy access to the urban economy. The lack of affordable low-income rental housing in urban centres has resulted in a growing informal and unregulated rental market, with many people living in deplorable conditions in abandoned and dilapidated buildings, or backyard shacks in informal settlements.

In analysing the submissions, the SAHRC notes the varied approaches adopted by State respondents in providing low-income rental accommodation, including in the manner in which rental is determined. These disparate approaches may cause confusion or give rise to tensions between communities. All State respondents cited the recovery of rental as a significant challenge in acquiring the operational costs required to maintain buildings used for low income rental and other social housing projects. Policies therefore appear to be unable to accommodate the reality of high unemployment and growing inequality, resulting in a large portion of South Africa's poor being unable to access a regular and stable income required to pay rent, even in nominal amounts.

However, State respondents also recognise gaps in the current rental housing framework. Past experience has demonstrated that subsidies allocated to social housing institutions have not always translated into improved living conditions for tenants, despite tenants paying rent. Again it is apparent that the demand for low-income rental housing far exceeds supply and policies targeted at new developments are being used to sustain old ones, thus resulting in stagnation in addressing rapid urbanisation. Moreover, and as reflected by GPG, there is no guarantee that should further subsidies be granted, they will be spent as intended. Further to this, while it is noted that difficult decisions need to be taken due to the growing backlog and limited funding available, there appears to be an inability to provide the wide variety of urban housing required to accommodate residents, including single individuals and families and assisting the "gap market", namely that segment of the market that does not qualify for subsidies or have access to private housing financing, also remains a serious challenge.

State respondents are aware of the gravity of the problem, but notwithstanding the recognition of the need for poor people to acquire housing close to places of work as a means of escaping poverty, the housing crisis in urban centres continues.

Analysis of the submissions on Upgrading informal settlements

Contrary to commitments made at the international level to improving the lives of slum dwellers, and despite the various housing programmes established since 1994, informal settlements persist, particularly in areas of economic activity. In fact, according to SPII, there are a similar number of people living in informal settlements as was the case in 1994. The State, through the NDP has acknowledged that previous approaches to housing programmes, such as the RDP, were unable to respond to the diverse housing needs of individuals and failed to respond to individuals who did not qualify for subsidies or the limited range of housing products available. Criticism has been levelled at the manner in which the UISP has been implemented, often repeating the mistakes of the RDP approach to housing development placing emphasis on “Greenfield” projects in areas that are unsuitable for that type of development because of the limited space available and high density. However, as submitted, the intention of the UISP has always been to provide room for creative approaches by municipal town planners in addressing specific contextual housing challenges. While flexibility may be beneficial in responding to the unique challenges faced by communities and municipalities, the outcome, as expressed by the GPG, has been the development of human settlements that look and feel depressing, without reflecting the diversity of the people residing within them.

State respondents representing provincial and local government appear to have been implementing the UISP in a fragmented manner, reinforcing seemingly “top down” approaches that reflect how the State believes people ought to be living, rather than allowing people to inform that decision-making process on the basis of their daily lived realities. The WCPG, in conflating its approach to UISP with its EHP, insists that bulk infrastructure such as roads are required in informal settlements to allow requisite services to reach a community should a fire or flood occur. However, residents may not require such bulk infrastructure in the manner conceived by the State in order to meet their daily needs, demonstrating the need for meaningful engagements to take place with communities during the planning processes for various forms of development.

The WCPG also tries to accommodate densities within informal settlements by first relocating families out of the settlement to establish bulk infrastructure. However, as stated in the UISP, not only should relocation be a measure of last resort, it should be with the voluntary consent of the affected communities. Essentially, this means that affected communities are entitled to resist such proposals should they not be comfortable with the approach, regardless of the reason for the dissatisfaction.

Upgrading *in situ* also appears to pose a significant challenge. As was heard by the CoJ, the perceived dangers associated with the typography of the land on which people have settled, such as dolomitic land, may not be suitable for *in situ* upgrading and is an expensive exercise to undertake. To do so would require either an increase in the subsidy provided or the introduction of new technology that lowers the cost of doing so. Consequently, it may be more appropriate to relocate people living on dolomitic land when implementing housing programmes.

Submissions illustrated ambiguous approaches to the implementation of UISP, poor planning and the State continuing to view long established informal settlements as temporary and thus not providing requisite access to basic services. Communities are not provided with a detailed, integrated, or time-bound plan regarding the manner in which the informal settlements they reside in will be developed.

If informal settlements are viewed by the State as temporary and thus not suitable for the investment of basic services, it follows that they will also not be provided with the necessary infrastructure required for sustainable economic activity. In a similar manner that such circumstances create fertile ground for informal living conditions prone to exploitation by those who exercise various forms of power in these communities, it also results in the creation of an informal and irregular economy, which in turn exacerbates competition for scarce resources. These factors further the social divide that exists within insecure living environments.

Integrated human settlements should be at the heart of all housing development projects. In order to achieve this, prior to constructing a housing development, a full picture must be established of what the outcome of the development will be. Not only will this address the current short-sightedness which in some instances results in developments being halted midway, but importantly, will provide affected communities with an idea of the environment they will be living in and how long they will need to wait to live there.

Analysis of the submissions on Free Basic Services

“The Constitution of the Republic of South Africa has as its primary objective the protection and the restoration of human dignity; it means simply that human beings must be treated as human beings. We have a duty ... to promote human dignity ... A failure to do this diminishes us all.” (Beja et al v Premier of the Western Cape, 2010: 2).

Aside from access to basic services, such as water, sanitation, electricity, and refuse removal being enshrined in the South African Constitution and international law because of its inextricable link to dignity, the FBS policy also recognises the link between the provision of these services and poverty alleviation. As noted by CoGTA, the provision of FBS was never intended to be a general benefit but rather a strategic intervention to assist indigent individuals out of the “poverty trap” by enabling poor people to participate more actively in the economy without having to spend wages on the basic necessities required to live a dignified life. Although these basic necessities are also constitutional guarantees, municipalities are still not able to recognise the provision of FBS as a poverty alleviation mechanism. The Commission’s 2014 water and sanitation report found that the indigent policy was not applied in a uniform manner, which was further highlighted during the hearing. The absence of a national poverty baseline has resulted in differential approaches being applied by municipalities, with varying consequences and levels of success, while the complexity and cumbersome requirements of indigent registers has resulted in a failure to accurately maintain registers, leading to an inequitable approach in the provision of FBS.

Municipalities such as the CoCT appear to apply its indigent policy in a manner intended to achieve the objectives espoused by CoGTA, for example, by declaring all owners of property with a value of R200 000 or less automatically indigent, or allowing households to register as indigent should the household not earn more than R5 000. However, adopting a blanket approach to the delivery of FBS can result in further challenges, for example the amount of informal rent-paying tenants who may reside on properties worth more than the cut off limit but whose landlord does not pay for services which are subsequently cut.

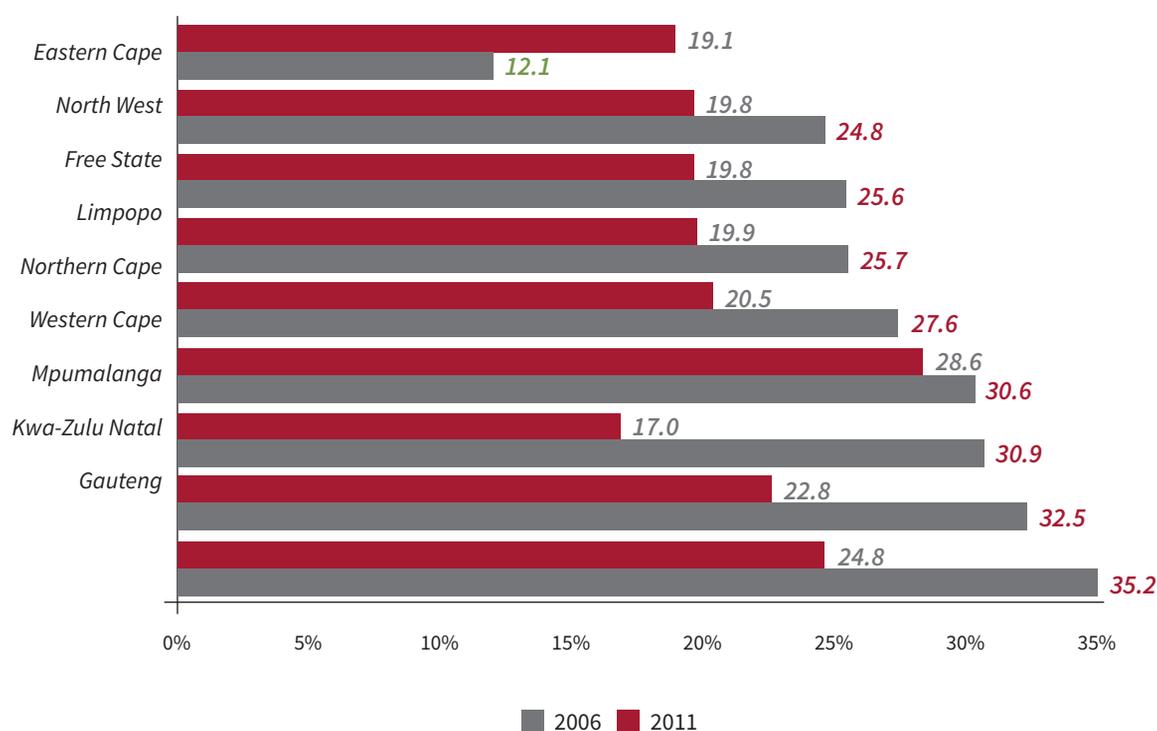
In recognising the high number of people living informally in Johannesburg, the CoJ provides FBS to all poor South Africans with identity numbers, , but this approach negatively impacts on the large amount of non-South African nationals also living in Johannesburg. In considering case law developed to date, this policy potentially violates the right to equality. The ET, on the other hand, submits that the provision of FBS is limited to “*law abiding indigent customers*”, therefore excludes customers who have “*tampered*” with their supplies. However, this approach fails to take account of a situation where tenants may be unaware that supplies have been tampered with and are therefore unable to access FBS as a poverty alleviation mechanism.

CoGTA explained that the new approach in the provision of FBS will involve standardisation across municipalities of the requirements necessary for one to be placed on the indigent register. However, it must be mentioned that while standardisation may lead to consistency and facilitate monitoring oversight at a national level, municipalities need to be capacitated to assess poverty within their contexts and respond accordingly, as per the spirit of decentralised governance echoed in the Constitution.

Although many of the challenges cited above were not created by the actions of poor people whom the FBS indigent policy is intended to assist, poor people bear the real cost of non-delivery. In addition to the non-realisation of the FBS’ intended objective of a poverty alleviation mechanism, the lack of access to FBS continues to subject poor people to violent crime and an environment that is hazardous to their health and general well-being. Poor people also face continued threats of arrest for illegally attempting to access FBS, even when this is done through no fault of their own, which results in the denial of their constitutional right to dignity, among others.

The table below illustrates that despite the fact that FBS has been implemented to reduce expenditure on basic services in an effort to assist indigent persons out of the poverty trap, expenditure on housing, water, electricity, gas and other fuels has increased in most provinces between 2006 and 2011.

Table: Percentage of household consumption expenditure spent on housing, water, electricity, gas and other fuels, across income deciles, by province, 2006 – 2011.



DATA SOURCE: Income and Expenditure Survey, 2006 – 2011

Source - SPII (2014) “Monitoring the right of access to adequate housing in South Africa: An analysis of the policy effort, resource allocation and expenditure and enjoyment of the right to housing”.

The current legal and policy framework for housing delivery is problematic in a number of ways and the analysis generally reflects that there is a disconnect between what is expected by local government in terms of delivery and what is able to be achievable in practice. Municipalities therefore face numerous difficulties in fulfilling their obligations as a result of inadequate policies and limited funding and land available, particularly in the inner-city areas. This is compounded by an insufficient amount of guidance and assistance provided by national and provincial spheres. However, while these challenges cannot be disputed, there are a number of measures available to municipalities which can enhance their ability to deliver housing opportunities, including engagement with communities in order to fully understand their unique challenges and needs prior to implementing development and housing initiatives. In recognising that the achievement of the right of access to adequate housing is a collective responsibility, greater oversight, together with further guidance therefore needs to be provided by the national and provincial spheres of government and a revision of policies must be undertaken to address the multiple challenges currently being faced.

05

BUDGET, PLANNING, MONITORING
AND EVALUATION

5.1 SUMMARY OF SUBMISSIONS

Budget and Planning

In its submission to the Panel, the WCPG quoted the following statistics, referencing the NDoHS document entitled “*Breaking New Ground: A Comprehensive Plan for the Development of Sustainable Human Settlements*” between 1996 and 2001:

- a) the South African population increased by 4.2 million people, with a 30% increase in households when only a 10% increase was expected
- b) urban areas were expected to grow at 2.7% per annum, with the Western Cape being one of the provinces that exceeds the national average
- c) due to high unemployment, housing and service provision did not keep pace with household formation, resulting in an increased backlog and
- d) the number of “shacks” in backyards and informal settlements increased from 1.45 million in 1996 to 1.84 million in 2001, an increase of 26%, which exceeds the 11% population growth over the same period

In moving forward toward integrated human settlements, the GPG submitted that before a housing development is constructed, a complete picture must be understood. Such architectural designs “*must be visible before we even put a new foundation ... we must be able to see where all infrastructural issues, water, sanitation, landscaping outside, because currently we build people human settlements that just look so terrible from the day we build them*”. The GPG further explained that the current approaches to the provision of housing assumes that certain types of housing are only for a particular race group and that in order to remedy this and create socially integrated human settlements, the provision of a variety housing options must be made available to beneficiaries.

Accordingly, a consequence of the current approach is that in the middle of construction the State realises that the basic infrastructure required to maintain a human settlement, such as water reservoirs or power stations, is not available and developments may be stalled as a result. In this regard, it is hoped the advent of SPLUMA will lead to better coordination and planning within municipalities in the way in which they manage their land use function, which according to SALGA needs to occur in a holistic manner in order to ensure effectiveness. Moreover, although not easy to do, budgets effectively disaggregated by area, will assist in monitoring the targeting of improved performance.

The WCPG is in the process of conducting a “Demand Study” to be completed during 2015, which aims to better understand the nature, characteristics, scale, and spatiality of the demand across the housing market. It is also intended to include an analysis of the demand for the suite of services that constitute integrated and sustainable human settlements, including social and economic infrastructure. The ET, on the other hand, illustrated difficulties in planning for and of funding of the provision of adequate accommodation given limited resources, noting that an estimated 4000 people migrate to eThekweni from various rural areas every week. Although the KZNPG noted that

subsidies have increased to build “bigger and better” houses, increasing in size from 15-25 m² to 40m², the overall budget available to it have not increased proportionately.

The under-spending of budgets was also raised as a concern by numerous stakeholders. Although annual budgets are increased and plans could be developed accordingly, under-spending of the budget results in National Treasury reducing it in the following year. According to SPII, under-spending has resulted in household surveys and assessments on the amount of informal settlements which are required in order to effectively plan, not being conducted. The KZNPG admitted that due to technical capacity deficits, it lost allocated funds to the *fiscus* as unspent. However, in acknowledging this, it aims to invest in its planning capacity. Moreover, as it aims to improve on its delivery, it finds itself having to reduce output and delay the commencement of new projects in order to ensure that it effectively spends its budget in a manner that is not only concentrated in one area of delivery. SPII suggested that a measure necessary to address the challenges in the housing sector is that overall housing allocations need to be increased above inflation while spending performance on current allocations need to be improved.

The CoCT submitted that it views the Urban Settlement Development Grant (USDG) as a “corporate risk”. In this respect, the CoCT is evaluating all grant expenditure to ensure that all grants are managed in an integrated manner.

In order to address the challenges in the housing sector, SPII suggests that:

- a) policy shifts must be well planned, coordinated, resourced and monitored, and take place as a result of proactive and meaningful engagement with communities, rather than as reactions to political or other pressures
- b) there is an urgent need for transparent and reliable statistics and a functional monitoring system of housing projects
- c) housing allocation and waiting lists meant to address the lack of transparency in housing allocation processes needs to be urgently investigated and steps taken to ensure greater accountability, monitoring and transparency
- d) a commitment needs to be made to implementing the MTSF Outcome 8 agreement (2014-19) to transfer title deeds for all 563,000 new subsidy units as well as the backlog of 900,000 over the next five years
- e) social and low income rental accommodation needs to be targeted and
- f) the municipal accreditation process needs to be expanded and improved

Planning reforms remain incomplete, despite case law declaring land use planning a municipal function. In this respect, Huchzermeyer submits that the limitations of SPLUMA include:

- a) situations in which the Minister has been vested with powers to override municipal decisions are left open to interpretation as the concepts of ‘national interest’ and ‘public interest’ are not defined and
- b) in terms of measures to ensure inclusion, it makes reference only to existing inclusionary zoning measures which have in fact been ineffective and the legislation misses the opportunity to require a strengthening of inclusionary zoning measures, for instance quotas for low income housing across the country and in all urban suburbs

According to SPII, poor planning and implementation of policies at the local government level, coupled with political pressure to speed up the delivery process has resulted in reactive policy shifts that themselves are poorly planned, which in turn creates a vicious cycle that perpetuates the non-delivery of rights.

Ill-considered planning in the past has further resulted in some wasteful expenditure. For example, the GPG advised that the cost of converting previously single-sex hostels into family accommodation has been done at five times the available subsidy allocated for such development, resulting in the inability to recover the costs through rent because beneficiaries cannot afford it, resulting in eventual eviction.

According to Huchzermeyer, there is also the assumption that housing policy can lead to urban restructuring. However, the rights regime remains such that property rights are stronger than occupational rights. The anticipated changes to property rights announced in the President’s most recent State of the Nation Address do not necessarily

speak to the urban context. Temporary restrictions to property rights have evolved through jurisprudence – property owners whose buildings are occupied by people who would be rendered homeless if evicted may not exercise their full ownership rights, including eviction, until the municipality has provided alternative accommodation. While important, this has little impact on the current property rights regime.

Monitoring and Evaluation

The NDoHS monitors the implementation of policy measures to ensure that funds are used in a manner that complies with the minimum norms and standards for housing development. In this respect, the NDoHS limits its monitoring role to assessing the impact of its programmes by assessing the manner in which a programme has been implemented, the problems experienced, solutions deployed to overcome these challenges, and whether the government has achieved its overall objective in alleviating the challenge through the implementation of the programme, rather than performing the auditing functions of the Auditor General.

According to Huchzermeyer, further challenges include unresolved discussions defining the “national urban agenda” beyond the NDP and the identification of the “institutional home” responsible for its monitoring and implementation. Currently SPLUMA falls within the responsibilities of the Department of Rural Development and Land Affairs; the Integrated Urban Development Framework sits with CoGTA; the NDP, as well as monitoring and evaluation generally is under the supervision of the Presidency; whereas the Treasury provides key urban grants and the NDoHS is responsible for the implementation of the Master Spatial Plan. Huchzermeyer goes on to explain that this institutional fragmentation renders coordination and implementation of the urban agenda difficult and also allows for contradicting messages, particularly with the NDoHS promoting mega projects or large scale housing developments when the other departments or institutions and their recent policy, financial, and legislative instruments prioritise compact, transit oriented development as close as possible to existing amenities, along with in-situ upgrading of informal settlements wherever possible.

The lack of clarity on definitions used negatively impacts on the ability to conduct adequate monitoring and evaluation exercises. Moreover, targets set by the provincial legislature pose an additional challenge since the provincial year-end is 30 March, while for the CoCT, for example, it is 30 June. This affects the monitoring of targets and budget planning.

In the LRC’s experience, in instances where people have obtained formal housing built with State resources, these have been shoddily built or deficient in the provision of services. Sometimes the houses are incomplete and the developers themselves or the relevant government authorities are not held to account. Poor people are thus unable to get defective delivery of housing remedied. For example, in some instances complaints in this respect have been referred to the Auditor General, further referred to the Special Investigating Unit, and almost a decade later a report is still to be delivered by the Presidency. The SJC further amplified this point with reference to the CoCT, stating that the delivery of basic services are still being outsourced resulting in wasteful expenditure, a failure of contractors to uphold the requirements of service delivery arrangements and a refusal by the CoCT to ensure that contractors are held accountable to provide a service paid for by public money.

The NDoHS acknowledged that in implementing various housing programmes, there has been poor workmanship and instances of fraud and corruption by State officials. In discussions with the Panel it emerged that although there is a deregistration process with the body that oversees construction, and municipalities have been requested to keep a list of private companies that have engaged in poor workmanship, one cannot merely “blacklist” such companies without following due legal processes. In addition to this the WCPG submitted that maintenance of housing units continues to be problematic as many contractors have gone into liquidation.

In terms of planning effectively, the CoCT has undertaken an exercise to identify poor project management and has created an electronic system that underpins all transactions entered into by the CoCT, including human settlements, while it further ensures that all contractors are registered with the National Home Builders Registration Council (NHBR) for the construction of houses. In addition to the system to ensure that all administrative requirements are met before a project can escalate to the next phase, it also ensures that it gets implemented according to fixed timeframes.

The need for greater oversight by the NHBRC to ensure compliance with building regulations was highlighted by the LRC. It further informed the Panel that there is little indication that sufficient checks are in place to ensure that developers are in fact registered with the NHBRC. According to the WCPG, although the regulations that govern building contractors are still viewed by the courts as being sufficient, resource constraints have resulted in building inspectors not visiting every building as required. As such, building contractors should be held to higher or constitutional standards to ensure that they provide a quality service.

As part of its “Monitoring the Progressive Realisation of Socio-Economic Rights Project”, SPII has developed a three-step methodology, which comprises of:

- a) assessing the policy effort by analysing constitutional and international obligations and reasonable undertakings by the state to meet those obligations, analysis of content of socio-economic rights policies and legislation, and implementation challenges and accountability mechanisms to address these challenges
- b) assessing resource allocation and expenditure, by analysing the generation and distribution of government resources, the allocation and expenditure of maximum available resources on socio-economic rights, and inclusivity of the budget cycle process and
- c) monitoring and evaluating the attainment of the right, by developing “access, adequacy, and quality” indicators.

“Access” indicators, which include both physical and economic access, includes *inter alia*:

- a) a general housing overview focusing on the percentage of households living in different dwelling types
- b) an analysis of government programmes and subsidies aimed to address access to housing
- c) an analysis of the affordable housing market within the nine metros; and
- d) the affordability of housing, including household costs.

“Adequacy” indicators include:

- a) tenure status, which identifies the percentage of households who own or rent the dwelling they live in
- b) the adequacy of shelter, which focuses on the percentage of households that describe their walls or roofs as weak and
- c) the adequacy of services available, which assesses the percentage of households that have access to safe drinking water, a flush toilet, and electricity.

“Quality” indicators, which focus on the location of housing and its impact on quality of life, includes:

- a) an assessment of expenditure spent on transport
- b) the average time it takes to get to the nearest health facility and
- c) the average time it takes a child to get to school.

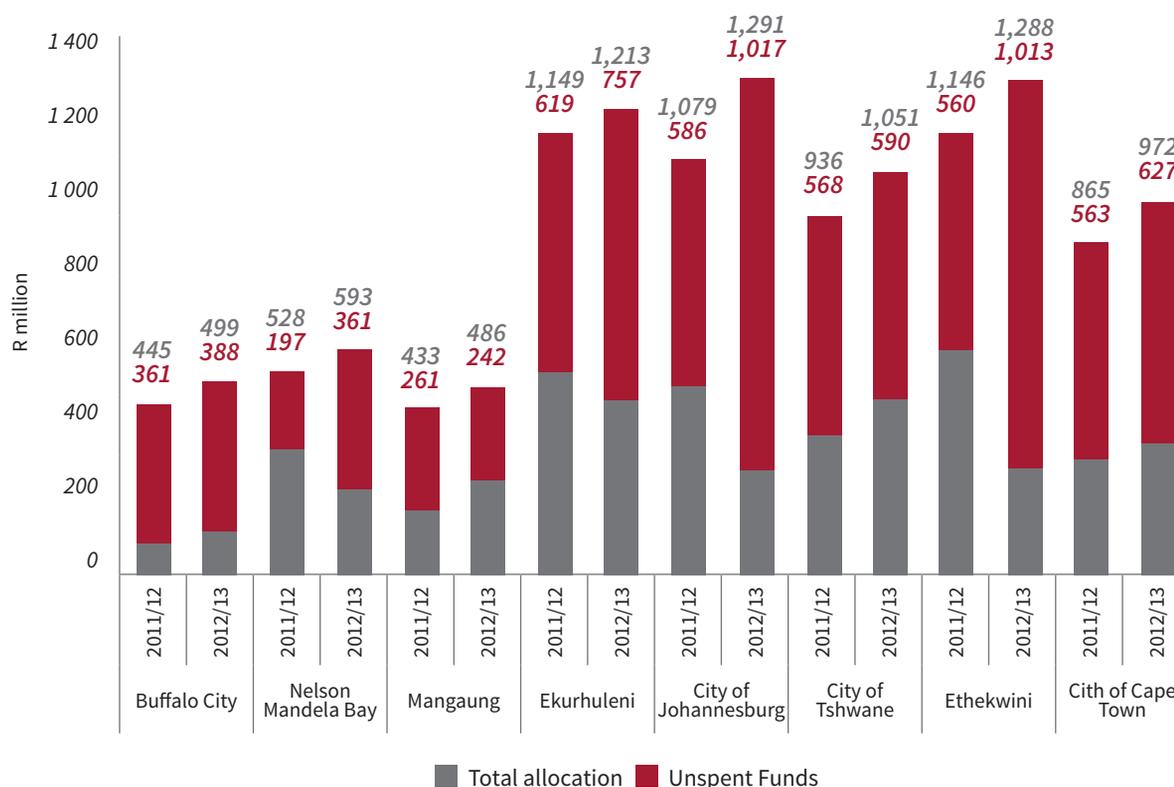
5.2 ANALYSIS

Key in the effective delivery of services is the planning processes involved in implementing the various legislative and policy interventions and the subsequent monitoring and evaluation of their impact. This also involves adequate budget allocation and forecasting. It must be noted that while approaches to budget allocation will form part of the subsequent analysis, budgets to be analysed were not requested from state respondents.

Although already discussed in the preceding sections, it is necessary to reiterate the concern that was raised regarding the ring-fencing of monies for the implementation of various programmes and the EHP in particular. Due to the unpredictable nature of emergencies, should the monies allocated not be spent, provinces are open to penalisation for under-spending and consequently, the budget allocation for the subsequent financial year may be adversely impacted. This approach clearly has unintended results by essentially penalising municipalities, and ultimately communities, for the failure to spend funds reserved for unexpected situations. Moreover, the failure to ensure that budget allocations take inflation into account also impacts on the ability of municipalities to effectively deliver.

According to the SPII submissions and the research it conducted into access to adequate housing, despite the increase in budget allocation for various housing programmes, reduction of budgets by National Treasury because of under-spending consequently results in the requisite surveys not being conducted in order to effectively assess the housing demand, which in turn further impacts on meaningful planning. The table below illustrates the level of under-expenditure by municipalities.

Table: USDG, real allocations and expenditures, by municipality, 2011/12 – 2012/13



Source - SPII (2014) “Monitoring the right of access to adequate housing in South Africa: An analysis of the policy effort, resource allocation and expenditure and enjoyment of the right to housing”.

The Commission’s 2014 water and sanitation report found that municipalities often do not have capacity to plan innovatively and effectively, which lack of capacity translates into a failure to meet service delivery targets.⁷⁰ In this regard, the NDP states that many of the difficulties currently being experienced in the housing sector are not as a result of a vacuum in policy, but rather insufficient institutional capacity, the lack of strong instruments required for implementation and a lack of coordination. While these factors inevitably contribute to planning inefficiencies, significant gaps in policies do appear to exist and have an important impact as well. Further to this, there appears to be a lack of trust between different interest groups, which reduces the willingness of relevant economic players to commit to the kind of long term investments required to generate economic returns that would support sustainable urban growth.⁷¹

While efforts undertaken to conduct demand studies in order to understand the housing market are positive, it is also concerning that respondents only appear to be conducting these studies at this late stage. If monitoring tools, such as the indigent registers, are not being used in a manner that allows provinces to monitor the municipalities for which they are responsible, adequately evaluating the quality of services provided also becomes problematic. The

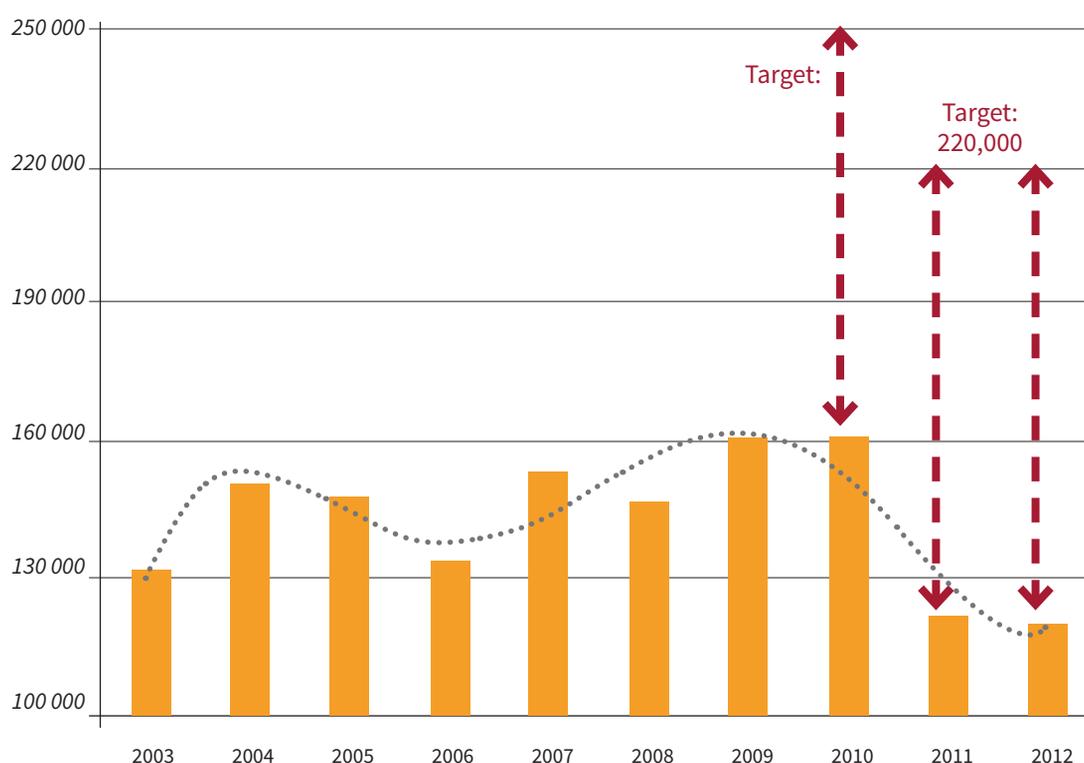
⁷⁰ P 56.

⁷¹ “The National Development Plan 2030: Our future – make it work”, p267.

failure to take steps to hold private contractors and government departments to account for the production of poor quality houses, including the lack of oversight provided to ensure compliance with building regulations, results in the perpetual violation of the rights of many communities. Not only does this result in wasteful expenditure, it further degrades the relationship of trust between communities and local government.

The lack of coordination in this respect has already resulted in confusion and the misuse of terminology and statistics, which further informs subsequent policy formulation. For example, delivery in excess of 3 million houses is frequently referred to, while in fact, the NDoHS confirms that it is estimated that only 2.7 million units have actually been built.

Table: Number of houses/units completed per year, 2003–2012



Source - SPII (2014) “Monitoring the right of access to adequate housing in South Africa: An analysis of the policy effort, resource allocation and expenditure and enjoyment of the right to housing”.

Also, as submitted by SPII, there is no clarity as to how much land is in fact held by the State and the private sector. As such, the amount of State land that is available for the delivery of housing becomes subject to perception resulting in further uncertainty aggravated by political opportunism.

Poor South Africans cannot be expected to be patient indefinitely. Incorrect planning and policy application has been a significant cause of evictions, even in instances where people have complied with their responsibilities in the payment of rent, for example. The inability of the State to adequately monitor and account for the needs of its housing market has also resulted in many people remaining unaccounted for, resulting in the increased mushrooming of informal settlements. The negative impacts of ineffective planning and the inadequacy of tools aimed to address it is further exacerbated in an environment of the trend towards growing urbanisation. Consequently, despite the gains made over the past 20 years in the housing sector to alleviate the burden inherited from apartheid, this may appear to be of little value, as the housing crisis continues to intensify.

06

COOPERATIVE GOVERNANCE

6.1 SUMMARY OF SUBMISSIONS

In submissions from State respondents cited above, the lack of cooperative governance between the local, provincial, and national spheres of government was cited as a key challenge hampering adequate monitoring and evaluation of progress made in realising the right of access to adequate housing and the delivery of other basic services, such as water, sanitation, electricity, and refuse removal. For CoGTA, cooperative governance is premised on *“the three spheres of government having concurrent overlapping authority for most service delivery functions, a right to an equitable share of revenue, and an obligation to cooperate with each as a single system of government for the country. But within this framework, national government has extensive powers to regulate the other two spheres, and provinces and municipalities must exercise their powers within the limits of the Constitution and national government’s regulatory authority”*.

Robust structures have been established to support inter-sphere development planning and the implementation thereof. However, the degree to which these frameworks are being implemented varies across the provinces. This is largely due to uneven capacity, conflicting priorities, concurrent functional responsibilities, and budgetary constraints between the provincial and local spheres of governments.

In terms of planning approaches, CoGTA notes that in the main, all three provinces forming part of the hearing have Intergovernmental Planning Frameworks (IDPs) in place and appear to be respected within all the provinces. However, IDPs have become local government planning tools, as opposed to intergovernmental planning instruments and there is therefore little or no alignment between the provincial and local spheres of government. Challenges relating to successful implementation of housing programmes, such as the IDP, include integration, alignment and coherence of policy, plans, and programmes at a municipal level. How needs identified by communities are aligned and integrated into plans and priorities of other spheres of government is not adequately communicated, resulting in the misalignment of plans and programmes thus adversely impacting on the purpose of so-called “bottom up” developmental approaches and negatively impacting on effective implementation processes. CoGTA submitted that these challenges could be attributed to a lack of guidelines and procedures available to municipalities on how to effectively align priorities, plans, and programmes across the various spheres of government. The CoCT added that municipal IDPs are generally aligned to the mandate the ruling party receive from their electorate and thus alignment of municipal IDPs to the broader strategy is difficult.

In noting that the Spatial Development Framework (SDF) is an integral part of the bigger IDP, SALGA submitted that it should form the basis of all planning, which will ensure that national and provincial plans are also reflected in municipal IDPs. In reiterating the need for a “bottom up” approach, SALGA stated that national and provincial government should therefore take part in the municipal IDP processes to ensure that planning is appropriately aligned and that all planning affecting a municipal area is reflected in both the SDF and IDP.

As submitted by SPII, poor coordination between the provincial and local spheres of government leads to delays in the completion of planned projects, creating the impression of broken promises. Specific challenges in this

respect identified by multiple stakeholders include the unlocking of well-located land in urban areas for residential development and the connection of bulk infrastructure and services to new housing developments. The State has recognised that this problem is largely due to a lack of adequate coordination between various government departments responsible for delivery, and joint meetings have since been initiated with a view of addressing it.

The restructuring of CoGTA in 2009 led to the weakening of existing structures and compromised the functionality of coordination forums. In its revised Back to Basics (B2B) strategy, it aims to strengthen coordination between departments responsible for the delivery of FBS, such as the Departments of Water and Sanitation, Human Settlements and Environmental Affairs, and Energy. In addition, provinces are being assisted to develop the necessary management systems to ensure greater coordination at the provincial level.

In addressing these challenges amongst many, CoGTA states that SPLUMA, which will be introduced in a staggered manner, will reflect the master plan for better living spaces. Old-order apartheid legislation relating to housing has created uncertainty and inconsistency and the aim of SPLUMA is to address the fragmented system of development created during apartheid and target the unsustainable development patterns fuelled by an inefficient and incoherent planning system. SPLUMA, as the only primary legislation that sets out a framework for the management of land development,⁷² further aims to provide for the inclusive, developmental, equitable and efficient spatial planning at different spheres of government. Once SPLUMA is fully operational, the spatial planning environment will be set by development frameworks that are to be adopted at national, provincial and local government levels.

However, CoGTA advised that few municipalities have the necessary skills and experience to implement SPLUMA. Consequently, multiple sectors will have to work together to realise the SPLUMA's objectives and the continued cooperation between government, civil society, and private sector stakeholders will be key in ensuring that the implementation of SPLUMA is a success.

In CoGTA's view, strategies are needed that compel all three spheres of government to consult meaningfully when planning, so that an integrated and aligned approach is adopted at the level of implementation. In order to improve intergovernmental planning, it submitted the following recommendations:

- a) intergovernmental planning is in need of stronger direction, with strong structures in place and agendas of who is responsible for participating in them and
- b) there needs to be a strong national system that can direct and influence other spheres to do good intergovernmental planning and
- c) local government needs to reimagine its role in development planning and facilitation in order to provide services as required in the NDP

6.2 ANALYSIS

The principle of cooperative governance is a thread that runs throughout South Africa's developmental framework. Noting the fragmented growth patterns caused by the country's apartheid past, it is recognised in the Constitution that while decentralised governance is key in ensuring that the needs of people are met at a local governance level, this is only possible if adequate support and oversight is provided at provincial and national spheres of government.

Although organisations such as SALGA provide municipalities with requisite training to assist them in performing their functions, it cannot be ignored that housing, basic service delivery, and indeed the realisation of all rights enshrined in the Constitution is an obligation imposed on all three levels of government. The devolution of responsibilities in terms of the Constitution has not been done with the intention of allowing provincial and national spheres of government to shirk responsibilities at the expense of municipalities, but rather to ensure that government is accessible to the majority of the South African population as a means of addressing the country's apartheid legacy.

⁷² SALGA (2014) "SPLUMA Key Municipal Steps towards readiness", Mbombela 4-5 September 2014, available at http://www.salga.org.za/app/webroot/assets/files/MediaRoomStatements/8th%20National%20Municipal%20Managers%20Forum/5_10%20%20Presentation%20on%20SPLUMA.pdf.

Despite the delivery of housing and basic services being a function of local government, the effective delivery thereof is therefore largely dependent on an aligned and consistent application of policies both across State departments and within the three spheres of government. Due to the overlapping role that each sphere of government plays in delivering the rights in question, it is essential that they operate as a single system.

The national and provincial spheres of government are responsible primarily for strategic and financial support to municipalities responsible for the implementation of policy. At a national level, capacity development training is developed and provided to municipal staff, and assistance is provided in the development of strategic documents. At provincial level, policies that require implementation are developed, and funding is allocated for programmatic support. However, all State respondents cite insufficient funding, a lack of skilled staff and capacity, conflicting priorities, and inconsistent approaches of policy implementation by municipalities as key challenges inhibiting the effective delivery of housing and basic services.

The aforementioned challenges have been identified by various respondents and stakeholders, and notwithstanding the development of Intergovernmental Planning Frameworks, the extent to which these are being implemented varies across provinces. The fact that municipal IDPs are aligned to the ruling party mandate rather than to the broader national and provincial strategy is problematic, resulting in a fractured and varied system across municipalities. IDPs are viewed narrowly as local government planning tools, rather than intergovernmental planning instruments which, ideally, should all be in alignment with each other, while taking into account each municipality's unique circumstances at the same time. State departments responsible for delivery continue to operate in silos, often resulting in misaligned plans and wasteful expenditure. Consequently, the degree to which programmes are implemented varies across municipalities. These challenges could be attributed to a lack of support and guidelines provided to municipalities on how to effectively align priorities, plans, and programmes that fall within their responsibility. Thus, although the necessary structures are in place, information is not being exchanged in a manner that allows for coordinated decision making processes.

In addition, more direct oversight is required from all spheres of government, particularly national and provincial, beyond the mere strategic and funding assistance currently in place for municipalities. The failure by any given municipality to deliver on its obligations does not only reflect a failure on that part of that municipality alone, but a failure of effective governance and delivery as a whole.

07

LOCAL GOVERNMENT

7.1 SUMMARY OF SUBMISSIONS

The National Housing Act allows for the progressive devolution of the housing function through a structured process referred to as accreditation. The process is concluded with executive assignment by agreement, where the municipality is given the full authority, both by the national and provincial spheres of government, to manage its own housing processes. At each level of accreditation, the municipality concerned will receive a certain level of administrative functions and capacity to manage subsidies. This includes the ability to decide which housing programme to apply and direct access to the required budget which has been transferred directly from Treasury for the implementation thereof.

Levels of accreditation as per the Accreditation Framework, 2009 are as follows:

- a) level 1 requires provincial oversight for subsidy budget planning, allocation, priority programme management, and administration
- b) level 2 requires provincial oversight for programme management and administration while
- c) level 3 (assignment) allows municipalities' financial administration, including direct receipt of the HSDG from the NDoHS.

Currently, of the 278 municipalities, nine have Level 1 accreditation, while 19 have Level 2 accreditation. To date, no municipality in South Africa has been awarded full assignment.

According to the CoGTA, and as per agreement between the President and Minister of Human Settlements, by 2014 the accreditation and assignment of housing functions to municipalities ought to have been confirmed. Although significant progress has been made in ensuring the readiness of six metropolitan municipalities (metros) for the formal transfer of the housing function by 2014, including a budget of approximately R900 million set aside for its operationalisation, a revised approach was introduced in late 2014. This resulted in the abeyance of the process and new capacity studies being conducted and requirements being set. To accommodate this shift, a Spatial Master Plan is progressively being introduced to provinces and metros.

Huchzermeyer submits that the delay in the accreditation and assignment process, which currently has the implication of the provincial legislatures controlling the budget and the spatial decision-making process in relation to housing development, has resulted in limited trust between the different spheres of government even in well capacitated municipalities and metros. Further, municipalities are unable to build the necessary capacity without being given the requisite function.

SALGA submits that "accreditation and assignment" would bring the sectoral policy in line with the courts' interpretation of the division of roles and responsibilities between the different spheres of government. However, most provinces are still not gazetting HSDG for municipalities that have been accredited thus far, despite the Division of Revenue Act (DORA)⁷³ requirement for them to do so, thus denying accredited municipalities much-needed funding certainty needed

⁷³ 2 of 2013.

to plan for emergency housing. Consequently, SALGA submits that the implementation of the housing accreditation and assignment framework would erase the current disjuncture and bring the policy framework in line with the jurisprudence on evictions, while also empowering municipalities to carry out its responsibilities as mandated to do by the courts through possessing the control of funding required to do so.

In attempting to support municipalities in the delivery of its functions, the GPG described the following challenges:

- a) a lack of bulk infrastructure in identified areas for development
- b) non-implementation of by-laws resulting in illegal land invasion
- c) municipality land registers that are not updated resulting in ineffective land utilisation
- d) USDG not being utilised for the purposes intended
- e) a lack of integrated planning resulting in the misalignment of the provision of services;
- f) non-reporting by municipalities on how funds have been utilised and
- g) a lack of capacity in municipalities

In relation to capacity constraints, SPII noted that unfilled vacancies in State departments inhibits the potential of the Department of Human Settlements at all levels, and municipalities, to implement programmes at the scale required in addition to responding to community needs. The CoCT submitted further that human resource capacity to deliver on projects remains static and advised that it is ensuring that project managers are trained in order to ensure that, over a two year period, more project managers are sufficiently capacitated.

Apart from the disjuncture between legal and financial obligations to provide alternative accommodation and the requirement to obtain funding from the provincial government, other challenges highlighted by SALGA include the shortage of available land on which housing, whether temporary or permanent, can be provided to those in need. The CoCT submitted that the release of State land would assist significantly in alleviating the burden of providing access to land.

During discussions with the Panel, when asked about what the COGTA representative considered to be the principal difficulties that municipalities face in providing access to land in urban areas, it was submitted that due to many buildings being privately owned and situated on prime land, they are often beyond the affordability of the municipality concerned. Balancing the rights of private property owners who want to attain market value and the needs of citizens in the quest for social justice will always be a struggle. Also problematic are abandoned buildings that could be used for affordable housing accommodation, but which have been “hijacked” by people who are not owners but are charging rent to tenants without maintaining the buildings, while the actual landlords are difficult to locate.

In terms of the challenges confronted by municipalities addressing the problem of poorly maintained or unsafe buildings, the ET submitted that this is done either by way of media reports or complaints, or routine inspections. Meetings are held with property owners in order to convince them to maintain their properties or to understand the consequences of a lack thereof and tenants are also advised of the consequences of occupying an identified dilapidated building. The CoJ, on the other hand, submitted that in identifying properties that are uninhabitable due to existing unhealthy conditions, or pose a fire hazard, or any other risk to public safety, the relevant departments conduct site inspections.

According to SALGA, the Chief Building Inspector appointed to each municipality as provided for in the National Building Regulations and Building Standards Act (NBRBSA),⁷⁴ is responsible for compliance with and enforcement of the NBRBSA. However, remedies available to municipalities in this respect are limited, because although a municipality can declare a building unsafe for human habitation, it is required to bring an application before court to enforce the NBRBSA. The courts have ruled that the NBRBSA cannot be used to evict people from unsafe buildings and the process stipulated in the PIE Act must be followed, reinforcing the obligation that a municipality must provide alternative accommodation if the eviction will lead to homelessness. Consequently, due to many buildings being privately owned and the location of the owner unknown, the neglect of these buildings becomes the responsibility of the municipality concerned.

⁷⁴ 103 of 1977.

Moreover, many municipalities face additional social issues such as gang territoriality expanding onto land earmarked for development, alcohol and drug abuse, and youth unemployment while, according to SPII, the prevalence of fraud and maladministration in housing allocation and delivery creates further confusion and distrust amongst citizens.

The SJC recommends that in addressing the aforementioned challenges, local government must develop coordinated, time-bound plans for the progressive realisation of the rights of informal settlement residents within its municipality. In this respect, better planning and budget allocation is needed and resources can be better managed. Migration should also be adequately accounted for using available forecasting data, rather than being used as an excuse not to deliver accordingly. In addition, local government should encourage participatory processes and work with communities in the effective advancement of policy development, planning, and implementation, and local government must comply with applicable legislation and make available public information with regard to the delivery of services and allocation of resources within its municipality.

In addition, during discussions with the Panel, it was agreed that there needs to be stronger accountability for leadership at local government level, with ward councillors who need to be able to distinguish between their political interests, and administrative or developmental responsibilities. To this extent, it was submitted that perhaps ward councillors require greater oversight by national and provincial CoGTA.

7.2 ANALYSIS

Representing the face of service delivery, an efficient and local government is the most crucial component of realising the goals and objectives of the Constitution, particularly in relation to the realisation of socio-economic rights. However, aside from the capacity and resources challenges already mentioned limiting effective cooperative governance and planning, further challenges appear to stem from the actual structure of the governance system itself.

Municipalities are responsible for implementing policies developed at provincial and national levels that may not reflect their own contextual needs. Yet, municipalities remain the primary bearers of responsibility in the actual delivery of housing, reflecting a disjuncture between court judgments and the actual ability of municipalities to abide by them.

Both CoGTA and SALGA have emphasised the need for the acceleration of the accreditation and assignment process, allowing for the full devolution of the housing process to be assigned to municipalities. Despite this, it appears that the decision to assign full responsibility of the housing function to municipalities has become a political issue. While it is acknowledged that not all municipalities possess the necessary capacity to adequately execute their responsibilities, this should not be used as a reason preventing capable municipalities from acquiring such assignment. Moreover, both provincial and national spheres of government should be demonstrating that all necessary steps are being undertaken to ensure a full devolution of responsibilities to municipalities in order for them to be held accountable to the people they represent.

Currently, municipalities appear to be unfairly bearing the consequences of ineffective service delivery without having direct access to the necessary funding and tools required to remedy the situation. Moreover, poorer municipalities are doubly-affected - not only were they systematically excluded and marginalised during the apartheid era, they continue to be excluded through ineffective capacity development and provision of requisite resources required to attend to the needs of South Africa's poorest segment of its population. It is often these municipalities that are not able to meet legislative obligations or comply with court judgments because they do not have access to the necessary resources to do so. The cycle of poverty and inequality is thus reinforced.

In its submissions, CoGTA explained that municipalities lack the necessary leadership capacity required to effectively manage their functions. One of the key responsibilities of municipalities is to ensure that their developmental outputs reflect the needs and diversity of the people residing within their jurisdiction. However, noting the various challenges currently being experienced, this can only be done if more stringent measures are put in place to hold local government leaders to account should they not perform their duties effectively.

In the current governance form, the delivery of housing is in fact a concurrent responsibility of national and provincial government, while local government acts as an implementing agent. As such, all parties should be playing a more active role in ensuring that municipalities can in fact meet their obligations. Alternatively, more adequate financing and tools need to be afforded to municipalities so that they are able to meet their responsibilities as provided for both in legislation and further elaborated by court rulings.

08

SECURITY OF TENURE AND EVICTIONS

8.1 SUMMARY OF SUBMISSIONS

In its submissions, the South African Board for Sheriffs (SABFS) explained that a sheriff is an impartial and independent officer of the court, whose role it is to execute all sentences, decrees, writs, summonses, rules, orders, warrants, commands, and processes of the court directed to him/her. In order to ensure that it performs its duties within the realm of the Constitution, the SABFS advised that every court document it is responsible to act on is scrutinised to ensure that it complies with the law, and where it is established that a court order is non-compliant, it should be probed and returned to the court or attorney responsible. However, beyond ensuring that the order directed to him/her is compliant with the law, there is not much more that the Sheriff can do to avoid execution, as (s)he is an officer of the court appointed to carry out its functions. In eviction proceedings, the sheriff only becomes involved where occupants are not willing to comply with the court order and vacate the land of their own accord. The Sheriff is therefore not always an active participant in the carrying out of evictions. Where the service of a sheriff is not required, a removal contractor may be used to assist in the relocation of people and their belongings.

In the execution of an eviction order, and in compliance with his/her constitutional duties, the sheriff is responsible for:

- a) scrutinising an eviction order to ensure that it is not a fraudulent one and that it adheres to the law and Rules of Court
- b) explaining the contents of the order to whom it is to be served, and further explaining their rights and responsibilities to them and
- c) ensuring that the order is executed during normal hours of the day and not during inclement weather

The SABFS submitted that to expect a sheriff to do any more than this could lead to the compromising of the sheriff's positions as an impartial and independent officer of the court and to them being accused of entering the legal arena. A sheriff tasked with the execution of an eviction order therefore, cannot delay such execution unreasonably, for example until the occupiers receive alternative accommodation, as such action may result in the sheriff being accused of occupying the role of the court, and place the SABFS at risk of proceedings being instituted against it compelling the sheriff to execute on the order.

Regarding the dependence on private security such as the "Red Ants" when executing eviction orders, sheriffs will in some instances meet resistance to an eviction, from groups which may include unlawful occupiers and the surrounding community. This is particularly the case when attempts are being made to execute large scale evictions. It was explained to the Panel that in such instances, the SAPS insists that the eviction can only take place with the presence of the Public Order Policing Unit (POPS), but that the Sheriff is present to ensure that all constitutional imperatives are observed, even when executed with assistance of private eviction units such as the "Red Ants". The SABFS further submitted that when executing eviction orders in "less affluent" areas, reliance is placed on POPS

and the “Red Ants” to ensure that they can execute their mandate without being exposed to violence, as sheriffs have been physically attacked during eviction proceedings in the past. However, POPS are not always available to assist in the execution of large scale evictions in particular and in some cases may only be available on short notice. Thus multiple evictions are executed as and when POPS is available. In order to ensure that evictions are executed, the SABFS also relies on private security companies to assist in the execution of evictions due to its limited resource capacity. In addition, unless applicants for eviction orders move in immediately after the eviction had been executed, the property is often re-occupied.

In terms of the execution of evictions, the GPG submitted that no evictions have been executed in GPG owned flats and hostels. It further explained that evictions that take place are to a large extent conducted by private property owners and social housing institutions. Prior to the process of eviction, it attempts to mediate between landlords and tenants through the Gauteng Rental Tribunal. The GPG has further signed a memorandum of understanding with the Department of Justice to receive matters on the court roll in an attempt to negotiate with property owners to find alternative solutions rather than having to resort to evictions when there are issues in dispute. In the event that evictions are executed, affected community members are placed on the demand database in order to benefit from housing opportunities at the earliest possible time to ensure that their situation is in fact temporary.

According to the City of Johannesburg (CoJ), in cases where evictions may lead to homelessness, it engages with affected occupiers and provides temporary alternative accommodation where possible, subject to “practical challenges” and resource constraints. While it does at times engage with parties prior to the start of evictions proceedings, it is generally only aware of a housing crisis caused by evictions once court papers in relation thereto are served on it. The CoJ submitted further that occupiers do not generally approach it seeking assistance for temporary accommodation and that the obligation to provide temporary accommodation is not an obligation that is binding in all eviction cases as it will not always result in homelessness. As referred to earlier in the report, the CoCT submitted that defaulting households are provided with “reasonable opportunities” and time to remedy any breach that may lead to eviction. Where an eviction does take place, temporary relocation areas are located within, or are easily accessible to established urban areas.

According to the LRC, evictions should not result in homelessness and the State must engage meaningfully with occupiers and ensure that alternative accommodation is indeed provided. However, in its experience, in some instances municipalities have resorted to circumventing the requirements and protections afforded to occupiers in the PIE Act on the basis that the PIE Act is not applicable because people have not established occupation.

8.2 ANALYSIS

In terms of international law, security of tenure as a key component in assessing the realisation of the right to housing comprises a wide array of housing arrangements including rental accommodation, cooperative housing, owner-occupation, emergency housing, and informal settlements. It also includes the guarantee that all persons be afforded legal protection against forced eviction, harassment, and other threats. This guarantee against forced eviction has been enforced in the Constitution and various forms of housing options giving effect to the international definition of security of tenure have been articulated in the National Housing Code, further informed by the National Housing Act.

A number of complaints received by the SAHRC detail the brutal manner in which eviction orders have at times been executed by Sheriffs of the court, usually with the assistance of private security companies such as the commonly referred to “Red Ants”. Although it is noted that many evictions are conducted without hassle, these complaints considered together with the submissions made by stakeholders demonstrate that evictions are not always executed in a manner that is ‘just and equitable’, nor are all relevant circumstances of evictees taken into account during the eviction process. As heard from the civil society sector, contrary to the prohibitions contained in law, evictions do result in homelessness without meaningfully engaging with affected communities or the provision of alternative accommodation as required. Evictions are also being conducted at times which do not give account to the physical weather conditions, or at times when courts are not easily accessible for lawyers to try and prevent the evictions.

There have also been a number of instances where municipalities have attempted to rely on the National Building Regulations and Building Standards Act⁷⁵ to conduct evictions rather than through the PIE Act.⁷⁶ While this was not discussed in detail during the submissions, it is important to emphasise the fact that while a municipality has an obligation to eliminate unsafe and unhealthy buildings, any attempt to evict residents from such buildings prior to obtaining a lawful eviction order through the PIE Act may lead to a consequential violation of section 26 (3) of the Constitution.

Sheriffs enforcing eviction orders are also compelled to execute on the orders granted by courts and failure to do so could result in the person in whose favour the order is granted instituting proceedings for damages. Beyond ensuring that the order to be executed upon is compliant with the law and rules of court, there is not much else the sheriff can do to avoid execution. However, as was submitted by the SABFS, it is the sheriffs' duty to explain the contents of the order to whom it is to be served upon, as well as their rights and responsibilities. In addition, the sheriff does have to give due regard to the time of day and weather conditions when carrying out an eviction order and ensure that the eviction is carried out in a humane way, particularly when security companies are relied on to assist in fulfilling its duties. This, it would appear, is also not always being done and despite laws and policies being in place, significant rights violations continue to take place.

All parties involved in carrying out eviction processes, including municipalities, property owners, sheriffs, SAPS, and private security companies have corresponding obligations to ensure that due process, which takes into account the rights of persons facing eviction, is followed. While the involvement of the POPS and private security companies such as the "Red Ants" may at times be necessary when executing eviction orders, adequate measures must be in place to ensure that the conduct of these bodies is in line with respect for the dignity and fundamental rights of persons. Furthermore, steps must be taken to ensure that those whose conduct is responsible for any unreasonable damage, injury, or the violation of rights must be held accountable.

Not only should eviction proceedings be instituted in line with the PIE Act, but meaningful engagements with communities must be conducted prior to the initiation of such proceedings as well. Previous complaints received by the Commission have highlighted the lack of engagement and access to information of communities who are often unaware of the location to which they will be transferred, the amenities available at the new location, and the period of time they will stay at the temporary alternative accommodation. In addition to this, the lack of engagement has also resulted in the temporary relocation of communities to areas far from their place or work or school, causing communities to feel frustrated. Meaningful consultation with all parties throughout the eviction process is therefore necessary to ensure that communities have access to adequate information and are able to identify any concerns and have queries addressed prior to the eviction being carried out, which in turn will most likely prevent or mitigate some feelings of frustration, anger, and resistance.

Although municipalities in particular are not always involved in eviction proceedings, the approach adopted by the GPG by working closely with the DOJCD in becoming informed of all proceedings instituted in advance is commendable and provides an opportunity to engage with all parties with a view of settling the matter amicably and in ensuring that all necessary arrangements have been made before an eviction is conducted.

⁷⁵ Act No. 103 of 1977

⁷⁶ *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC) at para 49.

09

PRIVATE PROPERTY OWNERS AND THE
ROLE OF THE PRIVATE SECTOR

9.1 SUMMARY OF SUBMISSIONS

The CoJ submitted that it has no role to play in private property evictions unless it is anticipated that the evictions may lead to homelessness and that it cannot directly interfere in the relationship between the tenant and property owner in privately owned properties. The State's role, it was submitted, is therefore limited to that of adjudicating disputes through the Rental Housing Tribunal. In these instances it may join proceedings to make recommendations on the timing of evictions amongst others. It may also join private eviction proceedings if it foresees the eviction leading to a public nuisance or an unhealthy, unsafe environment.

As discussed in more detail in earlier sections of the report, eviction proceedings instituted by private property owners impose an obligation on municipalities to provide alternative accommodation, which obligation in turn can hinder the ability to plan and deliver permanent housing development projects to communities.

During the hearing, the NDoHS suggested that it appears that private property owners are using the EHP as a means to force the government to resettle poor people currently occupying abandoned private property. In these circumstances use of the EHP is inappropriate, as the situation of homelessness has not been caused by an emergency either through a natural disaster or development processes, but rather by property owners on terms suitable to them. State respondents also made mention of the misperception that has been created by private property owners, namely, that there is available and unclaimed land suitable for occupation by poor people.

Although the primary constitutional obligation rests with the State, the right to housing also imposes certain obligations on private parties. In the LRC's experience, private property owners are often unaware of the restrictions that the Constitution places on them, particularly in the context of evictions and the execution against homes to satisfy judgment debts. Quoting the Constitutional Court in *Blue Moonlight* the LRC noted that:

*"It could reasonably be expected that when land is purchased for commercial purposes the owner, who is aware of the presence of occupiers over a long time, must consider the possibility of having to endure the occupation for some time. Of course a property owner cannot be expected to provide free housing for the homeless on its property for an indefinite period. But in certain circumstances an owner may have to be somewhat patient, and accept that the right to occupation may be temporarily restricted, as Blue Moonlight's situation in this case has already illustrated. An owner's right to use and enjoy property at common law can be limited in the process of the justice and equity enquiry mandated by PIE."*⁷⁷

The LRC therefore submitted that on the basis of *Blue Moonlight*, a private owner may be required to participate in processes of mediation and engagement along with affected occupiers and the municipality.

⁷⁷ Para 40.

When it comes to eviction orders being granted on the basis of hazardous conditions, particularly in the case of abandoned buildings owned by property owners, SALGA submitted that the disjuncture between court judgments and policies aimed to give effect thereto is exacerbating the problems experienced. For example, although the NBRBSA provides for a chief building inspector responsible to administer the inspections of buildings to ensure that they meet requisite standards for safe habitation, and can declare a building unsafe, the NBRBSA does not allow for evictions. As stated in law, evictions have to be granted in terms of the PIE Act and this is particularly problematic when the owner of the building is not the municipality concerned, and as such, it is only when private property owners themselves apply for eviction that the municipality then becomes responsible for the provision of alternative accommodation.

In respect to private property owners who do not maintain their buildings that potentially results in evictions, the CoCT advised that it uses the “Problem Building By-Law” to encourage the maintenance of buildings by private property owners. Other possible solutions including the requirement of private property owners to make a financial contribution, the refusal of a court to issue an eviction order in appropriate circumstances, as well as an approach which regards the private property to be “temporary accommodation” until the municipality is able to provide a more permanent solution have also been discussed earlier.

Private property owners also continue to benefit from developmental processes. Indeed, due to the lack of capacity, it is necessary for the State to rely on private developers to be substantively involved in the housing development process, particularly in the delivery of low-cost housing. However, State respondents cited as a key factor diminishing the right to housing to the delivery of shoddy development projects by private contractors without the ability to adequately hold them to account because contractors sometimes disappear.

The NDoHS has not as yet debated the manner in which the private sector could or should be involved in the housing development space, such as the administration or maintenance of housing units, beyond that of a service provider, and SPII suggests that the involvement of the private sector is essential in order to provide access to adequate housing in the affordable market. However, this will require the role of the private sector to be clearly defined and a serious, collaborative strategy developed to increase the supply of affordable housing.

9.2 ANALYSIS

Although it has been accepted that the delivery of housing is primarily a State function, all State respondents appeared to agree that circumstances that lead to the denial thereof often involves the private sector.

With regard to the occupation of land or buildings owned by private parties, the responsibility to make arrangements for occupiers becomes the responsibility of the municipality concerned when private owners subsequently want to make use of their property. The institution of eviction proceedings by private property owners cannot be planned for by the relevant local municipality, which, as discussed earlier in the report, can create significant challenges in planning and delivery in instances where the municipality becomes responsible for the provision of alternative accommodation. As such, it is not necessarily the law and policies in place that are problematic for the State, but rather the inability to effectively plan because of the unpredictable nature of evictions processes instituted by the private sector. Ironically, although many State respondents initially submitted that it was poor people who were being opportunistic in the “orchestration” of “land invasions”, it can be argued that it is in fact the private sector taking advantage of legislative interventions aimed to assist the poor, with the resulting outcome being at the expense of the poor. While the private sector may not be aware of its responsibilities in the housing process, particularly because of the absoluteness of private property ownership rights protected in the past, the *Blue Moonlight* judgment creates certain obligations. The private sector, therefore, also has certain obligations to take reasonable measures to secure land and buildings in an effort to mitigate against the risk of subsequent occupation, and to ensure that buildings do not fall into disrepair in contravention of building regulations to the extent that the health, welfare and safety of occupants are not placed in danger. Further, the private sector should be more actively involved in the process of evictions, and assist the State in the planning process to ensure that rights of poor people are not continuously violated. This process, it was broadly accepted, must also be based on a time bound action plan which the State must be responsible for implementing.

Non-accountability of private contractors for the quality of services delivered results in wasteful expenditure and a perpetuation of rights violations. Ultimately, it is poor people that bear the brunt, as State resources have to be spent on fixing defective work rather than expanding on housing delivery to meet the ever increasing backlog. Although the NDoHS is responsible for measuring the impact of its housing programmes, it is the Auditor General that is responsible for monitoring the way in which money is spent. In terms of legislation, organs of State are entitled to recover monies paid to contractors or to restrict a supplier from doing business with the public sector for a period not exceeding 10 years by blacklisting them on the National Treasury database if such supplier obtained preferences fraudulently, failed to perform in line with its contract, or renders shoddy work.⁷⁸ Due process needs to be followed to blacklist such contractors,⁷⁹ and the consequence of the current failure to do so is that private contractors often do not have to take responsibility or pay damages for the poor work provided, resulting in wasteful expenditure and a continuing violation of rights of access to adequate basic services, including housing.

While the Commission recognises the indispensable role played by the private sector in realising the right to adequate housing, section 8 (2) of the Constitution places individual responsibility on all members of South African society to respect its laws and the private sector is no exception, particularly when its actions may cause the violation of someone else's basic human rights. The private sector ought to be made aware that housing development extends beyond profit maximisation but is intimately related to reclaiming the dignity of many of the country's people. In doing so, the private sector need not forego its drive to benefit from the housing market, but should be mindful of the context in which it operates.

⁷⁸ The Preferential Procurement Policy Framework Act No. 5 of 2000 (Paragraph 15 of the Preferential Procurement Regulations, 2001) and the Treasury Practice Note 6 of 2005.

⁷⁹ Prior to the termination of services, the relevant department or other organ of state must give notice of its dissatisfaction and provide an opportunity to deliver within a period of 45 days, failing which it will have the right to terminate the contract. In order to restrict / blacklist a service provider, the contract must be terminated in line with this procedure on the ground of fraud, poor performance, or shoddy work.

10

COMMUNITY PARTICIPATION AND PROTEST ACTION

10.1 SUMMARY OF SUBMISSIONS

In attempting to unpack the challenges that formed the subject of this hearing, it was important for the SAHRC to hear the views and experiences of various community based civil society organisations and experts, and gain further insight to what leads to commonly referred to “service delivery protests” which, although research has shown to be peaceful in most instances, are often portrayed as violent in mainstream media.

Due to the lengthy submissions received from State respondents and interested stakeholders relating to community participation and protest action and the number of issues raised, this section has been divided into smaller sections. The first section will summarise submissions made in respect of community participation and engagement while the second section will delve more deeply into issues surrounding protest action.

Community participation and engagement

With regard to the lack of community participation in local government planning and fragmented decision-making processes, it is the LRC’s submission that this failure on the part of government has given rise to many “service delivery protests” due to massive frustration caused. Consequently, despite South Africa celebrating more than two decades of democracy, urban areas remain divided largely along racial and class lines, reinforcing the legacy of apartheid spatial planning and the denial of spatial justice. It was with the intention of addressing the injustices caused by apartheid that the Constitution entrenches democratic participation, accountability, sustainable service delivery, and the prioritisation of needs of poor communities as key components of the developmental duties of municipalities.

Access to information also poses a significant challenge to effective service delivery, and the lack thereof prevents poor people from participating meaningfully in developmental processes. Not only does this reduce the substance of South Africa’s democracy but it also impacts on the effectiveness of local government. The Ahmed Kathrada Foundation (AKF) submitted that most people rely on television or radio for information concerning government and oftentimes the SJC has had to rely on using the Promotion of Access to Information Act⁸⁰ to access information that should be in the public domain. Information such as service delivery agreements should be widely available in order for affected communities to assess the responsibilities of contractors and adequately participate in future policy and planning decisions. Abahlali baseMjondolo (Abahlali),⁸¹ submitted that although laws and policies are accessible, actual development plans and projects, such as IDPs, are not.

Even in instances where information, such as budgets is available publicly, it is in a manner that is not easily relatable to communities, and information on resource allocation in particular is rarely presented in a way that affords ordinary people the opportunity to make informed decisions on policy positions. As such, communities are not able

⁸⁰ Act No. 2 of 2000.

⁸¹ Abahlali baseMjondolo is an organisation which describes itself as “a democratic membership based movement of shack dwellers and other poor people...”

to establish how resources are allocated and whether they are in fact being allocated in a manner that contributes to the progressive realisation of rights.

As expressed by CALS, the lack of transparency in relation to municipal plans and policies further exacerbates hostility between communities and the municipalities concerned, while mobilised communities with access to the correct information are able to resolve many disputes that affect them. As such, CALS has embarked on numerous advocacy initiatives to equip communities with requisite information.

The LRC, in quoting the Constitutional Court in the *Doctors for Life Case*⁸² elaborated on the importance of community engagement:

“The participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people.”

The current legislative mechanisms provide for community consultation mechanisms, particularly at local government level. Legislation provides for structures, mechanisms, and processes to facilitate community participation, compulsory budgeting to facilitate community participation and notice requirements, in addition to the publicising of documents. However, the LRC submits that notwithstanding the establishment of these mechanisms, it has not proven to be effective by ensuring the involvement of communities, and poor communities in particular, in decision-making processes that affect their daily lived experiences. This, it was further explained, has been demonstrated in various court cases and academic research concerning the involvement of communities in the development of IDPs. Factors contributing to the lack of community engagement in the IDP process include the language used in such processes and a failure to address the logistical impediments used for participation in the IDP process, such as transport and meeting times, which adversely affects marginalised groups such as women, people with disabilities and farm workers.

In terms of the National Housing Code, there must be a Project Steering Committee (PSC) as part of the participatory processes required for developmental projects. Although the CoCT submitted that beneficiary communities are well represented on PSCs, which also include representatives from government and contractors, the LRC advised that while PSCs are key for communities to understand requisite processes, they are largely under-resourced, do not meet regularly enough, and rarely have minutes detailing meeting discussions. Consequently, there is a disconnection between the laws which provide for public participation in local government affairs and the actual experience of communities.

According to the NDoHS, however, community consultations can be cumbersome and it is difficult to manage the needs of all interested stakeholders. The CoCT submits that stakeholder engagements pose a challenge, particularly because “*you also have to make sure that you do not have a minority holding up a benefit for the majority of the community.*” The CoCT advised the Panel that often due to competition for resources where people have been waiting for housing for a substantial amount of time, a project can end up being slowed down significantly as a result of conflict occurring within a community. This, the CoCT contended, is often a result of community leaders agitating for one particular group of people to benefit over another. As such, resolving a dispute requires careful management if it is to have the consequence of taking a process forward in a manner which does not involve the delays currently experienced. However, the NDoHS has developed guidelines to assist municipalities when engaging with communities with the view of resolving disputes, as well as providing funding to municipalities to implement these guidelines.

⁸² *Doctors for Life International v Speaker of the National Assembly and Others* (2006) (6) SA 416 (CC).

In the view of AKF, the term “community” is used very loosely in the South African context. Rather, people reside in areas without much infrastructure or strong local government institutions. The weakness of ward committees who represent these areas and the absence of support from community development workers further compounds this problem. Government engagement tends to be bureaucratic, as people are directed to register complaints with officials, and time lags between officials reporting the problem to politicians and politicians actually addressing them. This results in the issue often being disregarded in the process, thus heightening frustrations.

In adding to the frustrations experienced with the political process of engagement, Abahlali, in focusing its submission on experiences in Durban, submitted that difficulties relate primarily to the manner in which it interacts with local government. Councillors, according to the submission, tend to serve the interests of the political parties they represent, rather than performing their official bureaucratic duties. Ward committees established to discuss matters concerning the delivery of services tend to exclude community organisations, such as faith-based organisations, taxi associations, or school governing bodies, resulting in ward committees being dominated by party politics. The outcome is often that service delivery is limited to those who favour the ward councillor’s political interests. According to Abahlali, ward councillors have also been responsible for causing divisions within communities, at times excluding or discriminating against migrant workers from provinces outside of KwaZulu-Natal.

South African Shack/Slum Dwellers International Alliance (SASDIA) submitted similar challenges, noting that a key concern is that local authorities appear to be disinterested in engaging with communities except through ward councillor structures. According to SASDIA, this form of engagement is very superficially participatory, as many community based organisations struggle to gain recognition from city officials and politicians, a point which was also reflected by Abahlali which emphasised the fact that the State largely ignores grassroots organisations about matters that affect their daily lives and with which they have lived experience. When dialogue does take place, it is often to meet requirements as stipulated in State procedures. Moreover, beneficiaries are viewed as passive recipients of basic services, rather than active participants in the developmental process. This form of engagement, SASDIA submitted, has led to the stifling of communities’ plans and aspirations to actively improve their situation. If communities were afforded the opportunity to partner with or “co-produce” outcomes, it would lead to communities acquiring mutual ownership of properties and foster critical engagement with authorities.

Further issues raised included the fact that the times at which community engagements are held are often at a time when most people are at work, because they suit the hours of bureaucratic officials, thus making it difficult for community members to actively participate, while organised lobbying to affect these decision-making processes remain confined to more affluent areas, reflecting the needs of those who reside in them. According to SALGA, it is not sufficient to engage with communities only when approval is needed for IDPs, which is usually once a year, but engagement must occur consistently thereafter in order to inform communities about what it will be possible to achieve within the available financial resources.

SASIDA went on to state that despite the close proximity of local authorities to communities, planning processes remain “top-down”, exclusionary, and increasingly further removed from the needs of people residing within them. Communities are often consulted with after development plans have already been completed and these plans have largely been designed by experts and practitioners that lack understanding of communities concerned. Consequentially, there are no institutional mechanisms in place for communities to influence the priorities of municipalities in the planning process. Also, local officials do not appear to be capacitated with the relevant skills to tackle issues of informality and tend to apply methodologies, principles, and regulations that are not well-suited to affected communities.

The SJC, focusing its submission to its experiences engaging with the CoCT regarding the issue of sanitation, submitted that engagement with local authorities often results in hostility towards poor communities, leaving them without any avenues for constructive participation and hampering effective delivery of services. Due to its inability to engage, the SJC further submitted that the CoCT has also missed several opportunities for it to assist the CoCT in realising its obligations in providing safe and dignified sanitation for all, although the CoCT advised that it will engage with NGO’s to facilitate local community engagements in local housing development, where appropriate. Moreover, the

SJC stated that the CoCT has responded in instances by reducing services in certain areas, assigning responsibility to the very communities it had refused to engage with. In addition to this, SPII explained that communities are not adequately consulted on matters that they ought to be benefitting from, resulting in communities not feeling a sense of ownership and thus rejecting rather than cooperating with local development projects.

The submissions further concluded that poor communities in South Africa feel deeply isolated and marginalised, while the nature of the delivery of basic services reinforces this alienation. At times, services are delivered in a manner that expressly goes against concerns raised by communities, such as safety, community dynamics, or specific community needs and requirements. The approach adopted by local government tends to focus on meeting quantity targets, rather than creating human settlements that take into account the context of communities who often have a much better understanding of their own needs and how service delivery ought to be handled within their spaces.

Community protest action

According to the Local Government Action Network (LGAN)⁸³ there is an indication that the State is becoming increasingly unresponsive and remote to the needs of poor people, specifically demonstrated in the failure to establish formal participatory mechanisms to address concerns of affected communities. Both the LGAN and CALS submitted that this reality frequently leads to communities becoming frustrated and isolated, thus turning to more informal forms of engagement, namely protest action.

As a result of the superficial participatory form of engagement utilised, SASIDA explained that communities engage in protest action because while expectations of delivery are high, actual delivery of basic services remains staggered and uneven. There is a growing perception of widespread corrupt service provision, and transparency and accountability of project procurement is minimal. Protest action is also used as a means to express needs where previous mechanisms of engaging stakeholders, including ward councillors, local officials, field officers, and ward committees, have failed.

In further seeking to explain the cause of protest action, research conducted by Jane Duncan shows that in many instances “service delivery” is at the bottom of the list of reasons for wanting to protest. In the Johannesburg metro, for example, of the 348 protests, only 50 related to issues of service delivery. However, based on how protests are covered in the media, misperceptions being created and stereotyping of protest action is taking place. For example, research conducted by the Multilevel Governance Initiative (MLGI) into civic protests indicates a high level of violent protests recorded. MLGI relies on media coverage to inform its conclusions. However, the research also shows that according to statistics provided by the South African Police Service (SAPS), peaceful crowd management incidents far exceed unrest-related crowd management incidents. For example, in 2013, 11 601 crowd management incidents were recorded as peaceful, while only 1907 were recorded as “unrest-related”. Consequently, protestors’ voices are further silenced as their needs are misinterpreted. It must be noted that SAPS does not use the term “violent”, while “unrest-related” can include protests that although illegal, were still peaceful.

⁸³ The Local Government Action Network is a loose alliance of South African organisations working with various communities, aiming to contribute towards the achievement of the constitutional ideal in the “*development of a democratic and open society in which government is based on the will of the people*”.

MLGI Civic Protests barometer – 2007 - 2014

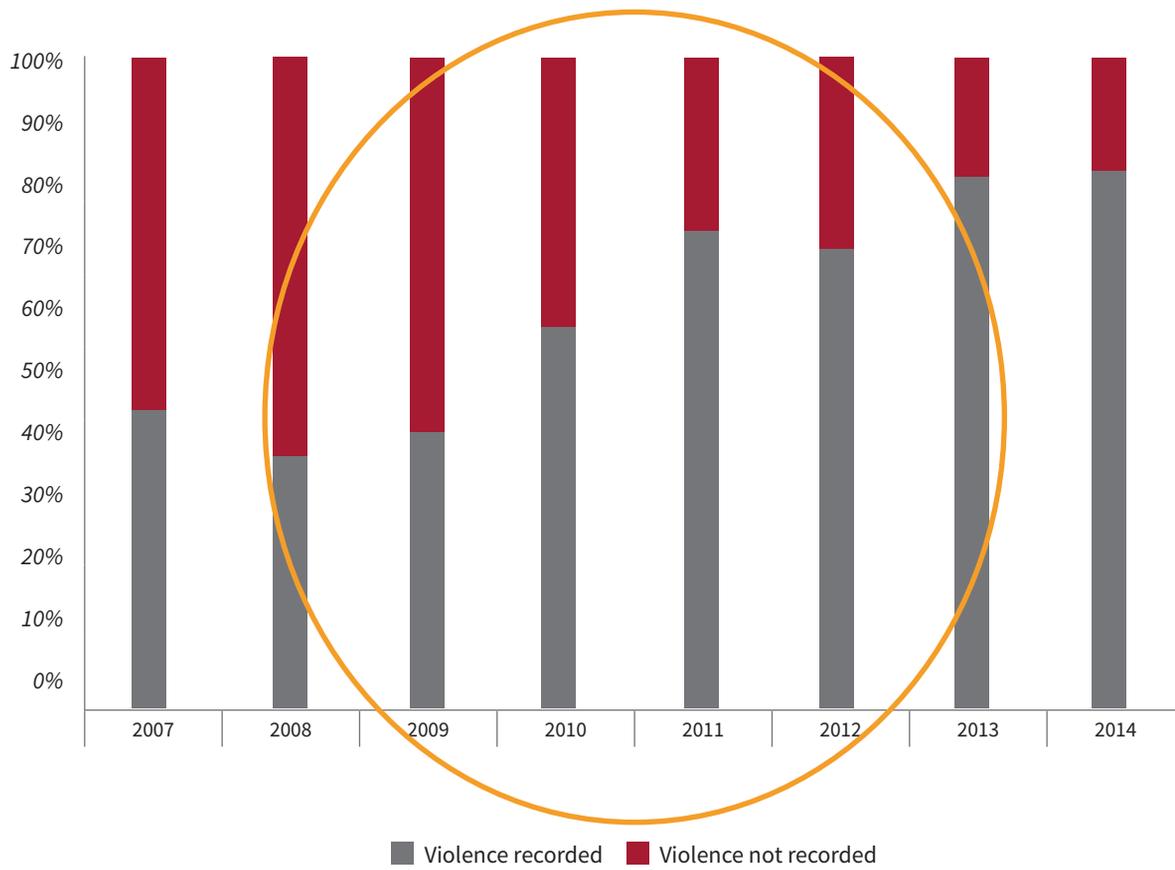
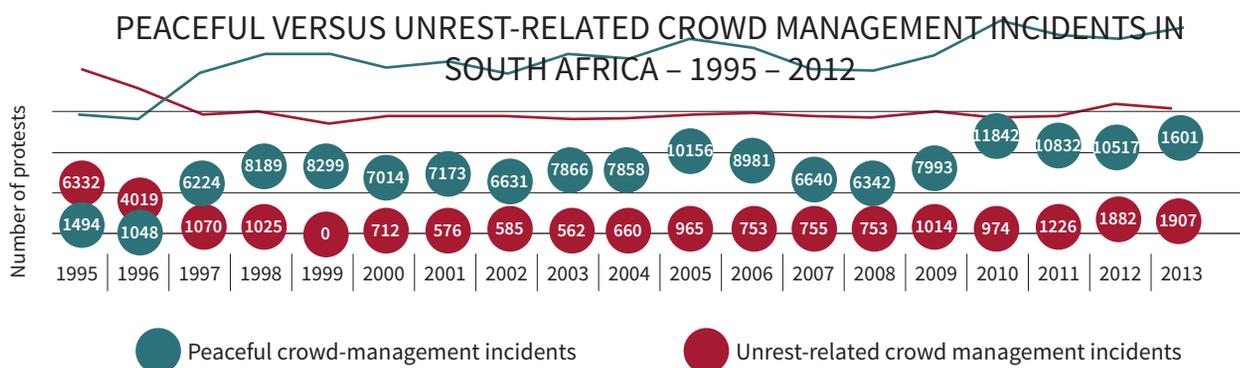
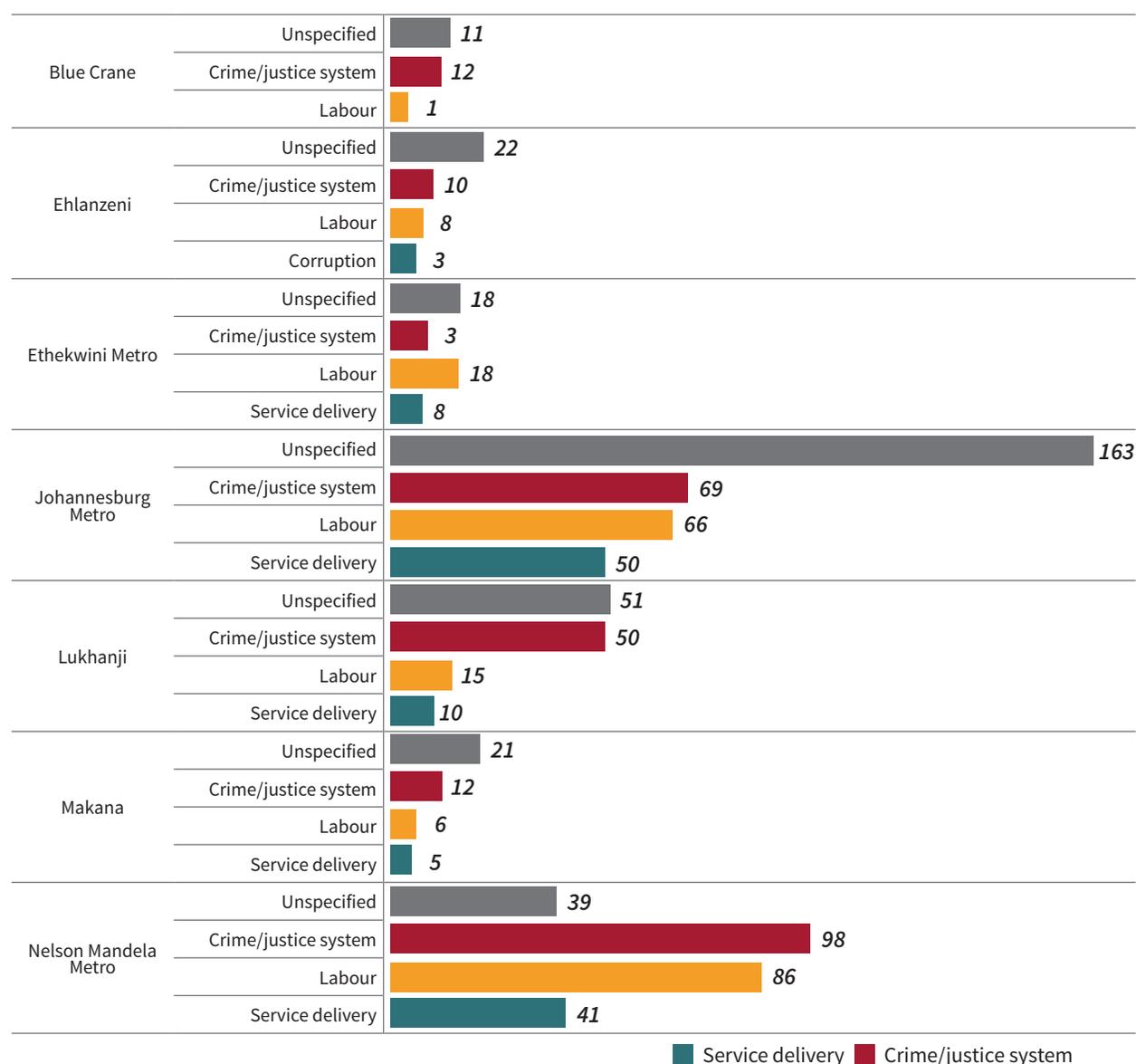


Table: proportion of protests involving violence – 2007 – 2014. Source: Civic Protests barometer, Multi-level Governance Initiative, February 2015, pg. 8.



TOP THREE REASONS FOR WANTING TO PROTEST



Abahlali submitted that while protest action is turned to as a last resort by communities in the quest of getting their voices heard, it has also yielded results sought after. Protests have been used as a means to avoid evictions, plans to eradicate informal settlements on well-located land have been dropped, and ward councillors have been removed. However, when services have been delivered, it has been to the exclusion of Abahlali members as a way of “punishing” them. Protests are also used as a means of sustaining the movement and ensuring that the movement remains in touch with the needs of the people it represents. Although Abahlali does attempt to organise protests legally, when requests to do so are denied by the State, or court judgments are not complied with, road blockades are organised as a means of demanding recognition and causing disruption to a system that members believe oppresses them. However, Abahlali insisted that although road blockades as a form of protest can be implemented relatively quickly, the process of taking such a decision is one that is considered over time.

In responding to a question posed by the SAHRC regarding the destruction of State-owned property during protests, Abahlali submitted that instances of such destruction is rare, in comparison to the daily encounters of destruction of homes, businesses, and community centres such as churches or crèches, and the disconnection of basic services that poor people have to endure. Abahlali submits that the destruction of State property must be understood in the context of the fear and anxiety impoverished South Africans experience every day and the stress endured through this reality is often expressed through anger.

Although protest action does yield results, SASIDA submitted that these result are often short-lived and the dysfunctional relationship that currently exists between local authorities and the communities they represent is reinforced. Consequentially, where gains are made, they do not always lead to the requisite institutional shifts fundamental to lasting and sustainable solutions.

Notwithstanding the peaceful manner in which these protests have been conducted, the SJC explained that many of its members have been arrested for contravening the Regulation of Gatherings Act (RGA),⁸⁴ thus criminalising the activities of such members. This point was reiterated by LGAN in submitting that the criminal justice system is used by the State not to address criminal activity, but rather to silence protestors and suppress popular dissent.

According to CALS, the discourse surrounding protest action in South Africa has centred largely on the violence that may ensue when embarked on, rather than unpacking the nuanced reasons as to why communities use protest as a form of expression and thus avoid interrogating State responses to attempts by communities to protest lawfully. When attempts are made to engage with politicians, members of the community are often confronted by the police tasked with restoring law and order, often resulting in violent exchanges as opposed to recognition and negotiation.

Professor Jane Duncan's submissions to the SAHRC focused on gatherings and protests in the context of the Regulation of Gatherings Act, and why "service delivery protests" either turn violent or are perceived as such through media reporting. Illustrating the manner in which gatherings and protests are distinguished between and authorised by local government, Duncan presented research conducted in various municipalities. In Rustenburg for example, in 2011, 41 per cent of the applications for gatherings were approved, while 12 per cent were not approved. In 2012, 33 per cent of the applications for gatherings were approved, while 10 per cent were not approved. This is in contrast to applications to embark on protests. In 2011, 32 per cent of the applications relating to protests were approved, while 29 per cent were not approved, while in 2012, 33 per cent of the applications were approved, while 53 per cent were not approved. The remainder percentages are unspecified.

In order to organise a public gathering, various municipal requirements need to be complied with, including:

- a) the provision of names and contact details
- b) name of the security company that will be used to assist
- c) a permit obtained to use a public road
- d) authorisation letter for use of venue
- e) temporary permit if liquor will be on sale
- f) tribal council permission letter
- g) a confirmation letter from the person due to be served with a memorandum
- h) a floor sketch of the venue and
- i) names of VIPs should any be expected

In some cases application fees are also requested.

Guidelines for municipalities detailing proactive measures to be undertaken when dealing with service delivery protests and public marches include:

- a) assigning a responsible person to coordinate and address community complaints and concerns

⁸⁴ 205 of 1993.

- b) work with the Office of the Speaker in the Public Participation Unit to ensure on-going engagement between councillors and residents
- c) develop and implement an on-going programme to communicate programmes, plans and budgets to ensure common understanding and information flow and
- d) monitor all events taking place in the municipality including service delivery protests and public marches

In instances where permission to protest has not been granted, reasons include: the purposes of the march not meeting the requirements of the RGA; the applicants not having a confirmation letter of the gathering venue or starting point; or the application being denied at another municipality. According to Duncan, in 2010, a protest planned by the Valley View Flats Committee in eThekweni Municipality was prohibited on the basis that *“an intelligence report said that these were actually members of Abahlali baseMjondolo attempting to protest under another name. The integrity of the application was therefore questionable due to the apparent misrepresentation and the march was not approved”*.

Problems were largely identified as persisting with the implementation of the RGA, which, according to CALS, is largely misunderstood or improperly applied by State officials tasked with enforcing it. State officials routinely assume that consent by the municipality is a requirement for the convening of a lawful protest, when in fact all that is required from the convenors is notification. Section 2 of the RGA further requires municipalities to be involved in the administration of the right to protest but not in providing consent thereto. In this context, individuals who want to embark in protest action are confronted with either having to pursue litigation to enforce their right, or face the consequences of protesting outside the ambit of the law.

As SPII explained, the causes of many commonly referred to “service delivery protests” are due to a lack of poor planning, coordination, capacity, and monitoring at State level. However, the term “service delivery protest” is also one that is contested by Abahlali as being too narrow in explaining their plight. While it is acknowledged that access to basic services is in fact required, the root of protest action lies not so much in the delivery of services, but rather in the demand to be treated by the State with dignity and respect and to actively participate in decision-making processes that directly affect them. For Abahlali, resolving the current struggle being experienced rests on the need for all people to be treated as human beings. State responsibilities must be separated from party politics. The social value of land must trump the needs and interests of its commercial value. Land occupations ought to be understood as grassroots urban planning to be supported rather than destroyed by the State.

The AKF further cautions against referring to “service delivery protests” as community based, because in many instances, protests are confined to groups within communities. The manner in which protests are portrayed further creates confusion as to how large protests actually are, or who they represent. In addition, if protests are organised by only a select group of people, in the event that State owned structures are destroyed in the process, it is unlikely that such destruction occurs under the mandate of the community, but rather a small group is attempting to get the attention of authorities.

SASIDA submitted that resolving challenges relating to access to housing and basic service delivery lies in the manner in which communities are consulted. Consultation forums should be managed jointly by communities and officials representing them. Procurement processes need to be transparent with a focus on community-centred development, which also requires a change in attitude, methodologies and local government practices when engaging with affected communities.

The AKF proposed that the political system of representation must change to make government more directly accountable to the people. Currently, State officials appear to be facilitating the interests of their political affiliations, rather than attending to official bureaucratic processes. Participatory budgetary models may assist in developing greater accountability. In addition, the model governing community development workers ought to be revisited as a means of closing the gap between local government and communities.

Continued municipal misunderstanding of the lived experiences of poor people, coupled with a lack of technical capacity required to effectively realise rights, reinforces poverty and exclusion. Importantly, the involvement of communities at all stages of implementing housing programmes is not only a constitutional right, but also is in

government's interests to avoid the occurrence of persistent service delivery protests. Such involvement will help to transform the relationship between the State and its poorest citizens, inevitably resulting in the improvement of services themselves.

10.2 ANALYSIS

Community participation is a central theme that runs throughout the Constitution, not only because such participation is recognised at international law for being vital to the effectiveness of developmental processes and projects, but because the majority of South Africans who endured colonialism and apartheid were not a part of decision-making processes that had a direct impact on their lives. Unexpected evictions and forced removals to unknown locations were a frequent occurrence along with the creation of so-called "homelands" and pass laws limited free movement. Insufficient resource allocation limited individual and economic development. These realities continue to be experienced by South Africa's poor population.

In its 2004 Housing Report, the SAHRC pointed out that contrary to the goals of the People's Housing Process as a route for strengthening culturally adequate housing and ensuring effective participation in the delivery of housing, the lack of effective community participation has become as a key concern. The 2004 Housing Report further stated that it was not appropriate for the then Department of Housing to mention community participation without effectively defining what such participation may mean or consist of. The 2014 water and sanitation report also found that the overall non-responsiveness of government and insufficient engagement with communities is an on-going concern. More than ten years after the publication of the Housing Report, the lack of effective community participation in the housing process continues to be one of the primary causes of community dissatisfaction and frustration, resulting in many to embark on protest action as an alternative means of having their voices heard.

When attempting to participate in the democratic processes afforded both in terms of the Constitution and its enabling legislation, communities are met with resistance by State respondents. Rather than being viewed as active participants in developmental processes, they are viewed as passive recipients of general service delivery.

There also appears to be a disconnect in how State respondents view community participation, often assuming that engagement will provide an opportunity for a minority of community members to stall development processes to further ulterior political agendas within a community. However, as presented by community organisations, democratic structures and procedures are what govern their aims and objectives. Access to information is essential in ensuring a transparent and accountable system of governance, where communities may be empowered to drive policies which affect their daily lives. All processes which have the potential to impact on the delivery of basic services, including budgeting and planning processes, should be made publically available. Moreover, the provision of information to communities which is not easily understandable further contributes to the denial of the right to access to information and of communities to contribute to the development process.

Communities thus feel stifled in their ability to contribute toward the improvement of their situation. The inability of the State to adequately engage with their needs has led to members of communities feeling excluded from decision-making processes governing their lives and further marginalised when the delivery of services is either not of a decent quality or inconsistent and haphazard. At times, services are delivered in a manner that expressly goes against concerns that have been raised with local authorities. Communities are often engaged with merely for local authorities to tick a box once development plans have already been agreed to without their knowledge and largely designed by professionals and experts who lack a thorough understanding of the community concerned. It is at this point that communities turn to protest action as a last resort as a means of voicing their frustrations.

Despite the recognition that community engagement is essential for real democratic governance and that the State is legally obliged to engage with communities, the manner in which such engagements are undertaken is important. Engagements need to move beyond a "tick-box" approach and the value of consulting with communities in a meaningful way must be recognised by local government representatives. The provision of access to information and meaningful engagements with communities is able to greatly assist and guide State departments in developing policies, processes, and plans which are accountable to the needs and are thus able to deliver basic services in a

sustainable manner. Community engagements should therefore be conducted in a manner which aims to be inclusive of all groups in a community, particularly vulnerable and marginalised groups, and factors such as the time of day, the location of the engagement (and accessibility of the location), and the language in which consultations are conducted must be taken into account.

When exercising civil-political rights such as the right to demonstrate, provided under section 17 of the Constitution, communities are met with further resistance from the State. In addition, the causes of these demonstrations are often misconstrued by the media reporting on them and the perception of violence attached thereto is often not a true reflection, as data from SAPS reveals. It must also be recognised that the media has an obligation to ensure that events are reported in a true light, to guard against misperceptions being created. In instances where community protests do turn violent, communities and community-based organisations need to be made aware of their corresponding obligations to refrain from engaging in activities which result in damage to property.

While it is also possible that the SAPS statistics may not provide an adequate assessment relating to “violent” protests either, particularly because no definition is provided explaining the term “unrest-related”. The use of the term “service delivery” itself poses a problem. This is largely because the term “service delivery” does not adequately define what aspect of service delivery protestors take issue with, thus creating difficulties in adequately addressing the cause of frustration. It also creates an assumption that an entire community is dissatisfied, when in fact it could just be a small group of people. Consequently, even when protests have resulted in positive measures being undertaken by the State, the general approach to community engagement and the on-going relationship between local government officials and communities remains unchanged.

Duncan further highlighted the onerous requirements set by municipalities for protests to be embarked on lawfully, with such requests increasingly being denied. Lawyers representing community based organisations have highlighted the intimate link between so-called civil political rights and socio-economic rights in this respect, as they are often called upon to assist in the application process in acquiring authorisation from municipalities for communities to embark on lawful protest action. Even when attempting as law abiding citizens, to follow municipal laws, the denial of their right to demonstrate their concerns criminalises poor communities even more. Thus the cycle of marginalisation continues, as poor communities become increasingly distrustful of the leadership tasked with meeting their needs.

11

ACCESS TO JUSTICE

11.1 SUMMARY OF SUBMISSIONS

Many of the State respondents in particular referred to the “inflexible” legal environment currently governing the housing sector and the disjuncture between court cases informing policies and the practical challenges experienced when trying to give effect thereto. It was thus of paramount importance that the SAHRC heard from the lawyers representing poor communities who are the subjects of eviction proceedings and facing other service delivery related challenges in an attempt to understand the circumstances and strategies that inform the legal processes adopted.

Having represented clients in terms of the PIE Act and the Land Reform Act,⁸⁵ it is the LRC’s experience that it is the eviction component of the right to adequate housing that has been extensively litigated in the courts. Moreover, court decisions thus far have focused largely on the negative component of the right rather than other aspects of which it comprises. This is of particular concern in a country where there are more than 3 million South Africans living in abject poverty in urban areas. This notwithstanding, the LRC limited its submissions to its own experience when litigating on matters concerning the right to adequate housing.

According to the LRC, banks often oppose litigation resulting in drawn out legal proceedings and the incurring of increased legal costs. Where ownership of houses has been lost, lengthy litigation is embarked on to get houses back in the former owner’s names, and obtaining title deeds reflecting ownership continues to be problematic.

In addition, poor communities in urban centres increasingly face criminalisation. As explained by CALS, local metro police repeatedly fine poor people for alleged illegal water and electricity connections, even in instances when these connections have been made prior to their occupation of properties. Standard procedure is that when a fine has been issued, representations have to be made by the recipient explaining why payment has not been made, usually in a court. However, failure to appear in court results in a warrant of arrest being issued. In many instances, affected communities are unaware of the fines being issued, or who is responsible for the illegal connection. Arrests also take place on weekends, and those arrested only appear in court days later. In most cases, lawyers are able to have these fines waived as the State is unable to prove that the accused individuals themselves are responsible for the illegal connectivity. Notwithstanding these explanations though, inner city buildings housing poor people are subject to continuous raids and arrests specifically in relation to water and electricity connections.

Access to legal resources has become increasingly challenging. Donor-funded organisations have less resources to assist in matters concerning individuals seeking redress and *pro bono* services offered by large law firms is often limited as many of them represent State respondents as clients. Communities therefore face significant barriers in accessing legal representation as a means to resolving housing, local governance, and service delivery disputes, which lack of representation is exacerbated in emergency situations such as evictions.

⁸⁵ Act 3 of 1996.

In the LRC's experiences, organisations such as Legal Aid South Africa (Legal Aid SA), tasked to provide legal representation in cases concerning evictions, often fail to assist as legal officers incorrectly decide that there is no defence available. Legal Aid SA officers therefore need improved training in understanding the circumstances facing evictees, in addition to the law relating thereto, even in circumstances where occupiers have not paid rent. In this regard, both the LRC and CALS submitted that expanding the capacity of paralegals and organisations (such as Legal Aid SA) tasked with providing legal representation to those who cannot afford it is vital to ensure the protection of rights of vulnerable communities and individuals.

A further submission from CALS indicated that the resolution of many disputes does not always require the involvement of the courts. In unpacking whether litigation is the most effective means to compel government to implement existing policies and legislation, it emerged that litigation is only one means of a broader strategy which should also include community mobilisation and advocacy in the realisation of rights. However, embarking on litigation in particular does provide greater clarity on obligations borne by various repositories of power that include both the State and the private sector. In its involvement in the *Blue Moonlight* case, for example, CALS noted that communities and organisations assisting them had been in constant contact with the CoJ and other local authorities, urging them to acknowledge that the constitutional obligation to provide alternative accommodation in instances where evictions will lead to homelessness extends beyond instances where only the State is instituting evictions proceedings, but also includes cases when such evictions are being pursued by private property owners. However, notwithstanding *Blue Moonlight* confirming this obligation, four years later, the CoJ still fails to adequately provide alternative accommodation in certain instances and the housing crisis in the Johannesburg inner city persists. Litigation is therefore not the end, but rather a means to a much longer process of enforcing the political will of those in power to change approaches to the manner in which the realisation of rights is addressed.

Due to the extensive amount of time and costs involved, CALS submitted that it remains its policy that litigation is turned to as a last resort. Prior to deciding to pursue litigation, attempts are made to engage all relevant stakeholders both verbally and in writing. Meetings are held with government officials to address inadequate responses received or to understand the State's remedial plan for the affected community's request for redress. In CALS experience, most communities approach legal organisations for assistance after already having attempted to obtain responses from municipalities and typically are met with promises that go unfulfilled.

Moreover, in instances concerning large-scale evictions from land owned by multiple private owners, the courts are not always best placed to resolve the dispute. The LRC proposes that the current model of the Commission for Conciliation, Mediation and Arbitration (CCMA) may be best suited to provide mediation and arbitration facilities in addressing such evictions and the formulation of the requisite relief sought. In this respect, the LRC submitted that the powers of the already established Rental Housing Tribunal be extended to achieve this outcome.

11.2 ANALYSIS

In securing the rights of poor people who continue to suffer various forms of violations relating to the delivery of housing and basic services generally, lawyers also face significant difficulties in attempting to protect these rights. Legal non-governmental organisations (NGOs), already limited by a lack of funding and staff attorneys required to attend to all clients in need of assistance, are being forced to attend to rectifying avoidable situations. As submitted by CALS, many a time cases have been resolved through communication with State Attorneys explaining the circumstances that led to the rights violation, and the State's responsibility in relation thereto. This suggests that not all disputes, such as the disconnection of water and electricity for example, need to be referred to a court of law for the matter to be resolved.

NGO lawyers are also requested to assist in acquiring the necessary permission to exercise rights such as embarking on protest action, notwithstanding enabling laws and policies already place. In essence, albeit through litigation processes, NGO's established to assist to the needs of poor people are effectively performing the duties of State employees, either through enforcing correct implementation of established policies, or educating them as to the content contained therein.

In addition, the lack of legal representation is exacerbated in emergency situations such as evictions, resulting in many people suffering continued rights violations despite laws enforced to protect them. The consequence is that lawyers are spending more time developing the negative component of the right of access to housing, namely, by developing case law informing State respondents of what *not* to do to avoid violating the right concerned, as opposed to assisting in the development of creative measures that could aid in progressively realising such rights. As such, in many instances, adversarial approaches have to be adopted to protect the rights of poor people, when such circumstances could have been avoided.

12

APARTHEID SPATIAL PLANNING

12.1 SUMMARY OF SUBMISSIONS

The NDoHS acknowledges that it has been criticised for not adequately contributing toward spatial transformation and the reversal of apartheid spatial planning. However, it hopes that the implementation of the Human Settlements Master Spatial Plan (HSMSP), enforced through provincial business plans, will address the challenges of settlements currently located on the periphery, where no social and economic amenities are available, and contribute toward the development of integrated communities. The NDoHS also acknowledges that in order to achieve this objective, greater cooperation with other departments is required as integrated human settlements is not about housing alone.

The CoCT has submitted a list of Catalytic Projects to the NDoHS which are aimed at addressing the legacy of apartheid spatial planning amongst others. As part of its “Caring City” framework, the CoCT intends to address its apartheid spatial legacy, premised on the densification of settlements along transit corridors. It further hopes to transform informal settlements into integrated human settlements with secure tenure supported by social and economic amenities that ensure self-sufficiency. In addition, the Mayoral Urban Regeneration Programme (MURP) aims to improve safety, quality of life, and socio-economic circumstances with a focus on the public realm. In each area identified in terms of the MURP, a specific package of interventions is negotiated with a representative community structure and a community action plan is developed.

With respect to addressing its apartheid legacy, the CoJ submitted that its “Corridors of Freedom” programme is “*the leading edge of an approach that must ultimately alter the spatial density of the city*”. Through this programme the CoJ intends to link the development of affordable rental stock to the development of properties and precincts along these so-called corridors, in order for people to better access the city. It aims to reshape the current manner in which space is used by the State, with respect to public transport and public environment, and the incentives governing how space is used by the private sector.

In terms of addressing its apartheid spatial legacy, the KZNPG has embarked in a joint partnership with eThekweni Municipality and Tongaat Hulett Developments. The project referred to as the “Cornubia Development” aims to deliver an integrated human settlement, providing for a variety of housing instruments including Integrated Residential Development Programme (IRDP), social housing, Financed Linked Individual Subsidy Programmes (FLISP) and middle income housing. In order to reverse apartheid spatial planning, the ET is following the NDP and is in the process of developing an integrated public transport network catering for densified areas, in addition to making “land parcels” available in well-located areas.

In responding to the SAHRC’s question regarding the biggest challenges to integrated urban development, and why there appears to be a disconnection between the intentions stipulated in various housing development policies and the implementation thereof, Huchzermeyer mentioned she had posed this very same question to 23 leading officials and consultants during her research conducted in 2014. Due to the fact that Huchzermeyer was still analysing her research in this regard, she presented her preliminary findings at the hearing.

Defining “integrated urban development” includes both process, which involves the development of urban areas in an integrated way, and outcomes, which centres on overcoming inherited apartheid urban geography. The process of integrated urban development cuts across inter-sectoral collaboration *within* spheres of government and intergovernmental cooperation, *between* the different spheres of government. Considering integrated urban development as an outcome to tackling the apartheid legacy involves a number of factors, including:

- a) special integration, which assesses spatial integration such as the proximity of facilities to where people live, the proximity between different land uses that are compatible with each other, the distances that people have to travel between where they live and work, and how they are able to access the economy
- b) closing the gap in terms of contrasting income groups and where they live, given the perpetuation of apartheid spatial and city geography with mostly separate areas for separate income groups and
- c) understanding the term “human settlements” in its fullest sense, thus interrogating whether the change in terminology has in fact impacted on the manner in which government approaches housing delivery

According to Huchzermeyer, the change in terminology from “housing” to “human settlements” has created some confusion and urgently needs to be refined in order to inform the spatial restructuring initiatives of the various municipalities. Although initiatives such as the CoJ’s “Corridors of Freedom”, for example, may appear to address apartheid spatial legacies, it is not clear how the poorest will be accommodated in these well-endowed areas, and how a ‘human settlements’ orientation of NDoHS can contribute to this. The reliance on private sector developers will in all likelihood result in buildings with small units being constructed to accommodate low-income rental, better suited for single occupancy, as opposed to family residential units required for many people working in the city. Moreover, in addition to these initiatives, exclusionary development continues in the form of gated community complexes of private property developers. This further limits access to prime land for the development of housing for people who are poor, although City of Johannesburg does purport to be buying up land for its corridor development. Due to the challenges of accommodating the poor within well located corridors, and given NDoHS’s idea of mega projects, it is likely that housing projects for poor people will continue to be developed on the periphery, reinforcing apartheid spatial planning.

12.2 ANALYSIS

The perpetuation of apartheid spatial planning remains of concern and the NDP recognises that South Africa is yet to achieve the RDP’s objectives of “*breaking down apartheid geography through land reform, more compact cities, decent public transport and the development of industries and services that use local resources and/or meet local needs*”.⁸⁶ Urban areas remain divided along racial and class lines, which not only reinforce colonial and apartheid legacies but denies spatial justice to the vast majority of the country’s population.

All State respondents have committed to reversing and eradicating the apartheid legacy. The NDoHS has developed a Master Spatial Plan (MSP) aimed to achieve a creative balance between spatial equity, economic competitiveness, and environmental sustainability to overcome the legacy of apartheid. The MSP states that all spatial development programmes should incorporate the following aspects:

- a) spatial justice (e.g. integration)
- b) spatial sustainability (e.g. location, access to employment opportunities, relationship with environment)
- c) spatial resilience (e.g. mixed use, incremental development)
- d) spatial quality (e.g. diversity and choice) and
- e) spatial efficiency (e.g. optimal use of limited resources) and good administration under the guidance of SPLUMA

However, one cannot ignore that South Africa also forms part of a broader global economy. In this respect, as cautioned by Huchzermeyer, emphasis on the “world class city” narrative as a means to attract foreign direct investment to

⁸⁶ “The National Development Plan 2030: Our future – make it work”, p260.

boost the economy has resulted in preference being granted to private investment in the development of prime land situated close to economic hubs, as opposed to prioritising the needs of the poor, thus largely confining poor people to land situated on the outskirts of these cities.

As research by SPII demonstrates, the cost of property continues to fall outside of the income margins of the majority of South Africans, further reinforcing poverty and inequality.

Table: South Africa Housing Price Gap, 2012 (Data Source: City Mark, 2014)⁸⁷

MUNICIPALITY	AVERAGE MONTHLY INCOME	TARGET AFFORDABLE HOUSE PRICE	AVERAGE SALES PRICE	HOUSING GAP	AFFORDABILITY RATIO
City of Tshwane	R 15,566	R 396,853	R 687,623	R 290,770	1.73
Ekurhuleni	R 10,694	R 272,638	R 726,681	R 454,043	2.67
Nelson Mandela Bay	R 8,482	R 216,239	R 577,616	R 361,377	2.67
City of Johannesburg	R 14,777	R 376,754	R 1,017,327	R 640,573	2.70
Msunduzi	R 9,582	R 244,287	R 684,673	R 440,386	2.80
City of Cape Town	R 13,164	R 335,628	R 1,046,333	R 710,705	3.12
Buffalo City	R 8,714	R 222,174	R 744,750	R 522,575	3.35
Mangaung	R 8,368	R 213,336	R 783,584	R 570,248	3.67
eThekweni	R 9,759	R 248,805	R 916,451	R 667,646	3.68
Average	R 11,012	R 280,746	R 798,338	R 517,591	2.93

Also, the reliance on private sector developers to implement these new housing development programmes could result in accommodating the needs of young entrants to the market, rather than the diversity of housing required of poor migrants to urban centres.

In addition, SPLUMA appears to have limitations in that it affords great protection to the needs of the private sector. In this regard it could be argued that although the powers afforded to the Minister to override decisions of the municipality may be necessary, especially in instances where municipalities are performing poorly, it could also provide a wide discretion to Ministers to prioritise the needs of the private sector in pursuit of economic development.

As a result, where before human rights did not feature during apartheid, and despite human rights now being fully recognised by the democratic dispensation, the needs of the private sector economy appears to continue to trump those who require assistance and protection of the Constitution the most. South Africa's cities remain highly fragmented and are imposing high costs on households and the economy. Although densities have increased in some urban areas since 1994 with partial regeneration of inner cities and a growth of housing ownership, overall little progress has been made in reversing the inherited apartheid geography.

⁸⁷ SPII (2014) "Monitoring the right of access to adequate housing in South Africa: An analysis of the policy effort, resource allocation and expenditure and enjoyment of the right to housing".

13

FINDINGS

Following the in-depth analysis of the submissions together with the legal and policy framework, a greater understanding of the current challenges facing access to housing and the delivery of basic services now exists. While detailed findings have been highlighted throughout the analysis portions of the report, the following is a brief overview of the findings.

- a) there is a disconnection between the legal framework and the ability of local government to deliver access to housing and basic services, and the lack of effective and consistent implementation of policies perpetuates rights violations and the cycle of poverty and inequality
- b) urban housing fails to provide for a variety of needs to accommodate residents, including single individuals and families, while assisting the “gap market” (i.e. persons who do not qualify for housing assistance and are unable to receive a bank loan), remains a serious challenge
- c) housing policies and programmes fail to address the needs of many poor and vulnerable people, including those with informal or irregular employment, and the inefficient implementation results in the on-going denial of access to basic services
- d) allocation of prime urban land to facilitate low income rental accommodation remains a challenge and appears to be compounded by the growing trend of urbanisation and the lack of affordable low-income rental housing in urban centres has resulted in a growing informal and unregulated rental market, with many people living in deplorable conditions in abandoned and dilapidated buildings, or backyard shacks in informal settlements
- e) resource and capacity constraints, compounded by a policy disconnect, continue to impact on the ability of local government to perform efficiently
- f) notwithstanding the fact that there are mechanisms in place, there is insufficient oversight and accountability exercised to ensure the efficient delivery of services by municipalities and private contractors, which results in wasteful expenditure and a perpetuation of rights violations
- g) despite recognition of the importance of inter-governmental coordination between the three spheres of government and State departments responsible for the delivery of basic services, they continue to operate in silos, often resulting in misaligned plans and wasteful expenditure
- h) there is a lack of transparency and access to adequate information in the housing process in general and local governments fail to conduct meaningful engagements with communities resulting in the implementation of inappropriate policies and plans that do not address the specific needs of communities, while also denying communities the right to participate in decisions which affect their daily lived experiences
- i) evictions are often conducted without due regard to the rights of affected communities, and there is insufficient accountability for damage to property and other rights violations which occur during such processes
- j) communities face significant barriers in attempting to voice their concerns through protest action in line with section 17 of the Constitution (the right to demonstrate), through arduous requirements and a lack of understanding and incorrect application of the process to be followed by government officials

- k) there is a further lack of accountability by private contractors for the incomplete provision of services, or for the delivery of shoddy work, leading to wasteful expenditure while communities continue to bear the greatest burden of continual rights violations as a result
- l) although it is recognised that the private sector are able to play a significant role in contributing towards the achievement of the right of access to adequate housing, private property owners appear to be largely unaware of their corresponding obligations to protect against rights violations of others, as well as the fact that property rights in themselves may be temporarily limited to guard against systemic rights violations, particularly those of vulnerable groups
- m) a combination of the aforementioned challenges relating to accessing the right to adequate housing and other basic services has resulted in the legacy of apartheid spatial planning being reinforced and
- n) overall, approaches to housing programming are not having the desired impact of progressively realising the right to adequate housing, and in some cases, are in fact leading to perpetual rights violations

14

RECOMMENDATIONS

The SAHRC notes the gains made by the South African government in progressively realising the right of access to adequate housing. However, it notes further that the findings made in its 2004 and 2014 Hearing Reports, amongst others, remain much the same.

It must be noted that when conducting the analysis, additional parties that were not invited to be part of the hearing process were identified as playing an integral role in the housing process. Although the scope of the hearing limited submissions to a small number of provincial governments and municipalities, it is acknowledged that other provincial and local governments face many of the same challenges. As such, recommendations have been aimed at provincial and local governments in general, and those State bodies that did not participate in the hearing process are likewise required to take special cognisance of the findings and recommendations made in assessing and delivering basic services within their own local contexts with a view of contributing towards the progressive realisation of rights.

While it is noted that provincial governments may, in some instances, implement housing projects directly, municipalities are the primary role players in delivering housing and basic services to local communities. In recognising this primary responsibility, recommendations made relating to the actual delivery of housing opportunities have largely been directed at municipalities. Cognisance must be taken that such recommendations are also applicable to provincial governments when fulfilling this function.

Following the order of the themes identified during its analysis of submissions made, the SAHRC makes the following recommendations:

14.1 LEGAL AND POLICY FRAMEWORK

A balance needs to be struck between the aspirational ideals of human rights, and the pragmatic considerations that may limit their realisation, noting the limited resources available to developing economies in particular. These limitations notwithstanding, as highlighted by the OHCHR, adopting a rights-based approach to policy-making ensures that “budget allocations are prioritized towards the most marginalized or discriminated against; provision is made for essential minimal levels for all rights; there is progressive improvement in human rights realization; and particular rights are not deliberately realised at the cost of others”⁸⁸

Emergency and Temporary Accommodation

THE SAHRC RECOMMENDS THAT:

- a) the NDoHS revise the EHP to more adequately accommodate inner city evictions, in order to avoid the provision of temporary accommodation further removed from urban centres
- b) provincial governments should avoid the conflation of various housing policies to minimise confusion arising amongst affected communities
- c) the application of norms and standards to temporary accommodation by municipalities, noting the more permanent nature of housing initially intended to be temporary, and particularly in instances where such alternative accommodation is likely to exceed a 12 month period
- d) the NDoHS, together with the relevant provincial authorities establish simplified processes for municipalities to have timely access to budgets required for implementation of EHP to facilitate the provision of alternative accommodation as a matter of urgency
- e) municipalities must ensure that the relocation of affected communities should be the exception rather than the norm
- f) the NDoHS must ensure that all housing and service delivery-related policies, including the EHP and FBS policies amongst others, adequately accommodate both South Africans and non-nationals in both conception as well as in implementation and provincial government and municipalities should likewise ensure that the implementation of all housing and service delivery-related policies adequately provide for non-nationals and
- g) all State respondents and other relevant stakeholders should be mindful of perceiving communities as opportunistic and avoid using language such as “land invasion” when referring to emergency situations where the use of the EHP is applicable, with a view of reducing existing community tensions.

⁸⁸ OHCHR (2006) “Frequently asked questions on a human rights-based approach to development cooperation”, p 12 (as accessed at <http://www.ohchr.org/Documents/Publications/FAQen.pdf>).

Low income rental accommodation

The allocation of prime urban land to facilitate low income rental accommodation remains a challenge, and appears to be compounded by the growing trend of urbanisation. In light of this, low income rental housing and other social housing options need to become a viable and sustainable option for the urban poor, particularly if the country is aiming to revive its economy.

The SAHRC welcomes initiatives undertaken by various State respondents to better understand housing demand but reiterates the position of its 2004 Housing Report – low income housing accommodation for the urban poor in particular, must be at the forefront of urban renewal programmes.

THE SAHRC RECOMMENDS THAT:

- a) provincial governments must avoid the conflation of policies and the stalling of developmental processes by using budgets allocated for new developments to maintain existing units; in this regard, national and provincial treasuries in collaboration with the NDoHS and other relevant departments must reconsider the funding allocations, or alternatively, develop appropriate safety nets, to ensure adequate measures are in place to provide for the operational cost of buildings in the event that residents are unable to pay for rent without the need to resort to evictions
- b) the NDoHS and other relevant departments must develop systems to accommodate unemployment or irregular employment, as well as the so-called “gap market”
- c) provincial and local governments must ensure that new developments accommodate the diverse needs of poor people in the provision of housing units for the range of participants in the market, such as single people and families; in this regard, the NDoHS must revise the criteria applied in housing policies to include a range of participants in the housing market
- d) approaches to low-income rental accommodation need to be applied consistently across urban metropolises in order to avoid the creation of tensions and confusion where some municipalities evict tenants for non-payment of rent, in other municipalities this may not be the case; in this regard it is recommended that the NDoHS in collaboration with CoGTA and other relevant departments and adopt a standard approach following consultations with provincial and local spheres of government in order to develop appropriate and sustainable strategies and solutions
- e) the NDoHS is to assist provincial and local governments to develop proper systems of profiling to identify who exactly lives in buildings, particularly in urban centres, to distinguish between those who have established power over a building and tenants who are vulnerable to exploitation
- f) municipalities must establish a relationship with poor people, informing them of what their dual responsibilities are in relation to the low income rental or social housing function and
- g) the NDoHS, with the assistance of CoGTA, the Department of Trade and Industry, and other relevant departments should engage further with the private sector with a view to encouraging investment in the development of low income residential units, particularly in urban and inner-city areas.

Upgrading Informal Settlements

A number of challenges persist in the upgrading of informal settlements and monitoring and projecting future migration trends, particularly into urban centres is important to enable provincial and local spheres of government to adequately plan. The SAHRC notes that some projections have already been made as articulated in the NDP, but emphasises the need for on-going monitoring.

THE SAHRC RECOMMENDS THAT:

- a) the NDoHS in collaboration with other relevant departments is required to urgently develop annual forecasting mechanisms to anticipate and accommodate new economic migrants to urban centres;
- b) such mechanisms should further provide for the monitoring of existing and newly established informal settlements in order to enhance the ability of municipalities to plan for and upgrade informal settlements
- c) in instances where evictions are required for the upgrading of informal settlements, municipalities must ensure that evictions are an option of last resort, and are conducted with the full consent of affected communities; in instances where consent cannot be obtained from affected communities despite meaningful consultations having been conducted, a court order must be obtained for the eviction of the community; in the latter instance, communities must be informed of the reasons why *in situ* upgrading cannot be conducted
- d) municipalities, with the support of the provincial governments, are to create integrated and time-bound plans for the upgrading of all informal settlements, which plans should be developed after conducting meaningful consultations with affected communities and must be made publically available
- e) information relating to the prioritisation of projects to upgrade informal settlements must be made publically available by provincial and local governments and
- f) in instances where the upgrading of informal settlements is not anticipated to take place within the next 12 months, municipalities must take interim measures to ensure that communities are provided with access to basic services including adequate water and sanitation as well as refuse removal services

Free Basic Services

The indigent policy that provides for FBS recognises the institutional exclusion experienced during apartheid. by the majority of those who still constitute South Africa's poor. People who live in poor municipalities continue to suffer the effects of exclusion and in instances where municipalities are poorly capacitated or under the administration due to incompetent management, are subjected to continuous rights violations through the non-delivery of FBS to which they are entitled in terms of the Constitution.

Beyond the acknowledgment in the Constitution that the delivery of FBS, namely adequate water and sanitation, energy, and refuse removal constitutes integral components of an individual's dignity and what it means to be human, it is also a vital poverty alleviation mechanism. When poor people need to pay for these services to ensure their mere survival, it means that they also have less money to acquire other basic needs such as food, health care, and education. This in turn impacts on the ability of poor people to become active participants in the broader consumer market, further confining them to a life of perpetual poverty and social inequality.

THE SAHRC RECOMMENDS THAT:

- a) the NDoHS, Department of Social Development (DSD) and CoGTA, in consultation with other relevant departments are required to urgently develop a standard approach for the establishment of a national poverty baseline, which must also take particular account of persons with irregular or seasonal income and must include non-nationals; the approach to be adopted should provide for a level of flexibility to enable municipalities to determine and apply an appropriate indigent policy in their context
- b) urgent assistance to be provided to municipalities by provincial levels of the NDoHS in the development of poverty baselines and indigent policies applicable to the context in which they operate
- c) municipalities are required to develop indigent registers to reflect those who qualify within a municipality, which registers must also account for non-nationals and must be updated on an annual basis
- d) the provincial governments are required to simplify processes and provide relevant guidance and/or assistance to facilitate municipality staff in updating indigent registers as required
- e) responsible departments at the national, provincial and local spheres of government to develop adequate safety mechanisms to ensure that indigent individuals are not denied access to FBS, especially in instances where municipalities are at fault
- f) in instances where it becomes necessary to suspend the provision of FBS, after having considered all relevant circumstances giving rise thereto, municipalities must follow due process and provide notice of termination to all affected individuals and not only to the owner of the property and
- g) building on the work already undertaken by CoGTA and SALGA, the education of municipal staff as to the importance of FBS as a poverty alleviation mechanism in addition to a human rights necessity should be prioritised by the relevant departments at a provincial level

14.2 BUDGETING, PLANNING, MONITORING AND EVALUATION

Inconsistent or inadequate planning can negatively impact on the ability to achieve targets and implement priorities, and all targets, priorities, and budgetary allocations should be aligned to ensure that a clear purpose with appropriate resources, has been identified and is capable of being achieved. Reasons for under-expenditure on programming are in many instances directly related to inadequate planning, which consequently affect the quality of project delivery as well as the ability of the State to deliver housing and basic services at the scale required.

THE SAHRC RECOMMENDS:

- a) provincial governments must ensure there is sufficient ring-fencing of funding to be allocated to various programmes as intended by the NDoHS, and should avoid the conflation of budgets allocated to policies aimed to achieve different outcomes
- b) where ring fenced funding has not been spent in instances where such spending has not been required, mechanisms ought to be developed by national and provincial treasuries in collaboration with other relevant departments to ensure that there is no penalisation in the subsequent financial year, particularly where programmes are designed to address unpredictable circumstances
- c) the NDoHS is required to consistently apply definitions provided to explain statistics to ensure that statistics provided are not misinterpreted, consequently affecting future planning
- d) CoGTA and SALGA to ensure that IDP's are aligned and integrated in accordance to the broader national strategy in realising the rights under investigation in order to avoid fragmentation
- e) provincial governments to ensure that monitoring tools are updated and refined on an annual basis to ensure that the housing demand is understood and accounted for, and the quality of services being provided does not violate rights; such monitoring tools should seek to incorporate gender indicators to ensure that housing and basic service delivery takes account of special needs of different groups
- f) greater monitoring and evaluation must be undertaken by both national and provincial governments to ensure that planning and delivery of housing and basic services is undertaken in an effective, integrated, and sustainable manner, and that both budget allocation and expenditure is appropriate
- g) national treasury to take into account the need for programmatic funding allocated at national level to account of inflation, while the spending performance on current allocations needs to be monitored and improved by national and provincial governments
- h) NDoHS together with provincial governments to take measures to ensure that the housing allocation processes and waiting lists are more transparent to ensure greater accountability in addition to enabling better monitoring and evaluation and
- i) the relevant State departments are required to conduct an assessment and to establish the amount of State-owned land which is open for development, and such information must be made readily available to provincial and local government, to enable them to adequately plan and/or to respond to emergency housing programmes on an urgent basis

14.3 COOPERATIVE GOVERNANCE

Due to the nature of rights being interrelated and interdependent, the necessity of departments responsible for the delivery of housing and the rights associated thereto to coordinate becomes crucial. In addition, while the delivery of housing is primarily the responsibility of municipalities, the constitutional obligation of realising the right affects national, provincial and local spheres of government. Cooperative governance is thus a vital component in ensuring the alignment of policy both across government departments and between the spheres of government to ensure sustainable delivery of the rights under investigation.

THE SAHRC RECOMMENDS THAT:

- a) national and provincial legislatures, in recognising that the delivery of housing and rights related thereto extend beyond the function of local government and is a concurrent function of all three spheres of government, is to provide adequate support to municipalities beyond strategic guidance and planning; such assistance is required particularly in poorer municipalities, where such municipalities may not possess the resources or skills to adequately deliver on their constitutional mandates and
- b) CoGTA, together with SALGA, provincial governments, and other relevant departments are to ensure that adequate resources and capacity development is provided to all municipalities prior to the full implementation of SPLUMA to avoid any deficiencies in delivery

14.4 LOCAL GOVERNMENT

Effective and efficient local government structures form the foundation of service delivery required to progressively realise the right to access to adequate housing and basic services. However, resource and capacity constraints continue to impact on the ability of local government to perform sufficiently and to engage in cooperative governance and planning mechanisms.

THE SAHRC RECOMMENDS THAT:

- a) national and provincial government to accelerate the accreditation and assignment process to municipalities that are adequately capacitated to take over the housing responsibility
 - b) provincial governments to prioritise the resource and skills capacity of poorer municipalities with a view to ensuring that they are able to fully manage the housing function through assignment
 - c) provincial government, with the support of NDoHS, to take measures to provide for the acceleration of funding available to municipalities to execute their functions, both in terms of policy and legislation, and subsequent case law and
 - d) emphasising to municipal leadership the distinction between their political interests and administrative responsibilities and to avoid conflation of the two; national and provincial spheres, through CoGTA, must ensure that appropriate accountability mechanisms are in place and accessible for municipal leaders that do not adequately deliver on their obligations and responsibilities
-

14.5 SECURITY OF TENURE AND EVICTIONS

In line with international law, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment, and other threats. Despite these guarantees, the manner in which evictions are conducted still results in the large-scale rights violations.

The SAHRC acknowledges that the law recognises and protects the rights of both property owners and those who unlawfully occupy their properties. It is clear to the SAHRC, however, that the Constitution and the jurisprudence of the Constitutional Court requires that a certain degree of empathy be exercised when eviction processes are undertaken, especially when such processes may lead to homelessness of affected individuals and communities.

THE SAHRC RECOMMENDS THAT:

- a) all parties involved in the evictions process, including courts, local and provincial governments, and private property owners, amongst others, should undertake to avoid compelling the execution of eviction orders if such evictions lead to homelessness of affected individuals and communities
- b) in instances where evictions are required for the implementation of developmental projects, municipalities, or other government stakeholders involved in the eviction process, should ensure that evictions are an option of last resort, and are conducted with the full consent of affected communities following meaningful engagement; in instances where consent cannot be obtained from affected communities despite meaningful consultations having been conducted, a court order must be obtained for the eviction of the community; in the latter instance, communities must be informed of the reasons why *in situ* upgrading cannot be conducted
- c) provincial governments, municipalities, and other parties involved must be aware of the fact that evictions are executed on the basis that emergency housing represents the *first step* towards a permanent housing solution and must therefore plan to provide people accommodated with emergency housing with more permanent housing over time; in this regard, time-bound plans must be developed by municipalities in consultation with affected communities and must be made publically available
- d) municipalities must conduct evictions in a transparent manner by ensuring that evictees are made aware of all relevant details including the places to which they will be relocated, the reasons therefore, the length of time that they will be living there as well as other details relating to matters such as access to transportation and schools
- e) provincial governments and municipalities should ensure that, in the event that temporary accommodation periods exceed 12 months, norms and standards applicable to housing developments are applied to temporary accommodation units
- f) all parties involved in the eviction process, including but not limited to municipalities, sheriffs, private security companies, and private property owners must make sure that evictions are executed in accordance to the requirements articulated in law, giving due regard to the time of day and weather, and with due respect given to the dignity, right of access to information, and respect for property of all persons in affected communities⁸⁹
- g) in instances where evictions are executed outside of these requirements or where loss or damage is unduly caused to property belonging to persons being evicted, authorities, including private security companies, must be held to account and/or disciplined accordingly by the relevant authorities and
- h) the State is required to take reasonable steps to protect its property against unlawful occupation and dilapidation of buildings in the event of occupation, whether legal or illegal, in order to prevent risk to health and safety of occupants and to guard against the necessity of conducting forced evictions when land is due to be developed

⁸⁹ The GPG's current Memorandum of Agreement with the Red Ants in terms of which the GPG is given a notice period of 48 hours by the Red Ants before an eviction is executed could be a useful approach to follow.

14.6 PRIVATE PROPERTY OWNERS AND THE PRIVATE CONTRACTORS

Private property owners play an integral role in the successful delivery of the housing function. The SAHRC acknowledges that the delivery of housing is primarily a State function but also notes that the Constitution is binding on everyone who resides within South Africa. In this respect, private property owners are urged to be patient to the needs of the housing crisis currently being experienced in South Africa and to display a degree of patience and empathy as articulated in the judgment of *Blue Moonlight*.

Furthermore, private contractors also contribute towards on-going rights violations through poor performance or the delivery of shoddy work, and State organs have an obligation to ensure that due process is followed in both awarding contracts as well as in conducting monitoring and evaluations and ensuring accountability for unacceptable performance. Not only will this decrease wasteful expenditure through reducing the amount required to repair defective work, but will also contribute towards the progressive realisation of rights.

THE SAHRC RECOMMENDS THAT:

Private property owners

- » private property owners commit to a time-bound process when embarking on evictions proceedings to allow the State adequate time to plan for imminent evictions and the provision of alternative accommodation as per its constitutional obligations
- » private property owners are further required to commit to engage with affected communities as well as the relevant local municipality prior to instituting eviction proceedings to ensure that communities are informed of the process to be undertaken and are not rendered homeless and
- » private property owners are further required to take reasonable steps to protect their property against unlawful occupation and dilapidation in the event of occupation, whether legal or illegal

Private contractors

- » the NHBRC, local municipalities, and, where relevant, provincial governments must identify contractors responsible for poor workmanship, not only in the provision of housing but in all services rendered, and must ensure that they rectify sub-standard work at their own cost
- » national, provincial and local governments must follow processes outlined in legislation and/or policy for the blacklisting of contractors in instances of poor performance, shoddy work, or the fraudulent acquisition of the contract
- » the NDoHS must provide oversight and constantly monitor the extent to which the NHBRC ensures that houses constructed by service providers meet the necessary quality requirements and
- » the NHBRC in partnership with local municipalities must engage in an awareness campaign to educate beneficiaries of State housing about recourse mechanisms and remedies available to them, should they find their housing to be of poor quality

14.7 COMMUNITY PARTICIPATION AND PROTEST ACTION

The SAHRC notes that effective community participation and communication between the State and its beneficiaries remains a significant challenge in the housing sector, resulting in confusion, misperception, exclusion, and frustration. Moreover, when communities attempt to voice these concerns through alternative means such as protest action, a right afforded to them in the Constitution, they are met with further resistance from the State, in the form of arduous requirements to embark on legal protest action. When these requirements have not been met and the protest is subsequently declared illegal, affected communities are met with further State resistance, often in the form of the police, which often results in protests that started peacefully turning violent.

THE SAHRC RECOMMENDS THAT:

- a) communities must be consulted with in all aspects concerning their living arrangements and the provision of goods and services and in this regard, municipalities must ensure that consultations are conducted in a meaningful way, prior to the conclusion of development plans in order to enhance transparency and accountability and to ensure that projects and policies accommodate needs in a sustainable manner; factors including but not limited to the location (and accessibility of the location) as well as the time of day that community engagements are held should be determined in a manner which ensures equitable opportunities of all members of the community, and specifically vulnerable groups, to participate in the process
- b) municipalities should make time-bound action plans detailing the developmental process available and easily accessible to communities
- c) communities are entitled to reject State proposals concerning their development and provide alternatives that respond to their daily realities; provincial governments and municipalities are obliged to consult with communities, and to take cognisance of alternative proposals made, however, the SAHRC recognises that alternative proposals made by communities may not be reasonably practicable in all instances this notwithstanding, provincial governments and municipalities must engage with communities with a view of identifying mutually agreeable solutions
- d) ward committees must reflect the diversity of the communities they represent
- e) community representatives must reflect the demographics of the community concerned, including marginalised groups such as women, persons with disabilities and children
- f) municipalities must take steps to ensure that IDPs and housing allocation databases are transparent and made available to communities regularly; municipalities which do not currently have housing allocation databases should develop such a system to ensure that people have access to information and that housing allocation is done in a transparent manner
- g) national governments to ensure that requirements to embark on lawful protests are simplified, acknowledging the constitutional right to embark on such activity; and in the interim, local authorities should be trained to ensure a correct and accurate application of the requirements contained in the RGA, in order to ensure that local communities are not unjustly denied the right to voice their concerns through protest action and
- h) during protest action, all political parties should commit to avoid engaging in criminal activities in destroying and or damaging public infrastructure facilities, and to distance themselves from any persons or groups in communities involved in such activities

14.8 ACCESS TO JUSTICE

In a broader sense, access to justice extends beyond the provision of legal assistance to individuals seeking redress for a violation of their rights to access to adequate housing or general service delivery. Access to justice also entails ensuring that laws and policies are developed and implemented to ensure the progressive realisation of the rights concerned, with the overarching goal of achieving the ideals set out in the Constitution. The current shortage of lawyers available to assist poor people facing violations on a daily basis has also impacted negatively on the legal profession's ability to assist the State in developing adequate rights based approaches to policy development and implementation.

THE SAHRC RECOMMENDS THAT:

- a) the Department of Justice and Constitutional Development, in partnership with other relevant departments to take measures to adequately resource and ensure the capacity building of Legal Aid SA staff to assist in housing related matters affecting indigent individuals
- b) the NDoHS in collaboration with other relevant State departments to extend the existing Rental Housing Tribunals to facilitate resolution of housing disagreements through alternative dispute resolution mechanisms, thus alleviating the current resource and capacity burdens experienced in the courts, and avoiding unnecessary delays in restoring the rights of groups and individuals
- c) discussions should be conducted between various stakeholders, including organisations representing municipalities and the Department of Justice and Constitutional Development with a view of staying/postponing the application and granting of eviction orders where it is evident that the granting of such an order may lead to homelessness⁹⁰ and
- d) CoGTA in collaboration with the NDoHS and other relevant departments to train municipal staff and all State respondents responsible for the housing and service delivery function in varying capacities on the law and due process to be followed when limiting constitutionally guaranteed rights

14.9 APARTHEID SPATIAL PLANNING

The combination of the aforementioned challenges relating to accessing the right of adequate housing and other basic services, has resulted in the legacy apartheid spatial planning being reinforced.

The SAHRC acknowledges that rectifying the legacy created by apartheid will take a significant amount of time to reverse. This notwithstanding, the SAHRC recommends that cognisance is given to programming to ensure that the social divisions created by apartheid are not reinforced, by prioritising the needs of one aspect of the population over those who are most vulnerable in society. Human rights extends beyond the implementation of redress mechanisms to restore human rights violations, but is more valuable when such redress leads to lasting solutions that impacts on systemic change.

THE SAHRC RECOMMENDS THAT:

- a) NDoHS together with provincial and local government to urgently address areas of housing programmes that have had the unintended consequences of reinforcing apartheid spatial planning and take measures in subsequent policy initiatives prior to implementation to ensure that mistakes are not repeated

⁹⁰ The GPG's current Memorandum of Understanding with the DoJCD may be a useful approach to follow in this regard.

15

CONCLUSION

It is accepted that policies ought to be reviewed consistently in order to ensure that the State meets its obligations. However, there also needs to be mechanisms in place that protect the most vulnerable of society from constant rights violations as a consequence of ineffective policy and decision-making processes. Perhaps because of the country's apartheid past, which included the dispossession of land and forced evictions from property, owner-centred approaches have driven housing programming. It also appears that informality is frowned upon, especially in the form of informal settlements, despite this being recognised as a form of security of tenure in international law. Consequently, the approaches to housing programming are not having the desired impact of progressively realising the right to adequate housing and in some cases, are in fact leading to perpetual rights violations.

This report has sought to highlight the interrelated nature of rights and that the non-realisation of a few can lead to the subsequent violations of many. As highlighted above, weak and irregular policy implementation has resulted in an irregular formal housing environment where poor people are vulnerable to exploitation on a daily basis. Abandoned privately owned buildings are run by unscrupulous "slum lords" who in some cases illegally connect buildings to basic services, which get cut by municipalities notwithstanding occupiers having paid rent. Often these cuts happen without any notification resulting in poor people having to endure fines or face arrest.

Poor people occupying land or buildings are labelled "illegal invaders" and "opportunistic" creating an impression of entitlement of those who are in desperate need of basic services. This discourse informs not only how the State interprets and subsequently implements policy, but also the perception of members of the general public who are unaware of the guarantees afforded to everyone in terms of the Constitution. Consequently, poor people continue to be excluded from the benefits democracy ought to be delivering to them.

High unemployment rates have given rise to increasing levels of urban migration, leading to the expansion of informal settlement and a growth in the informal housing market, particularly in urban and peri-urban areas. When residing in informal settlements, poor people are often either subjected to the threat of eviction in the name of developmental processes, or are not provided with basic services required to live a life with dignity, while the lack of infrastructure exposes residents of informal settlements to perpetual dangers such as violent crime. Yet despite this reality, a severe lack of low-income housing opportunities are available to accommodate the poor, or those with informal or irregular employment. Further, housing developments are often situated on the margins of society creating significant difficulty in accessing work and schools, hampering economic inclusion and reinforcing the legacy of the apartheid spatial design.

State respondents argue that various resource challenges are inhibiting their ability to meet their obligations, and that demand far exceeds supply. However, the manner in which various policies are being interpreted and implemented are not always suitable for the context in which they operate. Although mechanisms are available for ensuring that even the most destitute of individuals are accommodated, their needs are not adequately addressed. For example, rental policies do not incorporate requisite safety mechanisms to account for the high levels of erratic employment or unemployment. Despite the UISP stating that relocation of informal settlements should only take place as a last resort, and on a voluntary and consensual basis on the part of affected communities, communities are still being forcibly removed against their will.

In the event that residents are afforded temporary accommodation following a natural disaster or eviction, they are often placed in uniform dormitory-styled accommodation, unsuitable to live in for an indefinite period of time with norms and standards for housing not applicable, resulting in further rights violations being endured. Despite legal requirements regulating evictions, this process continues to result in a number of rights violations. Evictions can have devastating impacts on communities, fracturing established social and support structures, creating uncertainty, and potentially even destructing livelihoods which are dependent on access to economic opportunities. Organs of State and private parties alike must be aware of the impact which evictions have on people's lives, and in this way must ensure that a humane and dignified approach is taken, together with the necessary accountability measures for transgressions or damage which may occur to property in instances of forced evictions.

Poor planning and a lack of sufficient inter-governmental coordination have further hampered the ability of the State to provide adequate and sustainable housing solutions. Communities continue to feel excluded and frustrated by the failure of local government to consult and include them in the decision-making process. This challenge is compounded by perceptions of political bias and the loss of trust between local government representatives and the communities they represent, giving rise to increasing incidents of what have largely been described as "service delivery protests". Community participation and access to information are vital components in a democracy founded on principles of transparency and accountability, and communities must be empowered to influence policies and decisions which affect their daily lived experiences. Ultimately, organs of State and other relevant stakeholders must endeavour to understand the underlying causes and contributing factors giving rise to protest action, rather than adopting an approach which seeks to deter it. The significance of the right to peaceful protest action must be viewed in the historical context of South Africa, and applicable laws and policies in place to regulate such action must seek to facilitate easy access to this right, particularly for marginalised groups, to ensure that people are able to easily voice their concerns. It must further be noted, however, that all participants bear a corresponding duty to refrain from criminal activities in the form of violence or destruction of property and to engage in protest action in a responsible manner which is respectful of the rights of other persons.

Although processes and structures are in place to facilitate coordination between various State departments and spheres of government, these structures are not being adequately utilised. Insufficient integrated planning results in the development of housing without the necessary basic infrastructure to provide for service delivery, or alternatively, to the stalling of projects mid-way.

Despite the room for creative policy options available to State respondents in realising the right of access to adequate housing which allows for solutions suitable to a variety of contexts, State respondents appear to be adopting a rigid approach to realising the right. Again, notwithstanding the various protections afforded to poor communities in international law, national law, and case law confirming these protections, poor people continue to experience daily rights violations.

Twenty-one years into South Africa's democracy, the housing crisis persists, further exacerbated by global economic trends and migration to urban centres. The housing issue is a complex one where a balance is required between the need to address housing backlogs quickly and affordably, while at the same time, providing human settlements that will offer greater opportunities for income generation and human development. What is required is a shift in mindset of how state departments approach their housing obligations and interpret the concept of 'security of tenure' in respect to policies, to ensure that rights violations are addressed. For example, the norms and standards usually not applicable to the provision of emergency and temporary accommodation should be incorporated noting that temporary housing provided is becoming more permanent; informal settlements are provided with basic services while time-bound plans to develop them into integrated and liveable human settlements are established; and people are afforded the opportunity to build their own houses with the necessary assistance provided by the State. Not only will these ensure that rights are protected, but it will also assist the State in its planning processes and alleviate the current burden being experienced. Dignity, after all, is about respecting the way in which people live without forcing one specific model of living upon them, while at the same time ensuring that living conditions are constantly improved taking into account circumstances that may prevent them from acquiring the basics needed to live a dignified life.

Greater oversight and investment in capacity building of municipalities is required, in addition to greater accountability for State officials and private contractors alike in the performance of their obligations. Going forward, key role players including the State, private sector, community-based organisations as well as communities themselves, need to engage with a view to creating integrated and sustainable human settlements. Through its available mechanisms, the SAHRC commits to continue to be a part of this process in its quest to secure rights and transform society in a dignified manner. After all, dignity is one of the fundamental core values of our Constitution.

THUS SIGNED AND ISSUED BY THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION
AT BRAAMPARK SAHRC HEAD OFFICE ON THE 13th DAY OF NOVEMBER, 2015.



Commissioner Mohamed Shafie Ameeria

Chairperson of the Panel

SAHRC

www.sahrc.org.za

info@sahrc.org.za

FORUM 3 BRAAMPARK OFFICES,
33 HOOFD STREET, BRAAMFONTEIN, 2017
T: +27 11 877 3600