SUBMISSIONS TO THE PARLIAMENTARY PORTFOLIO COMMITTEE ON TRADE AND INDUSTRY ON THE COMPANIES AMENDMENT BILL OF 2010 [19 July 2010 Final Text] ON BEHALF OF THE M&G CENTRE FOR INVESTIGATIVE JOURNALISM

5 January 2010

The Committee is requested to note that the parties wish to make an oral presentation during any further oral hearings that may be contemplated

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1. Introduction

1.1 These submissions are made on behalf of the M&G Centre for Investigative Journalism. The centre is a not for profit organisation aimed at enhancing South Africa's capacity for investigative journalism in the public interest.

1.2 We submit that the provisions of the Companies Amendment Bill, 2010 ("**the Bill**") that limit public access to information concerning the identity of holders of securities in respect of the companies envisaged in the Bill,[1] and of the directors of such companies, are not consonant with the principles of openness, accountability and transparency; restrict the constitutional right of access to information; and will adversely impact upon freedom of expression.

1.3 The broad outline of our submissions is as follows:

1.3.1 first, we outline the provisions of the Bill that relate to public access to the securities and directors' registers ("**the registers**") and compare these to the position under section 26 of the Companies Act, 2008 ("**the Act**")[2];

1.3.2 secondly, we address the principles of openness, accountability and transparency and the role that these principles play in our constitutional democracy;

1.3.3 thirdly, we discuss the constitutional rights of access to information and freedom of expression, and we argue that the importance of access to the registers for members of the public, including journalists, researchers and potential investors, flows directly from the recognition of these constitutional rights;

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[1] The Act defines "securities" with reference to section 1 of the Securities Services Act, 2004; the definition includes shares, derivative instruments, bonds and debentures, and any financial instrument which confers the right to convert the instrument into a listed security. We collectively refer to the register that contains information about such securities (including information about their holders) for ease of reference as "**securities register**".

[2] The Act is only due to come into force on 1 April 2011. Section 26 of the Act is in material respects the same as sections 113 of the Companies Act, 1973, which remains in force at present; this provision provides in pertinent part that "**any person may apply to a company for a copy or extract from the register of members**".

1.3.4 fourthly, we discuss the Promotion of Access to Information Act, 2000 ("**PAIA**") which we submit, in the context of access to the registers, is a blunt tool for this purpose and ought not to be viewed by the drafters of the Bill as an effective substitute for an unequivocal right of access by members of the public to the registers;

1.3.5 finally, we emphasise that in many jurisdictions that provide useful precedents for South Africa, such as the United Kingdom and Australia, procedures are in place that permit access by the public to equivalent registers without requiring requesters to use freedom of information law procedures to obtain such access.

2. The relevant provisions of the Act and the Bill

2.1 Section 26 of the Act

2.1.1 The Act, like its predecessor, section 113 of the Companies Act, 1973, contains a clear right for members of the public to access shareholder information in respect of all companies registered under the Act, subject only to the payment of a maximum fee of R100. Section 26 of the Act states, inter alia, as follows (emphasis added):

> **(1) A person who holds or has a beneficial interest in any securities issued by a company --**
>
> **(a) has a right to inspect and copy the information contained in the records of the company …**
>
> **(b) …**
>
> **(c) may exercise the rights set out [above] -**
>
> **(i) by direct request made to the company in the prescribed manner, either in person or through an attorney or other personal representative designated in writing; *or***
>
> **(ii) in accordance with the Promotion of Access to Information Act, 2000 …**
>
> **(3) The register of members and register of directors of a company, must, during business hours for reasonable periods be open to inspection by any member, free of charge and by any other person, upon payment for each inspection of an amount not more than R100,00.**
>
> **(4) The rights of access to information set out in this section are in addition to, and not in substitution for, any rights a person may have to access information in terms of –**

(a) section 32 of the Constitution;

(b) the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000); or

(c) any other public regulation.

2.1.2 In addition to providing the general public with a right to access the registers, the Act makes it an offence for a company to fail or refuse to provide access to its register once a request has been made or to otherwise impede or frustrate the reasonable exercise of a person's rights to access information in terms of the section.[3]

2.1.3 The Act therefore rightly proceeds from the starting point of transparency in respect of shareholder and director information. Access to such information must be provided to any member of the public who requests such access, on pain of committing a criminal offence.[4]

2.1.4 Parenthetically, we note that section 26 does not explicitly permit non-members of a company to obtain a *copy* of the registers (it allows an inspection). We submit that full and meaningful access would require that a requester also be entitled to obtain a copy of the registers; indeed this is the position under section 113(2) of the Companies Act, 1973. We propose in this regard that clause 17(2) of the Bill state that a non-member has the right to "inspect and copy" the registers. We now turn to the nub of our client's complaint in relation to the Bill.

2.2 The position under the Bill

2.2.1 Clause 17 of the Bill seeks to amend section 26 of the Act, inter alia, by substituting its subsections with the following (emphasis added):

> **(1) A person who holds or has a beneficial interest in any securities issued by a profit company [-] or who is a member of a non-profit company, has a right to inspect and copy, without any charge for any such inspection or upon payment of no more than the prescribed maximum charge for any such copy, the information contained in the following records:**
>
> **(a) …**

[3] Section 26(6) of the Act.

[4] Section 114 provides for the power of a public company to close its register of members, but only after it has given notice of its intention to do so in the *Government Gazette* and in a newspaper circulating in the district of its registered office. Such a closure may not exceed an aggregate of 60 days in any year.

(b) …

(c) …

(d) …

(e) the securities register of a profit company, or the members register of a non-profit company that has members as mentioned in section 24(4).

(2) A person not contemplated in subsection (1) has a right to inspect the securities register of a profit company, or the members register of a non-profit company that has members, or the register of directors of a company, upon payment of an amount not exceeding the prescribed maximum fee for any such inspection

(3) …

(4) A person may exercise the rights set out in subsection (1) or (2), or contemplated in subsection (3) –

(a) for a reasonable period during business hours;

(b) by direct request made to a company in the prescribed manner, either in person, or through an attorney or other personal representative designated in writing; *and*

(c) in accordance with the Promotion of Access to Information Act, 2000 …

2.2.2 The apparent difference between section 26 of the Act and the position foreshadowed by clause 17 of the Bill is that the latter appears to require members of the public to follow the provisions of PAIA in order to access the registers. This appears to be the effect of the conjunctive ("and") in clause 17(4)(a) - (c). Section 26(3) of the Act clearly implies that a member of the public may inspect the registers by simply attending at the offices of the company, and section 26(1)(c) makes it plain that a holder of securities may exercise his or her rights of access either by attending at the offices of the company, or by written request, or under PAIA.

2.2.3 But clause 17(4) of the Bill appears to compel a holder of securities or a member of the public to use the mechanism of PAIA to request the registers. This interpretation of clause 17(4) is supported when regard is had to regulation 24 of the Draft Companies Regulations.

2.2.3.1 Regulation 24(2) provides that a person claiming a right of access to any record held by a company may not exercise that right until,

inter alia, "the person's right of access to the information has been confirmed in accordance with" PAIA.

2.2.3.2 Regulation 24(3) provides that a person claiming a right of access to any record held by a company must make a written request by delivering to the company a completed prescribed form as well as "any further documents or other material required in terms of" PAIA.[5]

2.2.4 If it is indeed the intention of the drafters of the Bill that PAIA ought exclusively to govern requests for access to the registers, then, as we develop below, this is entirely inadequate protection for transparency and openness. This deleterious position can be cured simply by ensuring that the conjunctive in clause 17(4) is changed to the disjunctive ("or"). This would ensure that the important rights of access envisaged in section 26 of the Act can be exercised, at the election of the requester, in one of the three ways that are stipulated in clause 17(4)(a) - (c).

2.2.5 We submit that although the Bill attempts to provide a simple process in order to achieve transparency that is in line with the existing legislative framework, its apparent insistence that PAIA be used to request access to the registers places a number of difficulties and delays in the way of the requester in regard to information that should be readily available. In doing so the Bill has a negative impact on openness and transparency, and because the proposed position in effect limits the rights to access to information and freedom of expression, it requires justification. We consider first the general obligations of openness and transparency.

[5] We note that comments on the Draft Companies Regulations are due by 31 January 2011. We do not intend to comment upon the Draft Companies Regulations here, but mention the relevant envisaged regulations only because they shed light on the proper interpretation to be afforded to clause 17(4) of the Bill.

3. The relevant constitutional principles

3.1 The values of openness, accountability and transparency

3.1.1 Openness is an underlying value of the Constitution. Thus section 1(d) provides that the Republic of South Africa is one democratic state founded upon a number of values, including "*a multi-party system of democratic government, to ensure accountability, responsiveness and openness*".

3.1.2 Our courts have considered the values of openness and accountability in the context of information that should be made available to the public. For instance, in *Mthembi-Mahanyele v Mail & Guardian Ltd,*[6] Lewis JA held:

> **The State, and its representatives, by virtue of the duties imposed upon them by the Constitution, are accountable to the public. The public has the right to know what the officials of the State do in discharge of their duties. And the public is entitled to call on such officials, or members of Government, to explain their conduct. When they fail to do so, without justification, they must bear the criticism and comment that their conduct attracts.**

3.1.3 In *Transnet Ltd v SA Metal Machinery Co (Pty) Ltd,*[7] Howie P for the Supreme Court of Appeal held that:

> **[Transnet Ltd] is bound by a constitutional obligation to conduct its operations transparently and accountably. Once it enters into a commercial agreement of a public character like the one in issue … the imperative of transparency and accountability entitles members of the public, in whose interest an organ of State operates, to know what expenditure such an agreement entails.**[8]

3.1.4 In the recent Supreme Court of Appeal decision of *The President of the Republic of South Africa v M & G Media Limited*, [9] Nugent JA stated as follows:

> **Open and transparent government and a free flow of information concerning the affairs of the state is the lifeblood of democracy**[10]

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[6] 2004 (6) SA 329 (SCA) at para 66.
[7] 2006 (6) SA 285 (SCA).
[8] Para 55; our emphasis.
[9] [2010] ZASCA 177 (14 December 2010).
[10] At para 1.

Nugent JA also endorsed the comments of Ngcobo J in *Brümmer v Minister for Social Development* [11] that:

> **The importance of [the rights of access to information] in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid.**

3.1.5 We submit that the obligations of openness, accountability and transparency do not only bind organs of state. Section 32(1)(b) of the Constitution makes it plain that the constitutional right extends not only to information held by the state, but also information held by private bodies. We examine the right of access to information next.

3.2 The rights of access to information and freedom of expression

Access to information

3.2.1 Section 32(1) of the Constitution provides as follows:

> **(1) Everyone has the right of access to -**
> **(a) any information held by the State; and**
> **(b) any information that is held by another person and that is required for the access or protection of any rights**.

3.2.2 The right of access to information created under section 32, which in terms extends to both public and private bodies, is a further reflection of the principles of openness, transparency and accountability on which our democracy is founded.

3.2.3 The Constitution thus recognises that entities operating in the private sphere play an important role in public life and should be held to constitutionally compliant standards of accountability. The Act itself recognises this principle explicitly: section 7(b)(iii) of the Act acknowledges the "*significant role of enterprises within the social and economic life of the nation".*[12]

The right of the public to freedom of expression and freedom of the media

3.2.4 Freedom of expression is protected by section 16(1) of the Constitution:

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[11] 2009 (6) SA 323 (CC) at para 62.

[12] See further 'Freedom of expression' below.

> **(1) Everyone has the right to freedom of expression which includes –**
> **(a) freedom of the press and other media;**
> **(b) freedom to receive or impart information or ideas …**

3.2.5 The importance of freedom of expression to an open and democratic society has been reiterated by our courts on numerous occasions. It should also be emphasised that freedom of the media – expressly protected by section 16(1)(a) of the Constitution – is inextricably connected with the right of the public to receive information and ideas (protected in section 16(1)(b) of the Constitution). It is an aspect of the right to freedom of expression that has received specific emphasis in the judgments of our highest courts. Thus in *Khumalo v Holomisa*,[13] the Constitutional Court stated as follows:

> **The print, broadcast and electronic media have a particular role in the protection of freedom of expression in our society. Every citizen has the right to freedom of the press and the media and the right to receive information and ideas. The media are key agents in ensuring that these aspects of the rights to freedom of information are respected**.[14]

3.3 The challenges and obstacles of PAIA

3.3.1 PAIA was promulgated to give effect to the constitutional right of access to information, but it is not exhaustive of the manner in which access to information (both held by public and private bodies) must be exercised. In *Leslie v La Lucia Sands Shareblock Ltd*,[15] the Kwa-Zulu Natal High Court had to deal with the argument that a request for a members register under section 113 of the Companies Act, 1973 was defective because it did not comply with PAIA. Judge Van Zyl held that:

> **Section 113 of the [Companies Act, 1973] creates a right to certain information and establishes a mechanism with which to enforce such right. … Where, for instance, applicants require from first respondent further information which is not required to be contained in the register of members of the first respondent and subject to disclosure in terms of section 113 … , then they would conceivably have to resort to the provisions of PAIA. <u>In my view</u>**

[13] 2002 (5) SA 401 (CC).
[14] At para 22.
[15] [2009] ZAKZDHC 35 (15 September 2009). The case went on appeal, but the relationship between PAIA and section 113 of the Companies Act, 1973, was not in issue.

> **PAIA is intended to create new mechanisms for obtaining information, not to displace existing mechanisms to enforce existing rights, such as section 113 of the [Companies Act].** [16] **(our emphasis)**

3.3.2 We add that, despite the lofty and desirable ideals expressed in the preamble of PAIA, it is not a panacea that will allow members of the public easily to access the securities register. The shortcomings of PAIA in this context are particularly apparent when regard is had to the importance of quick and ready access to the registers for journalists, company analysts, and researchers. It is no answer that a request may be made for the information in terms of PAIA.

3.3.3 Our clients' general experience of PAIA is that it will be a blunt tool for prompt access to the securities register. There are three fundamental reasons for this, all of which lead to the conclusion, we submit, that the Bill ought not to provide access to the registers only by means of PAIA.

3.3.3.1 Firstly, as discussed, one of the threshold requirements for a requester to obtain access to information held by a private entity under section 50(1)(a) of PAIA is that the requester must prove that the information requested is "*necessary for the exercise or protection of a right*". Our courts have held that a requester must establish, *prima facie*, that he or she has a specific right, the exercise or protection of which requires that the information requested be released.[17]

3.3.3.2 This requirement has the potential to be interpreted restrictively by courts. For instance, in *Institute for the Advancement of Democracy in South Africa v African National Congress*,[18] the entitlement of the applicant to records of donations to political parties did not meet the threshold. The Court held that "*[d]onor secrecy does not impugn any of the rights contained in either ss 19(1) or (2) of the Constitution. Put differently, disclosure of donor funding is not a prerequisite to free and fair elections*",[19] and the

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[16] At para 31.

[17] *Claase v Information Officer, South African Airways (Pty) Ltd* 2007 (5) SA 471 (SCA) at para 8.

[18] 2005 (5) SA 39 (C).

[19] At para 52.

Court did not accept that the information was required to protect the applicant's right to freedom of expression.[20] One implication of this interpretation is that journalists or members of the public seeking access to the registers in order to engage in legitimate research, analysis or journalism, may not meet the threshold requirement of PAIA for such access.

3.3.3.3 Secondly, even if the threshold test is overcome, there is considerable potential for a ground of refusal to be invoked by the company concerned. For instance, the disclosure of the information contained in the registers might be argued by the company's information officer to involve the unreasonable disclosure of personal information about a third party (the holder of the securities).[21] The disclosure might also be argued in at least some cases to "*constitute an action for breach of a duty of confidence owed to a third party in terms of an agreement"* (which could arguably protect the holder of the securities).[22] In any event, oral or written agreements might become commonplace over time, in order that the company of which the request is made can rely upon this ground of refusal to withhold the registers.

3.3.3.4 Thirdly, even apart from resistance to disclosure on the merits of the request, the procedural quagmire and significant cost consequences that a requester will encounter when using PAIA cannot be underestimated. There are inevitably lengthy delays where PAIA requests are made, and where the company concerned does not wish to divulge the information for whatever reason, it is an unfortunate fact that PAIA provides ample opportunity to delay responses.

3.3.3.5 In terms of section 25(1) of PAIA, an information officer usually has a maximum of 30 days within which to respond to the request. But in the case of the registers, it is possible – and perhaps even likely – that the information officer will invoke the third party

[20] At para 41.

[21] This is a ground of refusal in section 63(1) of PAIA.

[22] Section 65 of PAIA.

procedure contemplated in PAIA. This procedure states that the information officer must, if the information requested "*might*" be a record contemplated in some of the grounds of refusal provisions – including the refusals based on privacy and breach of confidence discussed above – take all reasonable steps to inform the third party of the record to which the request relates, within 21 days after receipt of the request.[23] The third party may then within 21 further days make representations to the information officer, who must decide on access within 30 days after informing the third party of the request.[24] If access is granted, the third party may appeal,[25] and if access is refused, the requester will have to launch a court application to attempt to obtain the information,[26] within 180 days of the decision. Given the potentially hundreds of holders of securities and directors, a decision by an information officer to invoke the third party procedure in PAIA will effectively put the registers out of the reach of the requester indefinitely.

3.3.3.6 Against the background sketched above, the comments of the Supreme Court of Appeal in a recent case give the lie to the proposition that PAIA is working well in our society:[27]

> **It is unfortunate that [PAIA] which (as appears from the preamble) was intended to … foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information [and] actively promote a society in which the people of South Africa have effective access to information to enable them to more fully exercise and protect all of their rights, should result in pre-trial litigation involving huge costs before the merits of the matter are aired in court. One of the objects of the legislation is to avoid litigation rather than propagate it. This is the fourth case in which information has been sought in terms of the Act that has in the past 18 months required the attention of this Court.**

3.3.3.7 Even if the third party procedure is not invoked, and if the threshold requirement is met, and no ground of refusal relied upon

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[23] Sections 71(1) and (2) of PAIA.

[24] Section 73(1) of PAIA.

[25] Section 73(3)(b) of PAIA.

[26] Section 78(2)(d) of PAIA.

[27] *Classe* above at para 1.

by the company concerned, it is unlikely that the registers will be made available earlier than 30 days after the request is made. In the case, for instance, of a newsworthy investigation by a journalist or a contemporaneous study of economic power by a researcher, the possible emergence of the registers more than a month after the request, may by then be of no relevance at all. As the European Court of Human Rights recently held:[28]

> **News is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest.**

3.3.4 The South African Human Rights Commission (the "**SAHRC**") and the Open Democracy Advice Centre ("**ODAC**") (a section 21 company whose mission is to promote open and transparent democracy and foster a culture of corporate and government accountability) have both confirmed and highlighted the various challenges that undermine the efficacy of PAIA.

3.3.4.1 The SAHRC has repeatedly argued that the present method of judicial enforcement of PAIA places a number of impediments in the path of realising the right to access to information, as PAIA litigation is difficult, expensive, and time-consuming.[29] It also reports that the courts are too congested to handle PAIA applications expeditiously.[30] Furthermore, the courts have expected applications to first meet all of the procedural requirements of PAIA, which are onerous and complex.[31]

3.3.4.2 In a forthcoming publication, ODAC has argued that delayed responses to PAIA requests are common, impacting on the currency of information, and that a negative attitude to PAIA as well as low levels of awareness, are acute problems to the exercise of information rights.[32]

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[28] *Sanoma Uitgevers BV v The Netherlands* (ECHR; 14 September 2010).

[29] SAHRC (2008) *Human Rights Development Report* p72-75 (Annexure "**A**").

[30] SAHRC (2010) *Annual Report 2009/2010* p147 (Annexure "**B**").

[31] *Human Rights Development Report* p78-9.

[32] C Kisoon (2010) *Ten Years of Access to Information in South Africa* (Annexure "**C**")

3.3.5 The challenges facing PAIA therefore make it untenable as a process to invoke access to the registers.

3.3.6 As stated above, it is not imperative that PAIA be invoked in regard to requests for information. PAIA is not exhaustive of the right of access to information contained in section 32 of the Constitution.[33] The right of access to information for the public is properly covered by section 26 of the Act, which recognises that a holder of beneficial interests in securities may vindicate his right to access company records by either making a "*direct request*" in the prescribed manner, or in accordance with PAIA. Indeed, section 26(3) of the Act confirms that the right of access to information of holders of securities are in addition to any rights under PAIA, section 32 of the Constitution, and any other public regulation. The Bill ought to explicitly endorse the proposition that access to the registers can be obtained not only via the PAIA process, but also through an inspection at the company's offices, or pursuant to a written request.

4. The law in other jurisdictions

4.1 In other jurisdictions, access to registers such as the registers in issue are not only obtainable by access to information legislation, but emerge as direct access rights from the company legislation in issue. We discuss the position in the United Kingdom and Australia below.

4.2 United Kingdom

4.2.1 Company law in the United Kingdom is governed by the Companies Act 2006 ("**UK Companies Act**"). Section 113(1) of the UK Companies Act requires every company to keep a register of its members.[34] The register of members may be inspected by any member of the company and "*any other person on payment of such fee as may be prescribed*".[35]

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[33] Cf *Tetra Mobile Radio (Pty) Ltd v MEC, Department of Public Works* 2008 (1) SA 438 (SCA); I Currie & J Klaaren *The Promotion of Access to Information Act Commentary* (2002) at 26.

[34] The register must contain the names and addresses of members, the date on which they became or ceased to be members and, in the case of a company having a share capital, the number of shares held by each member. See sections 113(2) and 113(3).

[35] See sections 116(1)(a) and 116(1)(b).

In addition to the right of inspection, members of the public can make copies of the whole, or any portion, of the register.[36]

4.2.2 A person who requests access to the register of members is required to submit a formal request setting out certain information that includes *inter alia* the purpose for which the information is to be used and whether the information will be disclosed to another person.[37]

4.2.3 Once the request has been submitted to the company it must, within five working days, either comply with the request or apply to court for an order that it need not comply with the request.[38] The court may only grant such an order if it is satisfied that the inspection or copy is not sought for a "*proper purpose*".[39]

4.2.4 The UK Companies Act also makes provision for a public company to maintain a register of interests in its shares in circumstances where the company knows or has reasonable cause to believe that the person to whom notice is given has an interest in the company's shares.[40] Such a register is available for inspection by the public free of charge.[41]

4.2.5 It is evident from the above that the UK Companies Act proceeds from the starting point, which we submit is correct, that members of the public are entitled to access information about the shareholders of a company. Although a requester is required to indicate the purpose to which the information will be put, the onus is on the company to seek a court order to prevent disclosure and to prove that the requester seeks the information for an improper purpose. Furthermore, unless court action is pursued, the information must be made available to the requester within five days, which, we submit, is a reasonable period of time for a requester to wait for the information. Were the provisions of PAIA to apply, it is the requester that would have to refer the matter to

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[36] Section 116(2).

[37] Sections 116(4)(c) and 116(4)(d).

[38] Sections 117(1)(a) and 117(1)(b).

[39] Section 117(3). The same provisions apply to the register of debentures, if such securities are issued by the company (see sections 743 – 47 of the UK Companies Act).

[40] Section 793 read with section 808.

[41] Section 811(1). The person seeking access must disclose the same information as applies to the register of members, including the 'purpose for which the information is to be used' (section 811(4)).

court, after following the lengthy and complex procedures that are set out.

4.3 **Australia**

4.3.1 In Australia the Corporations Act, 2001 ("**Australian Corporations Act**") governs the position regarding public access to shareholder information. In terms of section 169(1), a company must keep a register that reflects the names and addresses of all its members as well as the dates on which their names were entered into the register. Section 173(1) of the Australian Corporations Act states that "*a company or a registered scheme must allow anyone to inspect a register kept under this Chapter.*"[42]

4.3.2 The public's right to inspect the register of members is subject to payment of a fee, and as with the position in the UK, a requester may also obtain a copy of the register.[43]

4.3.3 The provisions of the Australian Corporations Act are very similar to the current South African provisions under section 26 of the Act. Unlike the position in the United Kingdom, there is no requirement that a requester indicate the purpose for which the information is required and the company must comply with the request. In other words, there is an absolute right of access to shareholder registers. Again, there is no need to use the formal provisions of the freedom of information laws for this purpose.

5. **Conclusion**

5.1 Clause 17(4) of the Bill, which appears to require an application for access to the registers via PAIA, would in so doing place massive obstacles in the way of transparency and openness as regards companies. Whereas the present position under the Act is that members of the public enjoy unlimited access to the register, under the Bill access would only be granted with the vagaries and procedural hurdles of PAIA.

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[42] The only limitation to this right is that in terms of section 173(7), the Australian Securities and Investments Commission may exempt a company from providing information in relation to debenture holders who hold debentures that are not convertible into share or options over unissued shares.

[43] See sections 173(2) and 173(3).

5.2 We submit that there is no compelling reason to jettison the public access rule that currently applies. To do so harms the objective of transparency that the Bill articulates, and also does not give effect to the constitutional principle of openness that applies to private as well as public bodies. Failure to provide access to the registers also limits the right of access to information and freedom of expression in circumstances where access is required by journalists, researchers, students, analysts and interested members of the public, for various legitimate purposes.

5.3 A comparison of the leading jurisdictions of the United Kingdom and Australia also reveals that the approach proposed in the Bill does not accord with the systems in place in these jurisdictions. In the UK, the onus is on the company to approach a court if it believes that a request for shareholder register access is not legitimate, failing which, access must be provided within five days of the request. In Australia, the position is identical to that which currently prevails under the Act: there is an unconditional access right in respect of shareholder registers. Neither jurisdiction insists that freedom of information law procedures must be followed to obtain access.

5.4 In the circumstances, we urge the Committee to replace the word "and" in clause 17(4) of the Bill, with the word "or". Further, we propose that clause 17(2) be amended to provide that a non-member may inspect as well as make a copy of the registers.

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on behalf of the M&G Centre for Investigative Journalism

5 January 2010

HUMAN RIGHTS DEVELOPMENT REPORT

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FOREWORD

Our young democracy was born quite miraculously, some have said out of the ruins and the injustice of apartheid. Even with the support of a progressive Constitution and the goodwill of millions of our people, the task of giving effect to the vision of a just and caring society has been a formidable one. Responding to the legitimate expectations of a 'better life for all', dealing with the massive socio-economic disparities, and healing the deep scars left by apartheid has absorbed, consumed, and sometimes, even divided us in ways we did not foresee.

Underpinning all these endeavours has been a human rights framework bold in its vision, courageous in its breadth and forward looking in every conceivable way. It does not only provide the social and economic indicators and imperatives for the nation but also the moral compass that should guide our constitutional journey. The constitutional journey, undertaken through the agency of government, civil society, the courts, independent institutions and the citizenry, has been both eventful and vigorously contested. We may have embraced a common vision about a just and democratic society but the means to achieve that vision, the choices we have had to make, the process of mediating and adjudicating competing but legitimate claims and demands has certainly challenged us in fundamental ways about the meaning and our understanding of the constitutional imperative of being 'united in our diversity'.

Whether we are dealing with race, racism and discrimination the transformation of our economy and social system, the role and place of the criminal justice system, the interventions required to deal with historical disadvantage, South Africa's place and position in the international community, finding the balance between religion and free choice, determining the parameters of free speech or defining the limits of the right of association, we have had deeply contested and at times divisive debates shaped largely by our past and our particular entry point into the constitutional space. The debate has often been emotional, partisan and sometimes irrational.

The South African Human Rights Commission, as a constitutional body mandated to promote human rights and constitutional democracy has a duty to advance and promote genuine constitutional and human rights debate. In seeking to reach consensus on what we need to achieve as a nation, we have to create the space to hear a diversity of voices and views and through such discourse we have to identify the challenges we face and the interventions required to address them.

With the launch of this first Human Rights Development Report it is the wish of the South African Human Rights Commission to contribute to the ongoing dialogue that engages us on the human rights imperatives that form the basis of our constitutional order. We wish to encourage honest, robust critical reflection on the state of our society, the progress we have made, and the

shortcomings and under-achievements for which we must take responsibility. We seek to identify and critique the policy choices that have been successful and those that are less successful. We also seek to set the debate against the context of the letter and the spirit of the Constitution and to ensure that in all that we do there remains a fidelity to the Constitution and its values.

It is our hope that we will encourage those outside the South African Human Rights Commission to contribute and participate in this process.

I would like to thank the authors who contributed to the writing of the Human Rights Development Report, and those who contributed in the production process of the publication. We welcome your views on any matter relevant to this report as we are committed to ensuring that it becomes a relevant contribution to the advancement of human rights culture in our country.

Jody Kollapen
Chairperson

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Judith R Cohen holds a BA LLB (UCT) and an LLM (Notre Dame, USA) in international human rights. She has worked in private practice as an attorney and at Lawyers for Human Rights where she worked extensively in rural areas on the eviction of farm workers. Since joining the South African Human Rights Commission in 2001 as a Parliamentary Officer, this area of work has expanded: Parliamentary Liaison Legislation and Treaty Body Monitoring. In addition she has drafted the SAHRC Report on National Inquiry into Violations in the Farming Community (2003), the SAHRC Report on Public Hearing into the Rights to Basic Education (2006) and was extensively involved in the drafting of the Report of Public Hearing on School-based Violence (2008). The Human Rights Development Report was drafted with many inputs of the Parliamentary Programme staff and various co-ordinators in the Commission. Special thanks must also go to Rachel Sherman and Elizabeth King, visiting interns from Harvard University, USA.

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Chantal Kisoon is an admitted attorney and formerly worked as researcher at the Constitutional Court of South Africa. She obtained a partial master's degree in International Human Rights Law from the University of Vrije in Holland. She was senior lecturer of law and Deputy Director of the Centre of Human Rights at the University of Pretoria. Kisoon is currently the Deputy Director of the Access to Information Programme at the South African Human Rights Commission.

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Jo Mangaliso Mdhlela is the Editor of the South African Human Rights Commission. Mdhlela trained for the Anglican Church priesthood at the College of Resurrection, Mirfield, West Yorkshire, England, UK, and holds an Honours degree in Ethics and Dogmatics from the University of Pretoria and an MA from the University of Leeds in the United Kingdom (UK). He was part of a group of international students who attended summer school on the New Testament at the St Anne College, Oxford University in 2005. A trained journalist, Mdhlela is a doctoral candidate on global ethics at the University of Pretoria.

ACRONYMS

AGRISA	Agriculture South Africa
AIDS	Acquired Immune Deficiency Syndrome
APRM	African Peer Review Mechanism
ATDs	Awaiting Trial Detainees
BAC	Business Against Crime
CAT	Convention against Torture and other Cruel, Inhuman or Degrading Treatment.
CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
CEDW	Committee on the Elimination on of Discrimination against Women
CERD	Committee on the Elimination of Racial Discrimination
CESRC	Committee on Economic, Social and Cultural Rights
CCTV	Closed Circuit Television
CMW	Committee on Migrant Workers
COSATU	Congress of South African Trade Unions
CPF	Community Policing Forum
CRC	Convention of the Rights of the Child
CRPD	Convention of the Rights of Persons with Disabilities
DHA	Department of Home Affairs
HIV	Human Immune-Deficiency Virus
HRDR	Human Rights Development Report
HRC	Human Rights Committee
HSRC	Human Sciences Research Council
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on Elimination of all Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICPED	International Convention for the Protection of all Persons from Enforced Disappearance
ICRMW	International Convention on the Protection of all Migrant Workers and Members of their Families
JCPS	Justice, Crime Prevention and Safety Cluster and Government Communications
NAFCOC	National African Federated Chamber of Commerce
NCOP	National Council of Provinces
NGO	Non-Governmental Organisation
NPM	National Preventative Mechanism

OPCAT	Optional Protocol to the Convention against Torture
PAIA	Promotion of Access to Information Act
PGM	Provincial Gender Machinery
SAIRR	South African Institute of Race Relations
SAPS	South African Police Service
UNESCO	United Nations Educational, Scientific and Cultural Organisation
WCAR	World Conference Against Racism, Xenophobia and Related Intolerances

INTRODUCTION TO HUMAN RIGHTS DEVELOPMENT REPORT

Jo Mdhlela

INTRODUCTION

What are human rights? In a country beset by so many inequalities, it would be a misnomer to look at human rights in isolation of socio-economic and political factors. If we have to ask this question, it cannot be successfully answered without contextualising it within the social, economic and political milieu – and many other factors that relate to the 'exclusion' and marginalisation of communities. In initiating the Human Rights Development Report (HRDR), the South African Human Rights Commission (Commission) hopes to achieve this objective by using the five chapters that constitute the HRDR to assess the progress that has been made towards addressing all that violates human dignity in South Africa. The focus will be on International Treaty Body Monitoring, Crime and Human Rights, Equality, Promotion of Access to Information and Poverty Discourse, and Human Rights in South Africa.

The real test for democracy must be determined by whether communities are able to lead their lives free from the threats of poverty and crime. As provided in section 32 of the Constitution of the Republic of South Africa Act 108 of 1996 (Constitution), communities must have a sense in which they believe that access to information is not the privilege or the luxury of the wealthy and the powerful, but rather is a right that must be enjoyed by all. The development of a human rights culture helps communities to feel confident that their rights are wholly protected – even by the United Nations Treaty Bodies that include the Human Rights Committee (HRC); the Committee on Economic and Social and Cultural Rights (CESRC); the Committee on the Elimination of Racial Discrimination (CERD); the Committee on the Elimination of Discrimination against Women; the Convention against Torture (CAT), the Convention on the Rights of the Child (CRC); and the Committee on Migrant Workers.

These instruments and structures are important as they give assurance to communities that they are protected against autocratic, undemocratic regimes and military juntas, among others, and that national governments are kept in check in terms of adhering to internationally recognised treaties, conventions and protocols.

In the South African context, what has 14 years of democracy meant for the country's citizens? Undoubtedly, there have been positive gains, but there are still huge pockets of poverty and suffering; vulnerable communities are still unaware of their rights; many, including children and women, are victims of crime. Many have had their right to life and security threatened. The prevalence of crime is not only a threat to life itself, but greatly impacts on the quality of life. Many continue to be denied access to information – the right to which everyone is entitled. There is a dearth of awareness in this area and much more needs to done by public bodies to educate

communities on the Promotion of Access to Information Act. Finally, many South Africans are denied access to economic and social rights and other rights essential to human dignity. They are shackled by crippling socio-economic conditions, and can barely eke out a decent, dignified existence.

The chapters in the HRDR will interrogate many of these human rights concerns as part of an assessment of where South Africa is as a nation, what progress has been achieved, the challenges as well as the panacea to meeting the obstacles that stand in the way of human rights being enjoyed by all.

The Commission, as a national human rights institution to promote and protect human rights, was established along the guidelines provided by the Paris Principles. Its mandate and powers are derived from section 184 of the Constitution of South Africa and the South African Human Rights Commission Act 54 of 1994. Its specific functions in terms of section 184 is to promote respect for human rights and a culture of human rights; to promote the protection, the development and attainment of human rights; and to monitor and assess the observance of human rights in South Africa.[1] Section 184 (2) of the Constitution confers powers on the Commission to investigate and report on the observance of human rights; to take steps to secure appropriate redress where human rights have been violated; to carry out research as well as to educate the public on human rights. Concomitant, the Constitution in section 184 (3) specifically mandates the Commission to monitor the implementation of economic and social rights by the relevant state organs through requesting information on an annual basis on the measures that they have taken towards the realisation of these rights. The Commission's mandate is broad and its functions and powers range widely. At a practical level, its activities include gathering information from organs of state on an annual basis, holding investigations into specific human rights issues, and carrying out public awareness campaigns, education and training on human rights. In addition, the Commission's mandate extends to the monitoring and assessment of the implementation of the Promotion of Equality and Unfair Discrimination Act 4 of 2000 and the Promotion of Access to Information Act 2 of 2000.

The HRDR will reflect the Commission's vision on human rights, and its commitment to being the conscience of the nation in so far as the observance of human rights is concerned.

BACKGROUND

The five chapters constituting the Human Rights Development Report engage with various components of human rights, and reflect on what it means to be a society that subscribes to a human rights culture, as well as the consequences of human rights violations. The HRDR is an addition to the Commission's many reports, and will be published annually. It has been inspired by the knowledge that the Commission has a constitutional obligation to develop and promote a

1 Section 184 (1) of the Constitution of the Republic of South Africa, Act 108 of 1996.

culture of human rights, and to track the progress of human rights development consistent with the provisions of section 184 of the Constitution. Another objective is to further the discourse of human rights in South Africa. This is an imperative aim as South Africa is a country with a deep rooted legacy of injustice, inequality and oppression. As a consequence, the majority of South Africans were left with festering social scars and deep wounds. Some progress has been made to address and correct the oppressive legislative framework but the journey to a more egalitarian society will only be realised when all issues of injustice and inequality have been eradicated. Fourteen years into democracy and South Africa continues to be an unequal society afflicted by racism, patriarchy and xenophobia whilst the scourge of crime and poverty threaten the very foundations of its fledgling democracy.

THE HRDR AND THE LEGISLATIVE FRAMEWORK

South Africa, prior to the ushering of democracy in 1994, was a country that lacked political credibility. As a result of its discriminatory policies, particularly those directed against black people, the country acquired pariah status and had a range of economic, cultural and social sanctions imposed upon it. The democratic dispensation of 1994 resulted in a new legislative framework informed by the principles of constitutional democracy with the founding provisions of the democratic South Africa based on the values of human dignity, non-racialism and non-sexism, supremacy of the Constitution and the rule of law, universal suffrage with a common national voters roll, regular elections and multi-party democratic government.

The Commission's work is to ensure that human rights are respected. Its work is strengthened by other international instruments including the Universal Declaration of Human Rights adopted and proclaimed by the United Nations General Assembly resolution 217 A (III) of December 1948, the African Charter on Human and Peoples' Rights, adopted by the Organisation of African Unity (OAU) on 27 June 1981, and the National Institutions for the Promotion and Protection of Human Rights (Paris Principles).

CONTENTS OF THE HUMAN RIGHTS DEVELOPMENT REPORT

The Human Rights Development Report seeks to give a perspective on a number of key development issues as dictated to by the Constitution and the Bill of Rights including issues on equality.

The report will reflect on issues of poverty, providing a broader perspective of what poverty is and its implications as a violator of human rights. It will also reflect on crime and its effects on the enjoyment of human rights, and determine the extent to which the Promotion of Access to Information Act impacts on the enjoyment of human rights, and what mechanisms there are to ensure that everyone benefits from the legislation.

The report will also enumerate and describe the functions of the current Treaty Bodies which include the Human Rights Committee (HRC); the Committee on Economic Social and Cultural

Rights (CESRC); the Committee on the Elimination of Racial Discrimination (CERD); the Committee on the Elimination of Discrimination Against Women (CEDAW); the Convention Against Torture (CAT); the Convention on the Rights of Child (CRC) and the Committee on Migrant Workers. It will describe how these bodies contribute to the enjoyment of human rights, and how the Commission relates to these bodies in its function of fulfilling its constitutional obligations.

METHODOLOGY

The methodology used included collecting information from public entities and the use of desktop research.

CHAPTER SYNOPSIS

The chapters in this report will trace human rights development in South Africa and locate the challenges facing the country as it adapts to aspects of constitutional democracy after decades of inequality and injustice.

International Treaty Body Monitoring

In great detail, the chapter explains the committees that conduct the International Treaty Body Monitoring, their functions and how they carry out their obligations under the convention. The chapter discusses the core international human rights treaties currently in existence through examining developments by the Treaty Body, country reports that were considered and major themes emanating from these treaties and their significance to South Africa as well as developments in South Africa during 2007 that are of significance to Treaty Bodies.

Crime and Human Rights

The chapter gives an analysis of crime and the negative impact it has on the enjoyment of human rights. It argues that crime is contradictory to everything the Constitution stands for in terms of promoting respect for human rights and a culture of human rights.

Equality

The chapter on equality traces the origins of inequality as informed by colonial and apartheid regimes, and how over many years a person's racial classification determined their destiny in life. The chapter reflects on how the Commission and other chapter 9 institutions, using the Constitution and the legislation, continue to address these injustices. This serves as a backdrop for a critical engagement of the key developments of 2007 in race, gender and disability.

Access to Information

Celebrated as a milestone, the Promotion of Access to Information Act faces grave implementation impediments in the South African public sector. Considered against the backdrop of its policy and legislative framework, these implementation challenges are explored, with particular reference to compliance, application, enforcement and realisation of the right to access information. A commitment in political will can shift implementation to a priority agenda – but is

this sufficient? Emerging from the monitoring functions of the Commission in 2007, practical recommendations are proffered in response to identified challenges in implementation.

Poverty

The chapter on poverty argues that poverty is an affront to human dignity. In part, the chapter argues that the state is obligated by the Constitution to ensure that the minimum legal rights to social security, housing, education and water, among others, need to be satisfied in order to help the poor to 'escape extreme poverty and deprivation'. This chapter also describes the dual economy thesis and the advantages and disadvantages of this school of thought.

CHAPTER ONE:

TREATY BODY MONITORING IN SOUTH AFRICA

INTRODUCTION

The United Nations oversees a number of international treaties that bind state parties to protect and to take positive action to facilitate the enjoyment of basic human rights. By adopting these treaties, member states send a strong message to the world community about their commitment to defending human rights. This commitment is not only symbolic as states that ratify international human rights treaties must implement domestic measures and legislation compatible with their treaty obligations and duties.

To demonstrate their compliance, states must abide by the treaty guidelines and periodically report to the United Nations committees. Independent bodies of experts form the committees that monitor implementation by reviewing state reports and issuing concluding observations and recommendations. Although the exact reporting requirements vary, typically state parties must submit an initial report within one year of ratifying a convention. Periodic reports are subsequently due at regular intervals set by each committee. Additional reports may be required if state parties have acceded to any optional protocols.

In addition to reviewing state reports, the United Nations committees may issue General Comments to clarify treaty obligations and provide further guidance on the steps necessary for effective implementation. In 2007, the Human Rights Committee, the Committee on Economic, Cultural and Social Rights, the Committee Against Torture, and the Committee on the Rights of the Child, each issued General Comments regarding their respective treaties.

Some treaty bodies also provide a mechanism that allows individuals to file complaints against state parties when they believe their rights have been violated. Such communications must be considered in closed private meetings. When an individual files a complaint, the reviewing committee investigates the claim and gives the named state an opportunity to respond. After a thorough enquiry, the committee publishes its findings. However, a committee may only consider complaints regarding states that have agreed to be subject to this process.

In considering the year 2007, this report will discuss the core international human rights treaties currently in existence through examining developments by the treaty body, country reports that were considered and major themes of significance to South Africa and developments in South Africa during the year in relation to the treaty bodies. As of 2007, South Africa has ratified the International Covenant on Civil and Political Rights (ICCPR); the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment (CAT); and the Convention on the Rights of the Child

(CRC). South Africa has ratified the United Nations Convention on the Rights of Persons with Disabilities (CRPD), but it has not yet entered into force.

The International Covenant on Economic, Social and Cultural Rights (ICESCR); the Optional Protocol to the Convention Against Torture (OPCAT); the International Convention on the Protection of All Migrant Workers and Members of their Families (ICRMW); and the International Convention for the Protection of All Persons from Enforced Disappearance (ICPED) have yet to be ratified, although South Africa is a signatory to OPCAT.

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

The Human Rights Committee

The International Covenant on Civil and Political Rights (ICCPR) is a treaty that safeguards the right to life, liberty, and security; freedom from torture and slavery; equality before the law; freedom of movement, association, thought, religion and expression; privacy; and the enjoyment of culture. Additionally, two optional protocols to the Covenant establish an individual complaints mechanism and abolish the death penalty, respectively. The ICCPR, along with the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Universal Declaration of Human Rights, forms what is commonly known as the International Bill of Rights.

The Human Rights Committee (HRC) monitors the implementation of the ICCPR and its optional protocols. The HRC is composed of 18 independent experts who are elected to four-year terms and normally meets three times per year.[2] Nine new members of the committee commenced duties in January 2007, including the Commission's Deputy Chairperson, Dr Zonke Majodina.

Pursuant to the Covenant, state parties must submit an initial report within a year of ratification, and periodic reports afterward whenever the Committee requests (usually every four years). In 2007, the Committee considered 11 state reports, including those of Madagascar, Zambia, Sudan, Libya and Algeria.[3] Common themes and issues that were of interest to the Committee may also concern South Africa. In particular, the HRC expressed disappointment over reports of violations of the rights of persons with mental disabilities, human trafficking, the relation of customary laws to women, and police treatment of detainees. The Committee also received a number of individual complaints throughout the year.

Recent Developments

In 2007, the HRC issued General Comment 32 to clarify the right to a fair trial and equality before courts, as established by Article 14 of the Covenant.[4] According to this Comment, tribunals with faceless judges do not satisfy basic standards of a fair trial; tribunals must be independent and

2 In 2007, the Committee held sessions in New York (12 – 30 March 2007) and Geneva (9 – 27 July 2007; October 2007 – 2 November 2007).
3 The Committee also considered reports from Chile, Barbados, the Czech Republic, Georgia, Austria, and Costa Rica. See General Comment No.32, Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32, 23 August 2007.
4 Human Rights Committee, Ninety-first session, 15 October – 2 November 2007.

impartial; and statements obtained under torture cannot be invoked as evidence except if they are used as evidence that torture occurred. Furthermore, appropriate measures must be taken to ensure that proceedings before religious and customary law courts meet the basic requirements of a fair trial and are limited to minor civil and criminal matters. The text also states that trials of civilians by military or special courts should be exceptional and limited to cases where the state party can show that resorting to such trials is necessary and justified.

South Africa and the Human Rights Committee

South Africa ratified both the ICCPR and its Optional Protocols on 10 December 1998. The Covenant entered into force in March 1999 and South Africa's initial report before the Committee was due in March 2000. South Africa has yet to appear before the Committee.

The Committee concluded the first individual complaint lodged by a South African citizen. After being seized with the individual complaint of Mr Gareth Prince since October 2005 the Committee released its view in October 2007.[5] Prince, a law graduate and practising Rastafarian was refused permission to register for articles, a requirement to become an attorney, due to his two previous criminal convictions for possession of cannabis and his expressed intention to continue using the substance for religious purposes. The matter, having wound its way through the South African legal system up to the Constitutional Court, was not found in Prince's favour. Prince took the matter to the African Commission on Human and People's Rights under the African Charter and was unsuccessful too. The Committee also did not find in Prince's favour and stated that there were no breaches of articles 18 (1) (right to freedom, thought, conscience and religion), 26 (non-discrimination) and 27 (ethnic, religious and linguistic minorities rights) of the ICCPR.

Back in South Africa, Sunali Pillay was more successful with the Constitutional Court in February 2007 recognising her cultural and religious rights to wear a nose stud to school. In *KwaZulu-Natal MEC of Education v Pillay*,[6] the Constitutional Court went on to uphold the High Court decision on appeal, ruling that prohibitions against wearing jewellery may result in indirect discrimination by allowing certain learners to express their religious and cultural identity freely while denying that right to others. According to Chief Justice Langa, the Constitution requires the community to affirm and reasonably accommodate differences, not merely to tolerate them as a last resort.[7]

In April 2007, the United Nations Special Rapporteur on Human Rights and Counter Terrorism, Martin Scheinin, conducted a ten day visit to South Africa at the invitation of the government. High-level meetings were held with ministers and officials responsible for foreign affairs, justice, defence, safety and security, intelligence, correctional services, and home affairs. During the visit, the Rapporteur also met with the Commission. The purpose of the visit was twofold: first, to examine South Africa's counter-terrorism laws, policies and practices and to assess their effect

5 Communication No.1474/2006, CCPR/C/91/D/1474/2006, 31 October 2007.
6 CCT 51/06.
7 Ibid.

on the protection and promotion of human rights; and second, to examine the role South Africa plays in Africa in countering terrorism in the international context.[8] In his findings the Special Rapporteur found that current immigration detention practices might raise issues concerning the right to personal liberty under Article 9 of the ICCPR. The Rapporteur recommended detention reform to allow mandatory judicial review of detention decisions, access to legal counsel, and the establishment of an independent body for oversight of immigration detention. With regards to the violence against Somali nationals, particularly in Cape Town, the Special Rapporteur encouraged South Africa to formulate clear policy objectives and concrete programmes for the eradication of xenophobia and inter-ethnic violence. The Rapporteur also recommended the insertion of a general non-refoulement clause in legislation, prohibiting the removal of a person from South Africa where there is the real risk of capital punishment, torture or any form of inhuman, cruel or degrading treatment or punishment.

January 2007 marked the release of the last eight death row prisoners in South Africa, commemorating a monumental step toward protecting human rights. From 1980 to 1989, South Africa executed 1109 prisoners and had the highest judicial execution rate in the world.[9] In 1995, the Constitutional Court declared the death penalty unconstitutional[10] and by November 2006 all death sentences had been replaced with alternate sentences.[11] Despite these significant achievements there are frequent calls for South Africa to reintroduce the death penalty given the persistently high levels of crime and the erroneous belief that it would act as a deterrent. The reintroduction of the death penalty would violate South Africa's obligations under the ICCPR's second Optional Protocol and would constitute a step backward for the protection of human rights in South Africa.

INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

The Committee on Economic Social and Cultural Rights

The International Covenant on Economic, Social and Cultural Rights (ICESCR) protects a range of economic, social, and cultural rights without prejudice to creed, political affiliation, gender or race. The Committee on Economic, Social and Cultural Rights (CESCR), which monitors the implementation of the ICESCR, meets twice a year in Geneva, Switzerland. The CESCR is comprised of eighteen independent experts who are elected to four-year terms. In 2007, Mr Chandrashekhar Dasgupta (India), Ms Barbara Wilson (Switzerland), and Mr Daode Zhan (China) joined the Committee.

State parties to the ICESCR must submit an initial report within two years of ratification, and every five years afterward. The Committee considered reports from fifteen countries in 2007,

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8 UN Special Rapporteur on Human Rights and Counter Terrorism issues preliminary findings on visit to South Africa, 26 April 2007" United Nations Press Release. Available online at http://www.unhchr.ch/huricane/huricane.nsf/view01/2972818321758A90C12572C900476EA5?, 15 November 2007.

9 See *S v Makwanyane and Another*, 1995 (3) SA 391 (CC).

10 Ibid.

11 "SA's Death Row now empty," *News24.com.* Available online at http://www.news24.com/News24/South_Africa/News/0,,2-7-1442_2038238,00.html, 30 November 2006.

including a report from Kenya.[12] A number of recurring themes in the Committee's observations are of particular relevance to South Africa, including discrimination against disadvantaged ethnic and linguistic groups; gender equality and gender-based violence; access to quality medical care; quality of education; alcohol and drug abuse; and the rights of people with disabilities.

Recent Developments

The Committee drafted and adopted in part a General Comment on Article 9 of the Convention regarding the right to social security, including social insurance. Also, the Joint Expert Group on the Monitoring of the Right to Education (JEG) is continuing its examination of the scope and meaning of 'free' and 'compulsory' primary education. It also explores ways to ensure non-discrimination and equal opportunities for boys and girls, including through temporary special measures and minority language education. Finally, the Committee adopted a statement on the "Evaluation of the obligation to take steps to the 'maximum of available resources' under an Optional Protocol to the Covenant."[13]

During May 2007, the Committee held a meeting with 59 state parties to discuss a proposed unified standing treaty body to revise reporting guidelines and to harmonise the working methods of treaty bodies. An Optional Protocol, which would provide a mechanism for individual complaints, was also drafted.[14]

South Africa and CESCR

Although South Africa signed the ICESCR on 4 October 1994, it has yet to ratify the Covenant. There have been suggestions that South Africa has not ratified the ICESCR because it guarantees the right to work, which is not directly protected by the South African Constitution.[15] A recent report by Parliament's joint Co-ordinating Committee on the South African Peer Review Mechanism countered that there "is no apparent reason for the country's failure to ratify the Covenant because it imposes no greater duties than the Constitution".[16]

Many of the issues South Africa faces regarding economic and social rights are relevant to the rights enshrined in the Covenant. Pertinent issues during 2007 included increasing income/wealth inequality, N2 gateway evictions, lack of housing and inability to process the housing waiting-list, school violence and the quality of education, prison overcrowding, medical care spending cuts, drug abuse, and service delivery protests. The provisions of the Covenant specifically address

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12 The Committee also considered reports from Nepal, Hungary, the Netherlands (Antilles), Finland, Latvia, Costa Rica, Ukraine, San Marino, Belgium, Paraguay, Sweden, Philippines, Bolivia and Nicaragua.

13 (E/C.12/2007/1). Available online at http://www.ohchr.org/english/bodies/cescr/docs/statements/Obligationtotakesteps-2007.pdf, 10 May 2007.

14 Note on the 38th session of the Committee of Economic, Social and Cultural Rights, and its Pre Sessional Working Group, 21 – 25 May 2007, p.1. Available on line at http://www.ohchr.org/english/bodies/cescr/docs/notes38session.pdf, 30 April – 18 May 2007.

15 COSATU, COSATU Submission on The APRM Focus Area Of Corporate Governance, p. 6. Available online at http://www.cosatu.org.za/docs/2006/corpgov.pdf. 23 January 2006

16 National Assembly and National Council of Provinces Parliament of South Africa Joint Coordinating Committee on the African Peer Review Mechanism, A Response to the African Peer Review Mechanism. *Self-Assessment Questionnaire* Synopsis. Available online at www.pmg.org.za/docs/ 2007/ 070210adhocreviewreport.htm

many of these issues and ratification would be a powerful step toward showing South Africa's commitment to alleviating these concerns.

A number of legislative developments during 2007 relate to articles in the Covenant. For example, the South African legislature passed the Children's Amendment Bill, which strives to provide improved care and social services to children, including those living in child-headed households. The Act particularly emphasises the provision of resources and services in poor, rural areas. The Education Laws Amendment Bill revises the education system in order to provide education that is safer and of a higher quality than that currently available in many public schools.[17] The Correctional Services Amendment Bill[18] was also considered in 2007, but was not finalised. The debates on the Correctional Services Amendment Bill raised questions of prison conditions, the provision of anti-retroviral drugs to individuals upon release from prison, and the fairness of parole proceedings.

INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

The Committee on the Elimination of Racial Discrimination

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) is a comprehensive instrument prohibiting discrimination based on race or national origin, sex, language, or religion. The Committee on the Elimination of Racial Discrimination (CERD), which monitors the implementation of the ICERD, meets in Geneva twice a year for three-week sessions, normally in February and August.[19] The Committee is composed of eighteen members, each of whom is elected for a term of four years. There is currently one South African member on the Committee, Ms Patricia Nozipho January-Bardill. Her term ends in 2008, although she may be re-elected if nominated.

State parties to the ICERD must submit an initial report within a year of ratification and every two years afterward. In 2007, the Committee examined fourteen state party reports, including the reports of Mozambique and the Democratic Republic of the Congo.[20] CERD made a number of recommendations, many of which may have applicability to current issues in South Africa. In particular, the Committee focused on the treatment of indigenous or aboriginal peoples, trafficking and violence against women, the failure to prosecute hate crimes, and discrimination against racial minorities and immigrants. This is notable because CERD made recommendations on similar issues regarding the need to implement effective measures to eliminate discrimination against foreigners after considering South Africa's report in August 2006. In 2007, the Committee also considered individual complaints brought against a number of countries.[21]

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17 http://www.pmg.org.za/bills/070920b33B-07.pdf [B 33 B-2007] 19 September 2007.
18 http://www.pmg.org.za/bills/070919b32B-07.pdf [B 32B-2007] 18 September 2007.
19 http://www2.ohchr.org/english/bodies/cerd/sessions.htm.
20 The Committee also considered state reports from Israel, Antigua and Barbuda, Canada, the Czech Republic, India, Liechtenstein, The Former Yugoslav Republic of Macedonia, the Republic of Indonesia, the Republic of Korea, New Zealand, Kyrgyzstan and Costa Rica.
21 Specifically, individual complaints concerning Belize, Brazil, Nicaragua, the Philippines, Peru and Chile were

Recent Developments

The Committee held discussions on treaty body reform, heard updates on progress made in several working groups, and continued its work on a draft study on procedures. During the second session, it made several changes to its working methods, including the adoption of draft guidelines for reports to be presented by state parties under Article 9 of the Convention. The Committee was also briefed on follow up activities to the Durban Declaration and Programme of Action that was adopted at the World Conference Against Racism, Xenophobia and Related Intolerances (WCAR).

South Africa and CERD

South Africa signed the ICERD on 3 October 1994 and ratified it four years later on 10 December 1998.[22] According to the Convention, state parties must file a report with the Committee within one year of joining the Convention and then every two years thereafter. South Africa's initial report was due in January 2000 while the second and the third reports were due in 2002 and 2004, respectively. However, the South African government decided to submit all three of these reports in one document in 2004.[23] These reports were examined during the 69th session of the CERD, and in August 2006, the Committee issued its observations and recommendations. At the time, the Committee requested that South Africa report on progress regarding hate crimes, hate speech, xenophobia and racist behaviour by 15 August 2007. At the close of 2007, this report was still not submitted.

There were no legislative developments in South Africa regarding racial discrimination during 2007. In particular, no new legislation on the issue of hate crimes or hate speech was proposed. Although a draft Hate Speech Bill was circulated in April 2004 it is unclear what became of the Bill. The proposed Bill would have prohibited the public advocacy of hatred against a person or groups of persons based on their race, ethnicity, gender or religion. South Africa continues to face difficulties in overcoming hate crimes and xenophobia.[24] Increasing numbers of hate crimes, including the rape and murder of two female lesbians in Soweto, were reported in 2007.[25] On 27 July 2007, the Commission hosted a roundtable to discuss the occurrence of hate crimes. The Commission is committed to continuing the public discourse on possible hate crime legislation.

The scourge of xenophobic attacks against non-nationals, and Somalis in particular, also remains a major concern for South Africa. Somali businesses have been ransacked and looted. At times, local communities have forcibly driven Somalis out of the townships. Some of these attacks have resulted in serious injury and even death. Many non-nationals were affected by attacks in Motherwell, Delareyville, Duncan Village, and Delmas. The Commission has been actively

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considered.

22 http://www2.ohchr.org/english/bodies/ratification/2.htm.

23 http://www.sahrc.org.za/sahrc_cms/downloads/CERD_Shadow%20Report.pdf.

24 World Conference Against Racism Sept 2001 and National Conference against Racism, Xenophobia and Related Intolerances, August 2000.

25 S Sigaga and S Masooa, 7 July 2007.

involved in interventions and has spearheaded strategic interventions with various critical stakeholders.[26]

In July 2007, the Department of Justice's Secretariat of the Forum on Racism hosted a consultative workshop in Durban[27] in order to further the process of implementing specific recommendations on combating xenophobia from the 2001 WCAR.

CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

The Committee On The Elimination Of Discrimination Against Women

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) establishes an International Bill of Rights for Women by defining gender equality and setting an agenda for state action to guarantee the enjoyment of equal rights. The Committee on the Elimination of Discrimination Against Women monitors the Convention and meets three times annually in New York in the United States of America. The CEDAW is comprised of 23 independent experts who are elected to four-year terms. During 2007, there was one South African member on the Committee, Ms Hazel Gumede-Shelton. Ms Ferdous Ara Begum (Bangladesh), Ms Saisuree Chutikul (Thailand), Ms Ruth Halperin-Kaddari (Israel) and Ms Violeta Neubauer (Slovenia) joined the Committee in 2007 as well.

Article 18 of CEDAW requires each state to submit a report within one year of ratification and regular periodic reports afterward. In 2007, the Committee examined a number of state reports, including that of Kenya. In concluding observations, the Committee expressed concern about violence against women, prostitution and trafficking and women's health. The Committee also noted its disappointment over Kenya's rejection of a draft constitution because it included gender equity provisions and criticised Kenya for not updating its gender equality legislation as required by the treaty. It expressed concern about the prevalence of polygamy and the number of regimes governing marriage in Kenya. Although South Africa's Constitution includes gender equality, the Committee's concerns regarding polygamy and the marriage regimes are relevant to South Africa due to the popularity of traditional laws in the country.

South Africa and CEDAW

South Africa signed the Convention in January 1993 and ratified CEDAW in December 1995.[28] As of May 2007, South Africa's second and third periodic reports were overdue with the respective due dates of 14 January 2001 and 14 January 2005.[29]

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26 Department of Home Affairs, UNHCR, SA Police Service, the South African Council of Churches, Islamic Relief, ANC ward councillors, Somali and community of Motherwell.

27 According to the Director, Adv N Mogale, the secretariat aims at hosting a similar workshop for the remaining provinces in the near future. The National Plan of Action therefore remains a work in progress.

28 UN Division for the Advancement of Women CEDAW States Parties Chart, http://www.un.org/omenwatch/daw/cedaw/states.htm.

29 Status of submission of reports by States parties under Article 18 of the Convention, United Nations CEDAW Committee 39th session.

Whilst there is progress in the area of gender equality, violence against women, particularly in the form of sexual and domestic violence, remains a considerable threat.[30] Furthermore, women remain economically disempowered as significant salary discrepancies between women and men persist.[31] Political parties still consider gender equity issues a priority, publicly noting that women have not fully realised the freedoms guaranteed in the Constitution.[32] In December 2007, at its conference in Polokwane, the ANC discussed the 50/50 gender principle, which would require that every alternative position available for leadership be reserved for a female candidate, with an amendment to the ANC constitution that gender equity applies to the National Executive Committee (NEC) as a whole and not in alternative positions. Thus it need not be the case that the parties' top six office-bearing officials necessarily include women.[33]

Parliament's Joint Monitoring Committee on the Improvement of Quality of Life and Status of Women had a diverse programme during 2007, including briefings on the implementation of the Civil Union Act, the impact of Equality legislation on women's lives, and the constitutional court judgment that extended the definition of rape.[34]

The long awaited Sexual Offences Bill was finally passed in December 2007 at the culmination of the annual 16 days of Activitism in opposition to violence against women and children. The Bill amends the old Sexual Offences Act of 1957 and provides significant changes to the common law definition of rape. It extends the act of rape to include men and boys and codifies the offences of rape, sexual violence and oral genital violence. The new law also introduces a range of crimes that relate specifically to the sexual exploitation of children and persons with mental disability. The announcement of the legislation was marred by a furore from teenagers who claimed that the Act criminalised young persons between the ages of 12 and 16 years who kiss in public. Protestation was voiced through the internet social network web site, "Facebook" and at shopping malls throughout the country.[35]

During 2007, the South African government acknowledged that the National Gender Machinery was not functioning as desired. In an effort to address this challenge, the government undertook efforts to revitalise the national machinery.[36] In 2005, the process of establishing a Provincial

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30 *The Mail & Guardian* "Reporting Rape Equals Being Raped Again in Court" [10 August 2007] http://www.mg.co.za/articlePage.aspx?articleid=316315&area=/breaking_news/breaking_news__national/; *The Cape Argus* "Police Not Enforcing Domestic Violence Laws" [29 October 2007] http://www.capeargus.co.za/index.php?fArticleId=4103999.

31 "Gender Commission Focuses on Salary Discrepancies" *Mail & Guardian.* Available online:http://www.mg.co.za/articlePage.aspx?articleid=309287&area=/breaking_news/breaking_news_national/, 23 May 2007.

32 "Buthelezi: Gender Equality a Priority for IFP," *Mail & Guardian,* Available online:http://www.mg.co.za/articlePage.aspx?articleid=324582&area=/breaking_news/breaking_news_national/, 11 November 2007.

33 "Gender parity plan in trouble," *M&G Online*, available at http://www.mg.co.za/articledirect.aspx?articleid=328074&area=ancconference_insight , 19 December 2007.

34 For a full list of the Committee's 2007 meetings go to: http://www.pmg.org.za/minutes.php?q=2&comid=43

35 'Angry SA teens plan mass kissing protest' *Independent Online* available at http://www.iol.co.za/index.php?set_id=1&click_id=3045&art_id=vn20071228110459992C98717, 28 December 2007.

36 Provincial Gender Machinery Draft Framework document, Lizelle Henn, PGM Coordinator. The Gender Advocacy Programme.

Gender Machinery (PGM) began. During the past year, the process gained momentum and the PGM is set to be launched in 2008.[37]

The Constitutional Court is currently in the process of hearing the case of Shilubana and Others v Nwamita.[38] This case addresses fundamental questions regarding the relationship between traditional customary law and the Constitution and courts of law.[39] Tinyiko Phillia Shilubana, the complainant, was next in succession to the position of *hosi* (chief), but she was sidelined by her cousin Sidwell Nwamita because the community believed in male succession.[40] Shilubana argued that because the Constitution overrides customary law, lineage cannot be based on gender and should therefore be restored to her side of the family. Due to multiple postponements of the case, judgment has not been rendered, as of the end of 2007.

CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT

The Committee Against Torture

The Convention Against Torture and other Cruel, Inhuman or Degrading Treatment (CAT) is an international human rights instrument that requires states to implement measures to prevent torture within their jurisdiction and forbids them to return persons to a country where there is reason to believe they will be tortured. The Committee Against Torture, which monitors CAT, meets twice a year in Geneva, Switzerland.[41] In October 2007, Myrna Kleopas (Cyprus) and Abdoulaye Gaye (Senegal) were elected to replace those delegates whose terms of office expired on 31 December 2007.[42]

State parties to CAT must submit an initial report within a year of ratification, and every four years thereafter. During 2007, the Committee Against Torture considered thirteen state reports.[43]Although none of the reports considered came from African states, a number of issues that concerned that Committee are of interest to South Africa. The Committee was concerned that state parties had not criminalised torture in domestic law and that detained criminal suspects were subject to abuse. Other concerns included insufficient training regarding the provisions of the Convention for law enforcement personnel and difficulties of asylum seekers. The Committee

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37 Ibid.

38 *Shilubana and Others v Nwamitwa* CCT3/07 (unreported 8 June 2007 Judgment).

39 *Ibid.* In the High Court and the Supreme Court of Appeals the respondent prevailed. Both courts allowed traditional customary laws to prevail. The courts observed that the Bill of Rights recognizes the existences of other rights and freedoms conferred by customary law to the extent they do not conflict with the Bill of Rights. The courts held that the patrilineal succession and male primogeniture do not conflict with the Constitution or any legislation involving customary law. Further, the court recognized a constitutional duty to apply customary law when valid and not in conflict with the constitution. *Nwamitwa Shilubana v Nwamtaw* [2006] SCA 174 (RSA).

40 *Independent Online*. Woman chief case scrapes into Concourt. http://www.iol.za.org/index.php?set_id=1&click_id=13&art_id=nw20071127120812236C350166, 27 November 2007.

41 In 2007, the first session was held from 30 April–18 May; the second took place from 5 November – 23 November.

42 An additional three members of CAT, including Felice Gaer (United States of America), Luis Gallegos Chiriboga (Ecuador), and Claudio Grossman (Chile), were re-elected to the Committee at that time as well. See http://www2.ohchr.org/english/bodies/cat/docs/electionscat.doc

43 The Committee considered reports from of Denmark, Luxembourg, Italy, the Netherlands, Ukraine, Japan, Poland, Latvia, Uzbekistan, Norway, Estonia, Portugal and Benin.

also considered individual communications and reviewed its methods of work, particularly in the context of ongoing reform of the human rights treaty bodies.

Recent Developments

In the November 2007 session, the CAT adopted a General Comment on Article 2 of the Convention,[44] which requires state parties "to take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."[45] The General Comment reinforces CAT's absolute prohibition against torture, stating that "no exceptional circumstances whatsoever may be invoked by a state party to justify acts of torture". This non-derogable prohibition includes both threats of terrorist acts and violent crime as well as international and domestic armed conflict. Additionally, the General Comment emphasises states' obligations to prevent and redress torture by making the offence of torture punishable under domestic criminal law.

OPCAT and the Sub-committee on Prevention of Torture

The Optional Protocol to the Convention Against Torture (OPCAT) was introduced in January 2003 to prevent torture by establishing a system of regular visits to places where violations are known to occur frequently.[46] February 2007 marked the inaugural meeting of the United Nations Sub-committee on Prevention of Torture and Other Cruel, Inhuman and Degrading Treatment, following OPCAT's entry into force on 22 June 2006. The ten-member[47] sub-committee has the power to make unannounced visits to places of detention in those countries that have ratified the OPCAT. The mandate of the sub-committee enables it to complement the existing framework to combat torture, that is, the Committee Against Torture, the Special Rapporteur on Torture, as well as the Voluntary Fund for Victims of Torture. On 20 November 2007, the CAT and sub-committee held their first joint meeting.

South Africa, CAT and OPCAT

South Africa has been a state party to CAT since August 1998. Despite signing the OPCAT on 20 September 2006, South Africa has yet to ratify the Optional Protocol and there appears to be little movement towards this. Apart from its obligations under the Convention Against Torture, South Africa and other African states are also encouraged by the Robben Island Guidelines, adopted by the African Commission on Human and Peoples' Rights in October 2002, to put mechanisms and processes in place to prohibit torture, criminalise torture, investigate allegations of torture, and to respond to the needs of victims of torture.

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44 CAT/C7GC/2/CRP.1/Rev.3, as amended.
45 Article 2, paragraph 1 of the Convention Against Torture.
46 Article 1 of OPCAT.
47 Silva Casala (United Kingdom), Leopoldo Torres Boursault (Spain), Miguel Sarrel Iguiniz (Mexico), Mario Luos Coriolano (Argentina), Zdenek Hajek (Czech Republic), Hans Draminski Petersen (Denmark), Victor Manuel Rodriguez Rescia (Costa Rica), Zbigniew Lasocik (Poland), Wilder Tayler Souto (Uruguay) and Marija Definis Gorjanovic (Croatia).

In April 2007, the alleged terrorist Khalid Rashid who disappeared after being handed over by the South African government officials to agents of the Pakistan government in November 2005, finally appeared after 18 months of secret detention.[48] Concerns were raised during 2006 when it was alleged that the South African government breached its obligations in terms of Article 3 of the CAT through participating in the enforced disappearance of and exposing Rashid to the risk of torture.[49] Rashid broke his silence in 2007 and contradicted the claims made by the South African Department of Home Affairs that he was deported as an illegal immigrant in terms of standard procedure.[50] Rashid claimed that whilst in South Africa, he was held incommunicado, was denied access to a lawyer or contact with the Pakistani embassy and was tricked into waiving his right to challenge his deportation.[51]

Although South Africa has demonstrated commitment to eradicating torture by ratifying CAT, torture continues to be an issue of concern. During the last two years, the number of unnatural deaths of prisoners increased from 30 to 62 in South African prisons.[52] Furthermore, deaths as a result of police action increased from 315 cases for the 2005–2006 reporting period to 439 cases for the 2006–2007 reporting period.[53] Recent examples include the alleged torture and intimidation of five accused armed robbers in the notorious Booysens police station[54] and repeated assaults on a Pastor and his son in the Grahamstown police station.[55] In both cases, torture was used in an attempt to obtain a confession.

The criminalisation of torture in South Africa is also a necessary tool in holding non-state actors accountable for such acts. There are a number of examples of incidences that may well fall within the international definition of torture. For example, an Mpumalanga primary school teacher, Zandile Nkosi, is currently on trial for attempted murder and abduction after allegedly torturing an "unruly" 11 year-old pupil whom she accused of stealing her handbag. She called in the help of other adult men who then beat the boy. According to a news24.com report, the boy was "repeatedly dunked head-first into the Crocodile River. Molten plastic was systematically dripped all over his bare body and genitals. He was also repeatedly burned with cigarettes."[56] As a result, the boy continues to suffer from grave physical and psychological harm. Other such incidents include the case of two youths who allegedly poured boiling water over the head and genitals of a

48 *Mail & Guardian.* (24 August 2007). "Rendered Rashid speaks." Available online at http://www.mg.co.za/articlePage.aspx?articleid=317418&area=/insight/insight__national/
49 "Pakistan/South Africa: Khalid Mehmood Rashid appears after 18 months of secret detention' *Amnesty International Press Release* available online at http://www.amnesty.org/en/library/info/AFR53/003/2007, 17 April 2007.
50 *Mail & Guardian.* "Rendered Rashid speaks." Available online at http://www.mg.co.za/articlePage.aspx?articleid=317418&area=/insight/insight__national/ , 24 August 2007.
51 Ibid.
52 " Report Card: Cabinet ministers from A to G" *Mail & Guardian*, available online at http://www.mg.co.za/articlePage.aspx?articleid=328230&area=?insight/insight_national/, 21 December 2007.
53 *Ibid.*
54 *The Pretoria News* . "Prisoners ask not to be tortured."; A 2005 SABC Special Assignment programme captured six police officers from Booysens police station extorting bribes for the release of illegal immigrants, 30 October 2007.
55 http://www.grocotts.co.za/article.php?aID=1112
56 http://www.news24.com/News24/0,,21386881,00.html

two year old, causing him serious injury;[57] and the "night of barbaric torture and humiliation" visited upon an elderly man and his son during a robbery in Laudium.[58]

Despite these alarming incidents during 2007, there were no legislative responses or developments in South Africa regarding torture. In October 2007, however, the Commission held an inaugural meeting of its Section 5 Torture Committee to advise and to co-ordinate efforts to raise awareness and advocate for the criminalisation of torture and the establishment of a National Preventative Mechanism. Additionally, the Commission submitted a comment on the Special Rapporteur's Counter-Terrorism Report on 13 December 2007, taking advantage of new United Nations Human Rights Council procedures that permit statements to be made in Council proceedings.

CONVENTION ON THE RIGHTS OF THE CHILD (CRC) (1989)

The Committee on the Rights of the Child

The Convention on the Rights of the Child (CRC) is a comprehensive instrument that sets out rights and defines universal principles and norms regarding the status of children. There are two Optional Protocols to the CRC. The first requires state parties to criminalise the sale of children, child prostitution, child pornography, and certain associated activities and to take measures to ensure prosecution. The second optional protocol focuses on halting the active participation of children under the age of eighteen in warfare and keeping them out of the armed forces entirely. The Committee on the Rights of the Child monitors the CRC and the two optional protocols to the convention.[59] The Committee meets three times a year in Geneva, with each session consisting of a three-week plenary and a one-week pre-sessional working group.[60] The Committee is composed of eighteen members, each of which is elected for a term of four years.[61]

State parties must submit regular reports to the Committee with the initial report due two years after acceding to the Convention and then every five years thereafter. During 2007, the Committee examined 28 state reports including those of Kenya, Mali and Sudan.[62] Several common themes that emerged and are applicable to current South African domestic issues include the high rate of HIV infection among children, female genital mutilation, physical and

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57 "Torture attack earns accused 27 years in jail," *Mail & Guardian Online a*vailable online at http://www.mg.co.za/articlePage.aspx?articleid=323420&area=/breaking_news/breaking_news_national/, 29 October 2007.

58 *Mail &Guardian Online.* "Boys in court over alleged torture of toddler." Available online at http://www.mg.co.za/articlePage.aspx?articleid=322363&area=/breaking_news/breaking_news_national/, 18 October 2007.

59 General Comment No 2: The role of independent national human rights institutions in the promotion and protection of the rights of the child, p.6 (2005).

60 http://www2.ohchr.org/english/bodies/crc/index.htm

61 Nine members were re-elected in 2007: Ms Agness Akosua Aidoo (Vice-Chair, Ghana); Mr.Luigi Citarella (Italy); Mr. Kamel Filati (Vice-Chair, Algeria); Ms Lothar Friedrich Krappmann (Rapporteur); Ms. Rosa Maria Ortiz (Vice-Chair, Paraguay) and Mr Dainius Puras (Lithuania).

62 During the first session of 2007, the Committee considered the state reports of Kenya, Mali, Honduras, Marshall Islands, Suriname, Malaysia and Chile. During the second session in 2007, the Committee considered and issued observations and recommendations about the state reports of Slovakia, the Maldives, Uruguay, Kazakhstan, Sudan, Guatemala, Ukraine, Bangladesh, Monaco, Norway, Sweden and Guatemala. In the final session of 2007, the Committee considered the state reports of Venezuela, Bulgaria, France, Spain, Croatia, Lithuania, Luxembourg, Qatar, and Syria.

sexual abuse of children, and child prostitution. The CRC cannot consider individual complaints, although child rights concerns may be raised before other committees with competence to consider these complaints.[63]

Recent Developments

During 2007, the Committee adopted a General Comment regarding children's rights in juvenile justice. Noting that the CRC requires states to "develop and implement a comprehensive juvenile justice policy," the Comment aims to encourage states to develop a comprehensive policy, provide them with guidance on how to implement such a policy, and promote the adoption of other international standards within the developed policy.[64] The Committee emphasises that such a policy must rely on principles of non-discrimination, the best interests of the child, the right to life, survival, and development; the right to be heard, and dignity.[65] Core elements of a comprehensive juvenile justice policy include the prevention of juvenile delinquency, intervention/diversion, age and children in conflict with the law, guarantees for a free trial, measures, and deprivation of liberty, before and after trial.[66]

The Committee also emphasised the importance of the Study on Violence Against Children and encouraged state parties, including South Africa, to raise awareness and ensure adequate institutional capacity to implement recommendations contained in the Study.[67] In addition, the Committee gave support to the Machel Study 10-Year Strategic Review which addresses, amongst other issues, children used in armed conflict. The Committee agreed to improve current working methods and create greater efficiency and effectiveness. Lastly, the Committee collaborated with other human rights institutional bodies and participated in annual Inter-Committee meetings among the treaty bodies.

South Africa and the CRC

South Africa signed the CRC on 29 January 1993 and ratified it two years later, on 16 June 1995.[68] After ratifying, South Africa presented its initial report to the Committee in November 1997.[69] In May 1999, the NGO sector, led by the National Children's Rights Committee, presented their First Supplementary Report to the Committee.[70] Both the government and civil society were commended for their initial reports.[71]

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63 http://www2.ohchr.org/english/bodies/crc/index.htm
64 *See* General Comment No. 10, Section II: The Objectives of the Present General comment, CRC/C/GC/10, 25 April 2007.
65 *Ibid*., Section III: Juvenile Justice: The Leading Principles of a Comprehensive Policy.
66 *Ibid*., Section IV: Juvenile Justice: The Core Elements of a Comprehensive Policy.
67 UN Study on Global Violence against Children: 2005, This study provides for the first time a comprehensive global view of the range and scale of violence against children.
68 http://www2.ohchr.org/english/bodies/ratification/11.htm
69 "Presentation of the South Africa Country Progress Report on the Implementation of the Convention on the Rights of the Child" at http://www.gcis.gov.za/media/minister/000125.htm.
70 *Ibid.*
71 South Africa's 2nd Children's Rights Country Report to the UN Committee on the Rights of the Child: 2006.

South Africa also ratified the first and second optional protocols on 30 July 2003 and 8 February 2002, respectively. During this period the Committee made its observations and recommendations and posed questions to the government. South Africa responded to these questions in its Supplement to the Initial Country Report, which is a follow-up to the Initial Country Report of January 2000.[72]

South Africa's second country report was due in the year 2002 and the third country report was due in the year 2007. At the end of 2007, both reports were still outstanding. Despite indications that the second country report would be submitted during 2007, this did not occur. South Africa has also not complied with its Optional Protocol reporting requirements.

During 2007, there were several significant legislative developments in South Africa regarding children's rights. The Sexual Offences Act[73] redefines sexual crimes against adults and children and creates a range of new sexual offences against children in the areas of exploitation, trafficking, and child pornography. There are concerns that the Act does not go far enough in protecting child witnesses in sexual offence cases.[74]

The Children's Amendment Bill made its way through Parliament during the course of 2007. The Bill addresses the right to family or appropriate alternative care; social services; and protection from abuse or maltreatment. The National Assembly passed the Children's Amendment Bill on 6 November 2007. However, moments prior to passing the Bill, the Assembly removed a prohibition on the use of corporal punishment in the home, purportedly for technical reasons. The Bill is yet to be finalised by the Parliament's Second House, the National Council of Provinces (NCOP). The Commission has been very active in its support for a total ban on corporal punishment.[75]

In late December 2007 the long awaited Child Justice Bill was returned to Parliament, and it is anticipated that it will be processed during 2008. The Bill focuses on restorative justice, keeping young offenders out of prisons, integration of young offenders into families and communities, and diversion. The Bill is important considering the ongoing concerns for the high numbers of children in prisons.[76]

During 2007, the Department of Social Development worked on developing a yet to-be-finalised strategic framework for children with disabilities. Also, the National Task Team on Child Abuse and Neglect is in the process of developing a strategy document. The Commission is involved in both of these processes.

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72 *See* "Implementation of the Convention on the Rights of the Child" at http://www.children.gov.za/Publications/policies3.htm.
73 Sexual Offences Act [Act 32 of 2007], available online at http://www.southafrica.info/public_services/citizens/your_rights/sexual-offences-bill3.htm
74 Lee Rondganger, *Tough new sex law means no more teen kisses*, Cape Times, p. 1, 17 Dec. 2007.
75 http://www.sahrc.org.za/sahrc_cms/publish/article_283.shtml
76 http:/fs/www.childlinesa.org.za/ChildrensRights.htm

The violation of children's rights continues to receive media attention. In October 2007, a newspaper exposé revealed that children were being mistreated at the Soweto Chris Hani-Baragwanath Hospital.[77] The article alleged that several newborn babies were placed in cardboard boxes as a result of budget cuts at the hospital. In addition, the hospital recorded a large number of maternal and infant deaths in 2006 and 2007. The Commission continues to receive a number of child rights violations related to equality and access to social security.

INTERNATIONAL CONVENTION ON THE PROTECTION OF ALL MIGRANT WORKERS AND MEMBERS OF THEIR FAMILIES

The Committee on Migrant Workers

The International Convention on the Protection of All Migrant Workers and Members of their Families (ICRMW) firmly establishes the economic, social, cultural, civil and political rights of all persons who are currently engaged or will engage in employment in a country of which they are not a national. The Committee on Migrant Workers (CMW) monitors the ICRMW and it is the newest treaty body of the United Nations. The ICRMW entered into force on 1 July 2003 and the CMW held its first session in March 2004. The CMW is comprised of ten committee members and meets once a year in Geneva, Switzerland. One new member, Ms Myriam Poussi Konsimbo (Burkina Faso), was elected to the Committee and commenced duties in 2007.

State parties must report to the CMW one year after acceding to the Convention and every five years thereafter. In 2007, the Committee only reviewed the state report of Ecuador. After considering this report, the CMW emphasised the need to protect particularly vulnerable groups of migrants, especially children, and recommended that steps be taken to eliminate hazardous forms of labour for migrant children, to prevent commercial sexual exploitation of migrant children, and to ensure that migrant children involved in trafficking and/or prostitution are properly treated as victims. In the future, the Committee may also be able to consider individual complaints, pending the acceptance of this procedure by at least ten state parties.

South Africa and the ICRMW

South Africa has neither signed nor ratified the ICRMW and is thus not bound by the Convention's obligations. Nationals of neighbouring African countries, particularly Zimbabwe, Mozambique, and Lesotho continue to migrate in large numbers to South Africa due to its relative prosperity in the region. Although the Immigration Act[78] seeks to limit this trend by setting out stringent admission criteria, many who do not meet these requirements still enter the country and work illegally. Undocumented workers are often relegated to menial jobs in hazardous conditions where they are increasingly vulnerable to abuse and exploitation due to an inability to seek recourse from the authorities because of their immigration status.

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77 http://www.sahrc.org.za/sahrc_cms/publish/article_282.shtml
78 No 13/2002.

Undocumented migrants who are detected by the authorities are returned to their countries of origin, often passing through the Lindela Detention Centre. The Commission in conjunction with non-governmental organisations monitors the conditions of detention. However, a number of complaints of prolonged detentions continue to be received.[79] In May 2007, the Commission assisted a group of 40 Ethiopians who had been detained in Lindela for more than the requisite 90 day period as set out in the Immigration Act.[80]

In August 2007, the Commission undertook a fact-finding and monitoring visit to the Zimbabwe-South Africa border area and visited a holding facility, located just outside Musina town, run by the South African Police Service (SAPS) to detain undocumented migrants pending deportation. The Commission noted and brought to the attention of both the SAPS and the Department of Home Affairs (DHA) that the police were irregularly carrying out deportations whilst this function belongs to the DHA. This has since been rectified.

There is no official regular monitoring system of places of detention although some monitoring is currently carried out by the Commission and local non-governmental organisations and advice offices. Authorities are currently building a bigger facility to accommodate the increasing numbers of Zimbabweans who are arrested, detained, and deported.[81]

UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

Recent International Developments

The Convention on the Rights of Persons with Disabilities is a treaty that ensures that persons with disabilities are able to exercise the same rights as all other persons and receive the accommodation required to do so. The Convention was opened for signing on 30 March 2007. South Africa signed the Convention and its Optional Protocol that same day and ratified these instruments on 30 November 2007.[82] As of 31 December 2007, 120 countries signed the Convention and 14 ratified it.[83] The Optional Protocol has been signed by 67 countries and ratified by eight.[84]

The Convention will come into effect when it has been ratified by 20 countries.[85] The Committee on the Rights of Persons with Disabilities will be formed at that time.[86] As one of the first 20

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79 Statistics from Lindela/DHA for Jan-Oct 2007, with one person detained for 527 days. Reasons mainly relate to the difficulties of national verification, lack of cooperation by foreign embassies or the stringent rules they have in what type of assistance to render their nationals who are in contravention of South African's immigration laws.

80 Section 34 of the Immigration Act 13/2002.

81 IRIN "Stop Zimbabwean deportations say refugee organizations" http://www.irinnews.org/report notes that from Jan-July 2007, 117737 people were processed as deportees on the Zimbabwean side

82 United Nations Enable, Countries that have Ratified the Convention, http://www.un.org/disability/default.asp?id=257. United Nations Enable, Countries, http:///.un.org/disabilities/countries.asp?navid=12&pid=166. The other 13 countries to have ratified the Convention are: Bangladesh, Croatia, Cuba El Salvador, Gabon, Hungary, India, Jamaica, Mexico, Namibia, Nicaragua, Panama, Spain. United Nations.

83 United Nations Enable, Countries, http:///.un.org/disabilities/countries.asp?navid=12&pid=166. The other countries to have ratified the Optional Protocol are: Croatia, El Salvador, Hungary, Mexico, Namibia, Panama and Spain. *Id*. United Nations Enable, Countries, http:///.un.org/disabilities/countries.asp?navid=12&pid=166

84 Convention on the Rights of Persons with Disabilities, Art. 45(1)

85 *Idem*, Art. 34.

86 Ibid

countries to ratify the Convention, South Africa will be able to nominate its nationals as committee members to the initial committee.[87] Countries will be required to submit reports to the Committee a minimum of every four years, with additional reports required if requested by the Committee.

South Africa and the UNCRPD

During 2007, various government and non-governmental organisations in South Africa have been involved in raising awareness around the Convention and disability rights. For example, the Western Cape celebrated the International Day of Persons with Disabilities with a large event and a march protesting the failure of business to achieve employment targets for persons with disabilities. The Commission also designed a Toolkit for training and awareness raising on the Convention, which was launched at a conference in December.

There is urgent need to redress violations of disability rights. Children with disabilities, for example, often face major barriers to education, including the refusal to accommodate them in mainstream schools. There are also insufficient places available in special schools, particularly for learners with multiple disabilities. There are also long delays in processing the necessary paperwork for admittance to these special schools.[88]

Physical accessibility for persons with disabilities continues to be a major challenge in South Africa. Despite legislation, inaccessible buildings continue to be constructed. Additionally, the public transportation system is virtually impossible for persons with paraplegia.[89] As a result, a report in 2007 stated that it is "highly unlikely that South Africa's government and tourism industry would be ready to accommodate an estimated one million disabled visitors to the 2010 World Cup."[90]

Employment also continues to be a major area of concern, with the 2007 Employment Equity Report finding that persons with disabilities made up only 0.3% of persons who were recruited during the report period. An estimated "1.4 million people receive disability grants, but the department has determined that as many as 64 percent of them could actually work if there were opportunities for them."[91] Bias against persons with disabilities is also evident. For example, a 2007 study found that South Africans underestimate the capacity of persons with mental disabilities.[92]

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87 Idem, Art. 35(2).
88 *See, e.g.,* Candes Keating, Special Needs Facilities Dwindle, Cape Argus, 4 Feb 2008, p. 4 (discussing ongoing problems with special needs education in the Western Cape).
89 Tsabeng Nthite, We're in cul-de-sac with taxis, say disabled, page 2 of Pretoria News on December 20, 2006 http://www.iol.co.za/index.php?set_id=1&click_id=594&art_id=vn20061220025834687C151891 (discussing the situation of a man who was refused access by a taxi); Melanie Peters, Disabled 'have very little to celebrate', IOL 2 Dec 2007 at http://www.iol.co.za/index.php?set_id=1&click_id=3045&art_id=vn20071202082830114C15090
90 2010 readiness for disabled 'unlikely', IOL, March 28 2007, available at http://www.iol.co.za/index.php?set_id=1&click_id=139&art_id=nw20070328144410303C125655
91 Christina Gallagher and Sheree Russouw, Social grants given dependency shake-up , The Star, Jan 27 2007, available at http://www.iol.co.za/index.php?set_id=1&click_id=594&art_id=vn20070127092407406C661563
92 Linda Mbongwa, Intellectual disability exists - what is it?, The Star, p. 9, available at http://www.iol.co.za/index.php?set_id=1&click_id=139&art_id=vn20070502004325283C144160.

During 2007, the Commission handled complaints of discrimination against persons with disabilities and brought a case to the Hermanus Equality Court regarding access to a shopping centre at the Village Square Centre.[93] The Commission is also engaged in Equality Court litigation against a local airline that charges an extra fee to persons with physical disabilities who need to make use of the Passenger Aid Unit when taking a flight. The Commission is receiving a number of cases regarding access to education of children with mental disabilities.

Finally, the long-standing debate concerning the status of Sign Language took a step forward in 2007 with a submission to the Joint Constitutional Review Committee by the Deaf Federation of South Africa (DEAFSA) for Sign Language to be added to the country's list of official languages.[94] The request has been referred by the relevant parliamentary committee to the executive to investigate the feasibility of doing so.[95]

INTERNATIONAL CONVENTION FOR THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCE

On 20 December 2006, the newest Convention, the International Convention for the Protection of All Persons from Enforced Disappearance was adopted by the United Nations General Assembly and opened for signing on 6 February 2007. By December 2007, 71 countries had signed the Convention, and four had ratified the Convention.[96] The Convention will enter into force when it is ratified by 20 countries. Upon entry into force, the Convention provides for the establishment of a Committee on Enforced Disappearances, which will carry out the functions under this Convention.[97]

This Convention is significant as it defines enforced disappearances as a human rights violation and imposes a duty on state parties to criminalise such acts. The Convention recognises the right of families to know what happened to victims and also the right to reparations for victims of enforced disappearances. The Convention is novel in that family members are also recognised as victims. South Africa has yet to sign or ratify the Convention.

RECOMMENDATIONS

- South Africa should ratify the ICESCR, OPCAT, ICRMW, and ICPED as soon as possible as they are important sources of protection for human rights. Doing so would be an important step toward demonstrating South Africa's ongoing commitment to improving human rights for all persons, particularly victims of torture, migrant workers, and the disabled.

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93 See, e.g. Access for Citizens Committee: WC/26/244-bs.
94 PMG, Joint Constitutional Review Committee, DEAFSA Submission, 25 May 2007, available at http://www.pmg.org.za/viewminute.php?id=9049; *see also* Janine Stephen, SA may get a 12th language, Cape Times, 15 June 2007, p. 3, available at http://www.iol.co.za/index.php?set_id=1&click_id=3015&art_id=vn20070615002716827C79440
95 Ibid.
96 Albania, Argentina, Mexico, Honduras
97 *See* Article 26, International Convention for the Protection of All Persons from Enforced Disappearance.

- South Africa should ensure that all outstanding reports are completed and delivered to the Treaty Bodies (ICCPR, supplementary ICERD and CAT, CEDAW and CRC).
- The Commission should maintain a leadership role in monitoring the government's performance in relation to its international treaty obligations. The Commission must also continue to engage with stakeholders, raise public awareness, encourage government commitment on these issues and submit NHRI reports to Treaty Bodies.
- South Africa should criminalise torture and establish a National Preventative Mechanism (NPM) in terms of compliance with OPCAT.
- South Africa should criminalise hate speech and other forms of hate crime. These are important and necessary steps to address xenophobia and discrimination.

CONCLUSION

While South Africa has made significant progress in promoting, protecting and monitoring human rights, continued work is still necessary to bring the country into full compliance with its treaty obligations. South Africa is still a new entrant within international circles and is held in high regard in the international community for its successful transition from apartheid to constitutional democracy. The time has come to demonstrate to the international community that there is the political will and capacity to take these international obligations seriously and, most importantly, to ensure the successful and full implementation of these treaty obligations.

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CHAPTER TWO:

CRIME AND HUMAN RIGHTS IN SOUTH AFRICA

INTRODUCTION

"*Crime and violence and their often devastating effects continue to engage South Africans in more ways than we could ever have envisaged fourteen years ago when we boldly crafted a new constitutional dispensation. From a variety of perspectives – confidence in the economy, moral regeneration, the dysfunction of many communities, schooling and education, governance and democracy and even the prospects for the 2010 World Cup – the prevalence of and the effect of crime becomes woven into the text and subtext of many a discussion on the state of our nation – sometimes warranted but often not.*"[98]

The scourge of crime continues to plague South Africa and public confidence in the government's ability to radically turn the tide is at an all-time low. Several surveys have indicated that South Africans of all races list crime as one of their major concerns which impacts negatively on their enjoyment of life, and their ability to realise their rights as provided for in the Constitution.[99] Although recent statistics have shown that crime is on a general downward trend, the actual number of crimes committed remains at unacceptable levels.[100] The violent nature of crime in South Africa is often highlighted, but white collar crimes, especially those committed by leaders of our business community, are also rampant and impact negatively on the rights of our citizens.

South Africans are bombarded on a daily basis with grim stories of violent crime. The nature of some of the violence being perpetrated upon victims defies any logic, whether it is pouring boiling water over the face of a woman whose house had just been burgled, raping and killing a child and then hiding her body in an attic, or burglars gluing a victim to his exercise bike. Jody Kollapen, Chairperson of the Commission, stated in his foreword to the Crime Conference Report, that "crime also affects the moral fibre of the nation, especially the morale of victims." It also has seriously prejudiced South Africa's profile at the international level. Crime has led to perceptions that the Constitution as well as the criminal justice system are criminal-friendly. There are also perceptions that "the transformation of the criminal justice system, in order to bring it in line with international human rights norms and standards, hampers law enforcement agencies from effectively dealing with crime in the country. These perceptions have led to the loss of faith in the entire criminal justice system to prevent and combat crime in the country."[101] Given these sentiments, an inescapable conclusion is that South Africans want crime to be dealt with as a matter of priority.

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98 Kollapen, J. *Crime, Violence and Social Justice*. Unpublished Paper. 2007

99 Burton P. *et al.* (2004). National Victims of Crime Survey South Africa 2003. *Institute for Security Studies*. Pretoria, pp. SABC/Markinor Survey. *Government Performance: Expectations and Perceptions.* (2005), at http://www.ipsos-markinor.co.za/news/government-performance-expectations-and-perceptions.

100 This is evident from the Crime Statistics that were released on 03 July 2007 that covered the reporting period April 2006 – March 2007, as well as the Crime Statistics that was released on 06 December 2007 that covered the period April 2007 – September 2007.

101 South African Human Rights Commission. *Crime and its Impact on Human Rights: Ten Years of the Bill of Rights.* Crime Conference Report, p.4. 2007.

In the majority of crimes that are committed in South Africa, the perpetrator and the victim are acquainted with each other.[102] As such, it can be safe to assume that crime, as it manifests itself in South Africa, is more of a social problem than a matter of inadequate policing. On the contrary, no sufficient evidence exists that increased policing by itself will sufficiently reduce the alarming levels of crime in the country. According to Jamrozik and Nocella "… the term 'social problem' applies to social conditions, processes, societal arrangements or attitudes that are commonly perceived to be undesirable, negative and threatening certain values or interests such as social cohesion, maintenance of law and order, moral standards, stability of social institutions, economic prosperity or individual freedoms."[103] To be considered a social problem, there must be a general acceptance that such a problem can be overcome through concerted joint efforts by the society affected by it. In his State of the Nation address, President Thabo Mbeki stated that "*none of the great social problems we have to solve is capable of resolution outside the context of the creation of jobs and the alleviation and eradication of poverty*."[104] The emphasis of the President of looking at crime from a social perspective is welcoming, given the fact that an over reliance on criminal justice processes provides no guarantee of creating a more peaceful society.

Legislative and policy interventions during 2007 had been minimal despite talks of a restructuring of the criminal justice system. Great concern was raised when the ruling African National Congress passed a resolution at its 52nd Conference asking for the disbanding of the Directorate of Special Operations, better known as the Scorpions, despite the unit's effectiveness. The suspension of Vusi Pikoli, head of the National Prosecuting Authority, caused a frenzy in the legal community, with some pundits declaring that it makes up a constitutional crisis.[105]

This chapter will look at the levels of crime in South Africa by analysing the most recent crime statistics, as well as taking a closer look at legislative and policy developments in 2007. It will further scrutinise South Africa's response to the African Peer Review Mechanism Report which was highly critical of the levels of crime in South Africa. The Justice, Crime Prevention and Safety Cluster's activities will also be discussed as well as a special look at crimes perpetrated by businesses. The chapter will conclude with critical recommendations that will assist in positively addressing the scourge of crime.

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102 According to a sample police docket analysis conducted by the South African Police Service in 2007, victims and perpetrators knew each other in 89% of reported common assault cases, 82% of murder cases, and 76% of all reported rape cases.

103 Jamrozik, A. and Nocella, L. *The Sociology of Social Problems. Theoretical Perspectives and Methods of Intervention*. Cambridge University Press, p. 36. 1998.

104 State of the Nation Address of the President of South Africa, Thabo Mbeki: Joint Sitting of Parliament, 09 February 2007.

105 The initial reason given for Mr Pikoli's suspension was that the irrevocable breakdown of the relationship between him and the Minister of Justice and Constitutional Development, Ms Brigitte Mbandla. Mr Pikoli's suspension became embroiled in controversy after it was discovered that the Directorate for Special Operations (Scorpions) had obtained a warrant of arrest against the National Commissioner of Police, Jackie Selebi, with Mr Pikoli's approval. According to the Constitution, the National Director of Prosecutions exercises his authority to institute criminal prosecutions independent of anybody, and many believed that his suspension was interference in such independence.

CRIME STATISTICS

The crime statistics that are released by the South African Police Service reflect only crimes that are reported to the police. It is widely accepted that crime remains under-reported in South Africa, with the major reasons advanced for this state of affairs being the lack of trust of the people in our criminal justice system, the inaccessibility and lack of user-friendliness of police stations, and the harsh treatment of victims of crime when they come into contact with the criminal justice system. The police also released crime statistics on a six-monthly basis for the first time in 2007 which is a positive development as they adhered to calls for a more frequent release of crime statistics.

The first crime statistics were released on 03 July 2007, which covered the period April 2006 – March 2007. The following table gives a good synopsis of the crime situation in its various categories:

Crime Statistics (Sourced from South African Police Service)

Crime Category	**April 2001 – March 2002**	**April 2002– March 2003**	**April 2003 – March 2004**	**April 2004- March 2005**	**April 2005 – March 2006**	**April 2006 – March 2007**
Murder	21 405	21 553	19 824	18 793	18 545	19 202
Attempted murder	31 293	35 861	30 076	24 516	20 553	20 142
Rape	54 293	52 425	52 733	55 114	54 926	52 617
Indecent assault	7 683	8 815	9 302	10 123	9 805	9 367
Assault with the attempt to inflict grievous bodily harm	264 012	266 321	260 082	249 369	226 942	218 030
Common assault	261 886	282 526	280 942	267 857	227 553	210 057
Common Robbery	90 205	101 537	95 551	90 825	74 723	71 156
Robbery with aggravating circumstances	116 736	126 905	133 658	126 789	119 726	126 558
General aggravated robbery (subcategory of aggravated robbery)	96 963	96 166	105 690	100 436	91 068	92 021
Carjacking (subcategory of aggravated robbery)	15 846	14 691	13 793	12 434	12 825	13 599
Truck hijacking (subcategory of aggravated robbery)	3 333	986	901	930	829	892
Robbery at residential premises (subcategory of aggravated robbery)	N.A.	9 063	9 351	9 391	10 137	12761
Robbery at business premises (subcategory of aggravated robbery)	N.A.	5 498	3 677	3 320	4 387	6 689

Robbery of cash in transit (subcategory of aggravated robbery)	238	374	192	220	385	467
Bank robbery (subcategory of aggravated robbery)	356	127	54	58	59	129
Arson	8 739	9 186	8 806	8 184	7 622	7 858
Malicious damage to property	145 451	157 070	158 247	150 785	144 265	143 336
Burglary at residential premises	302 657	319 984	299 290	276 164	262 535	249 665
Burglary at business premises	87 114	73 975	64 629	56 048	64 367	58 438
Theft of motor vehicle and motorcycle	96 859	93 133	88 144	83 857	85 964	86 298
Theft out of or from motor vehicle	199 282	195 896	171 982	148 512	139 090	124 029
Stock theft	41 635	46 680	41 273	32 675	28 742	28 828
Illegal possession of firearms and ammunition	15 494	15 839	16 839	15 497	13 453	14 354
Drug-related crime	52 900	53 810	62 689	84 001	95 690	104 689
Driving under the influence of alcohol or drugs	24 553	22 144	24 886	29 927	33 116	38 261
All theft not mentioned elsewhere	576 676	620 240	606 460	536 281	432 629	415 163
Commercial crime	58 462	56 232	55 869	53 931	54 214	61 690
Shoplifting	68 404	69 005	71 888	66 525	64 491	65 489
Culpable homicide	10 944	11 202	11 096	11 995	12 415	12 871
Kidnapping	4 433	3 071	3 004	2 618	2 320	2 345
Abduction	3 132	4 210	4 044	3 880	3 345	3 217
Neglect and ill-treatment of children	2 648	4 798	6 504	5 568	4 828	4 258
Public violence	907	1 049	979	974	1 044	1 023
Crimen injuria	60 919	63 717	59 908	55 929	44 512	36 747

The crime statistics released for the period 2006–2007 show an overall reduction of 2.6% for all reported crime.[106] The actual number of crimes committed, however, still remained alarmingly high. Of particular concern was the rise of contact crimes, especially murder, robbery with aggravating circumstances, burglary at residential premises, hijackings and robbery at residential premises. Murder increased by 2.4% in 2006/2007. Robbery with aggravating circumstances increased by 4.6% and cash-in transit robberies by 21.9% while hijackings increased by 6% and bank robberies increased by a staggering 118.6%.

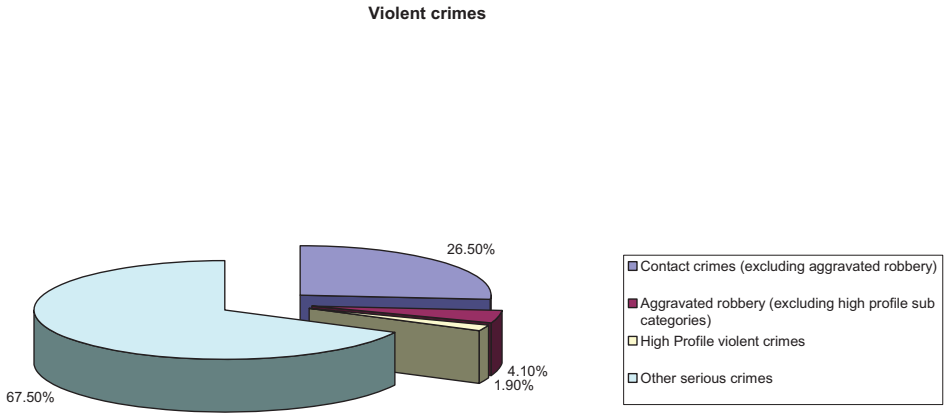
106 Violent crime has been reduced by 3.4% within the last five years per SAPS statistics covering that period.

The above statistics also illustrate that social contact crimes remain unacceptably high. Social contact crime is defined as crime that happens between people who are acquainted with each other. A sample docket analysis undertaken by the South African Police Service indicated that perpetrators and their victims knew each other in 89% of cases involving assault with the intention to inflict grievous bodily harm.[107] They also knew each other in 89% of common assault cases, 82% of murder cases, and 76% of reported rape cases. These figures clearly point to a serious problem of social cohesion which is mainly beyond the policing capability of the South African Police Service. It also clearly illustrates the negative attitude that so many South Africans harbour towards their fellow citizens.

The first six-monthly statistics, covering the period 01 April 2007–30 September 2007 was released on 06 December 2007. The Commission was cautiously encouraged by the decrease in reported crime as indicated in the crime statistics. The Commission, however, still finds the sheer number of offences committed to be unacceptable. This is exacerbated by the massive under-reporting of crime which scathingly speaks to the continued mistrust and unwillingness of South African citizens to avail themselves to the protection of the state.

Specifically encouraging was the decrease in contact crimes committed, most notably murder which went down by 6.5%, attempted murder which went down by 7.6%, common robbery which went down by 12.2%, and robbery with aggravating circumstance which went down by 9.7%. The statistics also show encouraging signs with regard to the decrease in burglaries at residential premises which went down by 7.9%, and theft of motor vehicles which went down by 10%. Of particular concern was the increase of robberies and burglaries at business premises which went up by 29.3% and 3.4% respectively. South Africans also still remain unsafe at their homes as robberies at residential premises had increased by 7% for the 6 months covered.

107 South African Police Service Annual Report 2005/2006, p.56.



Pie Chart[108]

The increase in the detection of drug-related crimes and driving under the influence of alcohol or drugs should most probably be ascribed to more vigilance and increased police activities as these crimes depend heavily on police action for detection. It is also apparent from the released crime statistics that special initiatives undertaken by the police, like Operation Trio in Gauteng, are bearing fruit. Operation Trio has resulted in a 2.4% decrease in car-jackings in Gauteng (KwaZulu-Natal showed a 8.6% increase over the same period); a 7.7% decrease in robberies at residential premises (KwaZulu-Natal showed a 32.5% increase); and only a 2.6% increase in robberies at business premises (KwaZulu-Natal showed a 71% increase, and the North West, the Eastern Cape and the Western Cape showed a 47.6%, 112.3% and a 168.5% increase respectively). These figures clearly show the need to share success stories and to replicate police efficiencies in the various provinces with the necessary changes to suit unique provincial circumstances.

Although crime statistics cannot provide a full picture of the real extent of crime in South Africa, they nonetheless provide valuable insight into crime in general, especially crime patterns and trends. The crime statistics in their current form, however, leaves much to be desired and there exists a real need for improved crime statistics. South Africa must produce co-ordinated and joint crime statistics which will include data from the South African Police Service, the Department of Justice and Constitutional Development as well as the Department of Correctional Services. It is important to ascertain how many reported cases make it to prosecution as it correlates with the efficiency of the criminal justice system. For example, the British Crime Survey is a large-scale

108 Data provided by the South African Police Service, and covers the period April 2007–September 2007.

victim survey conducted annually by the British Home Office. The combination of these statistics with the statistics from the police and the courts provide a better picture of the extent of crime in Britain. A similar approach in South Africa may assist in developing a better sociological understanding of crime.

In South Africa, as in the majority of other countries in the world, the collation of crime statistics favours measurement over description. In other words, crimes are merely recorded for statistical purposes in a generic sense. As an example, when a person is stabbed with a knife, the only recording that will be made is "assault with the intent to inflict grievous bodily harm." A description of the circumstances under which it happened is not recorded. While this approach gives the lay person a better understanding and grasp of the extent of crime in the country, it does not promote the effective use of such data in policy formulation.

Other ways of improving our crime statistics may involve:

- Police detection rates in statistics (i.e. Crime that is actually detected by police as opposed to the public);
- Number of offenders cautioned;
- Number of offenders convicted and sentenced;
- The nature of the sentences; and
- Breaking the statistics up by offence, age and sex of the offender, as well as family income level so as to ascertain the underlying class dynamics at play with regard to crime.

LEGISLATIVE AND POLICY DEVELOPMENTS

Many of the legislative and policy developments of 2007 related to crime have placed a lot of emphasis on the plight and the need to protect the rights of victims of crime. Some of the major legislative and policy developments of 2007 include the Criminal Law Amendment Bill, Service Charter for Victims of Crime and the proposed restructuring of the criminal justice system.

Criminal Law (Sentencing) Amendment Bill [B15-2007]

The Criminal Law Amendment Bill [B15-2007] aims to expedite the finalisation of serious cases, and also seeks to avoid secondary victimisation of complainants which often occurs when vulnerable witnesses have to repeat their testimony in more than one court. This is especially onerous when the complainants are children. In terms of the proposed amendments, regional courts will be granted jurisdiction to impose life sentences, thereby eliminating the requirement of having to refer a case to the high court for sentencing purposes. To mitigate this new power bestowed on regional courts, convicted persons will have an automatic right of appeal when they are sentenced by a regional court to a sentence of life imprisonment.

In terms of the Bill, when a sentence must be imposed in respect of the offence of rape, none of the following shall constitute substantial and compelling circumstances, justifying the imposition of

a lesser sentence, namely:

- Any previous sexual history of the complainant,
- An accused person's cultural or religious beliefs about rape, or
- Any relationship between the accused person and the complainant prior to the offence being committed.

The Bill is to be applauded for its provisions regarding secondary victimisation of complainants, especially in cases of a sexual nature, or where minors are involved. It is hoped that this will aid the cause of encouraging victims to report rape cases and lay charges against their violators.

The Bill was referred to the Justice and Constitutional Development Portfolio Committee, which in turn voted on 21 November 2007 to reject the amendments proposed by the National Council of Provinces dealing with the unintended consequences of the provisions of the Bill. The Portfolio Committee instead agreed that the Department of Justice should, within 24 months, review and report to the Portfolio Committee whether there had been any unintended consequences pertaining to the proposed amendments. The Bill is set to pass in early 2008.

The Criminal Law Amendment Act 105 of 1997 (hereinafter referred to as the Act), which came into operation on 1 May 1998, deals with the abolition of the death penalty and created a legal regime of discretionary minimum sentences in respect of certain serious offences. Sections 51 and 52 of the Act make provision for the imposition of minimum sentences in respect of serious offences. These offences are categorised in terms of their degree of seriousness and are listed in Parts I-IV of Schedule 2 to the Act. In terms of section 51 (3), a high court or regional court is given a discretionary power to impose a lesser sentence, if satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the prescribed minimum sentence.

The constitutional validity of both sections 51 and 52 of the Act was tested in 2000 (*State v Dzukuda)*[109] and 2001 *(State v Dodo),*[110] respectively. These cases dealt with two major challenges on two different grounds, namely an accused's right to a fair trial and the independence of the judiciary. The Constitutional Court rejected both these challenges. The Constitutional Court in Dzukuda held that "it had not been established, either for the reasons furnished in the High Court judgment, or for any other reason, whether taken individually or collectively that the provisions of section 52 of the Act limited an accused's right to a fair trial under section 35 (3) of the Constitution."[111] The Constitutional Court in Dodo, in interpreting the words "substantial and compelling circumstances" in section 51 (3) of the Act endorsed the step-by-step sentencing procedure set out in *S v Malgas* (2001).[112] The Court held in this regard that

109 *S v Dzukuda and Others* 2000 (4) SA 1078 (CC).
110 *S v Dodo* 2001 (3) SA 382 (CC).
111 AD paragraph 60.
112 *S v Malgas* 2001 (2) SA 1222 (SCA).

the interpretation of the Supreme Court of Appeal "steers an appropriate path, which the Legislature doubtless intended, respecting the Legislature's decision to ensure that consistently heavier sentences are imposed in relation to the serious crimes covered by section 51 and at the same time promoting the spirit, purport and objects of the Bill of Rights."[113]

In dealing with the issue of the separation of powers and the court's role in sentencing, the court concluded as follows: "While our Constitution recognises a separation of powers between the different branches of the state and a system of appropriate checks and balances on the exercise of the respective functions and powers of these branches, such separation does not confer on the courts the sole authority to determine the nature and severity of sentences to be imposed on convicted persons. Both the legislature and the executive have a legitimate interest, role and duty, in regard to the imposition and subsequent administration of penal sentences."[114]

The Constitutional Court in both instances dismissed the constitutional challenges against these provisions and upheld the constitutional validity of the Act. Despite the fact that the legislation has been found to be constitutionally sound, certain practical problems with the application of sections 51 and 52 have been identified, based on inputs by the judiciary, the National Prosecuting Authority and other stakeholders. The Bill aims to address these practical problems whilst retaining the principles underlying the Act.

Service Charter for Victims of Crime

The Service Charter for Victims of Crime, commonly known as the Victims Charter, was adopted by Cabinet in 2004 to give added protection to victims of crime, whose rights were widely perceived by the public to have been subsidiary to those of their perpetrators. The implementation of the Victims Charter was held back until a national implementation plan was finalised.

The National Implementation Plan for Victims of Crime represents the government's commitment to the realisation of the rights for victims and is a blueprint upon which government departments will provide services and interventions in an attempt to make abstract rights a living testament to the Constitution.

The Victims Charter affirms existing rights afforded to victims of crime contained in the Constitution, and other legislation such as the Criminal Procedure Act 51 of 1977 and the Witness Protection Act 112 of 1998. Essentially the Victims Charter affirms the rights of all victims of crime to ensure that they are central and not subsidiary to the criminal justice system. The seven rights contained in the Victims Charter include:

113 AD paragraph 54.
114 AD paragraph 67.

- The right to be treated with fairness and with respect to dignity and privacy;
- The right to offer information;
- The right to receive information;
- The right to protection;
- The right to assistance;
- The right to compensation; and
- The right to restitution.

The National Implementation Plan to the Victims Charter was drafted by an inter-departmental committee representing the departments of Justice and Constitutional Development; the National Prosecuting Authority, Correctional Services, Social Development, Health, the South African Police Service, Government Communications and Information Service, as well as the Commission.

The Commission recognised the rights of victims of crime as human rights, and given the high incidents of crime in our country, it was appropriate for the Commission to ensure that it also focused on advancing the rights of victims of crime. In this regard, in March 2006, the Commission hosted a Seminar on the Victims Charter to which a variety of stakeholders were invited. The Commission also hosted a successful national conference on *Crime and its Impact on Human Rights* during March 2007 and appointed a Co-ordinator for Human Rights and Crime to streamline, co-ordinate and drive the activities of the Commission in relation to human rights and crime, as well as to provide support within the Commission to develop a human rights-based response to crime.

In responding to the challenges of the Victims Charter, the Commission has chosen an approach to ensure that the work relevant to and arising out of the Charter is integrated into all its functions in accordance with its core mandate of promoting, protecting and monitoring human rights.

Proposed Restructuring of Criminal Justice System

The Sunday Times[115] reported an unpublished policing plan by the National Police Commissioner, Jackie Selebi. According to the paper, the document contained findings that:

- Conviction rates are low due to the poor quality of investigations by detectives;
- Some policemen are corrupt as they enter the force; and
- Many recruits do not pass even a basic psychometric test – although the standard of testing is low – and many are accepted into the force despite failing to meet all the minimum requirements.

115 Govender, P. In *Sunday Times, 28* 0ctober, 2007. "Criminals rule the roost, cops admit."

According to the Sunday Times, some of the more substantive proposals of the plan include:

- A comprehensive 12-point plan detailing how investigations should be conducted and improving the ability of police detectives to assess crime scenes;
- Providing a 24-hour service, with proper management of crime scenes and ensuring that police take quality statements from witnesses and complainants;
- That decisions on case dockets be taken within 24 hours; and
- Addressing, with investigators, the number of dockets that are not court-ready and monitoring new and outstanding cases to ensure investigations are completed within a reasonable timeframe.

Commissioner Selebi also stated that the new strategy was designed to tap the full potential of commanders and police officers.[116]

The Cabinet also approved a seven-point strategy in November 2007 to address the problems that are afflicting the criminal justice system. According to The Sunday Independent, the new plan is "influenced by a British review of that country's criminal justice system and intends to empower those at the coalface – with crime-battered citizens the ultimate winners."[117] The article also quoted Johnny de Lange, Deputy Minister of Justice and Constitutional Development, as saying that the new strategy would strive to change the current system in a fundamental way, and would try to, inter alia improve the capacity of detectives, prosecutors and forensic experts. Some of the highlights of the plan include:

- Increasing the number of detectives in the police force to at least 25%, growing to an eventual 33%;
- An increase in facilities and equipment;
- Attracting and retaining experienced detectives as well as graduates;
- The introduction of new salary incentives to make the detective service a more specialised branch;
- The creation of new senior detective posts in designated courts;
- Employing detectives with a legal background*;*
- Expedited and appropriate training programmes;
- Increasing the number of forensic experts that deal with DNA, ballistics, fingerprints, crime-scene mapping and photography;
- Maintaining the services of experienced prosecutors; and
- Transforming the criminal court processes to ensure that trials are brought to a conclusion at a faster pace by especially clamping down on unnecessary postponements of cases.

116 Ibid.
117 *The Sunday Independent*. "It's war on crime," 11 November, 2007.

The above initiatives are to be welcomed, since they will definitely increase the ability of the police to fight crime more effectively. They will also help to ensure that crimes are solved more expeditiously, and to bring closure for victims of crime more swiftly. The government, however, did not commit itself to a timeframe which flies in the face of their ostensible commitment to turn the criminal justice system around as a matter of priority. Also absent is the setting of specific and measurable targets related to the reduction of crime in most categories.

In order to create a human rights-based approach to crime, the creation of a participatory legislative and policy framework is essential. Although many of these processes are institutionalised, especially with regard to the legislative framework, these processes remain elusive to a large sector of the South African society.

Since everybody in the country can be regarded as a victim of crime, the imperative for greater participation is so much bigger. For processes to be truly participatory, however, they have to be active, free and meaningful. It is therefore important for the government and civil society to act together at every single level in order to develop a sustainable policy with regard to creating an effective criminal justice system.

KEY DEVELOPMENTS

South Africa's Response to the African Peer Review Mechanism Report

The African Peer Review Mechanism Report (APRM Report) on South Africa stated that stakeholders have stressed the alarming rates of crime across South Africa.[118] In its official response to the APRM Report dated 18 January 2007, the South African government acknowledged that crime poses a serious challenge. The South African government continued to state the following in its response to the Report:

"… an impression should not be created that the Government is not taking steps to curb it [crime]. In addition to a number of initiatives, the Justice, Crime Prevention and Safety (JCPS) Cluster and Government Communications are working with the private sector and other stakeholders to formulate a National Anti-Crime Campaign focused on community mobilisation and improving popular partnership with the criminal justice system. Community police forums are expected to play a key role in the campaign which is aimed at strengthening society's hand in the fight against crime."[119]

It should be noted that the National Anti-Crime Campaign of the South African government only got off the ground in October 2007 when the Minister of Home Affairs, Nosiviwe Mapisa-Nqakula, organised a meeting with several stakeholders to set out the objectives of the campaign and to get relevant input from such stakeholders. The Commission also participated in that meeting and

118 African Peer Review Mechanism Report on South Africa, p.86 at paragraph 172.
119 Comments from the Government of South Africa to the African Peer Review Mechanism Report, p.17.

is convinced that the National Anti-Crime Campaign as articulated by the Minister is too narrowly construed with an over-emphasis on crime-related issues that afflict the Department of Home Affairs.

The Commission believes that a more co-ordinated approach involving other departments and civil society would be a better way to get an Anti-Crime campaign off the ground. The fact that this ad-hoc Anti-Crime campaign was launched so late in the year, devoid of any serious or meticulous planning, makes the South African government's pledge to strengthen society's hand in the fight against crime ring hollow.

The APRM Report also drew the government's attention to the following areas that require attention in order to fight corruption:

- Private funding of political parties;
- Post-public sector employment regulation;
- Bribery of foreign public officials by South African business persons;
- Improving the co-ordination and roles of the different anti-corruption bodies; and
- Promotion of the knowledge and application of key legislation in the anti-corruption framework, particularly access to information and protection of whistle blowers.

The South African government's response was that all the above areas, with the exception of the bribery of foreign public officials, are being addressed in the Public Service Anti-Corruption Strategy, the resolutions of the second National Anti-Corruption Summit and the National Anti-Corruption Programme.[120] The government also stated that they feel comfortable that the Prevention and Combating of Corrupt Activities Act of 2004 can adequately deal with South African business people who bribe foreign public officials. Despite the government's reference to the above strategies and programmes, its response to the APRM Report is conspicuously silent on whether or not these strategies and programmes are successful or have any effect on reducing the levels of corruption in the country.

South Africa was ranked 51st out of 163 countries in Transparency International's Corruption Index for 2006. Official corruption across government departments, but especially in the Department of Home Affairs, is widespread. South Africa is a signatory to the United Nations Convention against Corruption but is yet to become a signatory to the OECD Convention on Combating Bribery.[121] Perhaps, the time has come for the South African government to show its resolve in combating official corruption by acceding to the OECD Convention.

Justice, Crime Prevention and Safety (JCPS) Cluster

The Justice, Crime Prevention and Security (JCPS) Cluster is made up of the Departments of

120 Ad paragraph 109.
121 See chapter 1 in this report on Treaty Body Monitoring in South Africa.

Safety and Security, Correctional Services, and Justice and Constitutional Development. The JCPS Cluster is primarily responsible for the fight against crime, and releases reports on progress made on a two-monthly basis, that is, a yearly reporting schedule of six cycles.[122]

The JCPS Cluster listed the following as areas in which they achieved success in the fight against crime in 2007:[123]

- Crime prevention and public safety;
- Organised crime;
- Improving effectiveness of the criminal justice system;
- Upholding national security; and
- Planning for major events.

CRIME PREVENTION AND PUBLIC SAFETY

Contact Crimes

Various integrated cluster operations were conducted to reduce contact crimes in the priority station areas. Contact crimes refer to murder, attempted murder, rape, indecent assault, aggravated robbery, common assault and robbery. During the reporting period of 01 July 2007 to 30 September 2007, 3 339 law enforcement operations focusing on contact crimes were conducted and 30 515 arrests were made relating to contact crimes.

Interventions from Correctional Services

An Inmate Tracking System, amongst other initiatives, assists in tracking wanted criminals in correctional facilities. Video Arraignment Systems between correctional facilities and the courts were installed which prevent and minimise the risk of escapes by awaiting trial offenders, while being transported. This is useful for high risk criminals. Forty four courts aligned to twenty two correctional facilities have been established.

Management of Overcrowding

In August and September 2007, 4 805 sentenced offenders were released on parole, 509 offenders were sent to community corrections after serving 1/6th of their sentences while offenders who are regarded as posing little or no danger to society are increasingly being released to serve their sentences outside. For example, there are 20 137 awaiting trial detainees (ATDs) who were granted bail of less than R2000.00 in prison facilities, whose placement must be managed such that a balance is struck between public safety and the costs of keeping them in government facilities at R193.00 a person a day. These interventions are informed by the Department of Correctional Services' aim to prioritise aggressive and sexual offenders whose numbers are continuously increasing, constituting 63% of the ATDs and 72% of the sentenced offenders during the reporting period.

122 It is not, however, clear whether this cluster deals with crime related to xenophobic attacks. See Chapter 3 in this report on the right to equality for further analysis on xenophobia.
123 Excerpts from various briefings.

Public and Stakeholders Mobilisation

The Department of Correctional Services' drive to intensify public mobilisation for effective correction, rehabilitation and social re-integration reached new heights as they celebrated the second Corrections Week between the 15 and 19 October 2007. Some of the highlights of the week were:

- The signing of a memorandum of understanding with the Provincial Legislature of the Eastern Cape and the Women's Caucus;
- A crime prevention campaign run by the JCPS cluster in collaboration with the Social Sector cluster and NGOs targeting students from problematic schools, who were motivated not to exchange their school uniform for a uniform of shame worn by offenders;
- Partnerships with the business community as showcased during the official opening of a nearly R1 million business sponsored food processing plant at Pollsmoor Correctional Centre; and
- A moral regeneration campaign run in collaboration with various faith-based organisations where a collective decision was taken to collect over one million signatures of people committed to joining a national partnership against crime.

Railways

Four permanent contact points at railway stations where the public can report crime were established from April 2007 to June 2007. These are situated at Johannesburg, Denneboom in Pretoria, KwaMashu and Reunion in Durban – in response to crime experienced by rail commuters. There are currently 1 654 Railway Police members deployed nationally to combat crime in the rail transport environment. This is an increase of 454 from the previous reporting cycle.

Reservists

During the reporting period July – August 2007, 1498 paid reservists were called up and 4 522 new reservists were recruited. A number of ex-Commandos have joined the reservists. This will have a major impact in assisting the police to combat crime and increase police visibility.

Other Police Activities and Initiatives

The police continued with "flood and flush" operations in the nine provinces focusing on high-crime precincts. Daily Public Order Police deployments in support of the identified station areas (crime hot spots) yielded the following interventions in the quarter, July-September 2007: 5 061 roadblocks; 134 200 stop and search operations; 171 759 vehicle patrols; 7 956 firearms checked; 1 468 014 vehicles searched. Other notable initiatives include:

- Cross-referencing of records to identify repeat offenders;
- Establishment of provincial and cluster tracing teams;
- Co-ordination of investigations and prosecutions;
- Priority prosecutions for organised-crime suspects;

- Deployment of technology such as Morpho Touch, Mobile Computer-based notebook and other software analyses, as well as cell phone linkages; and
- Improved crime scene management and evidence gathering.

These initiatives have over a period of two months contributed to the arrest of more than 2 730 suspects in 2 582 cases.

IMPROVING THE EFFECTIVENESS OF THE CRIMINAL JUSTICE SYSTEM

SAPS Organisational Structure

The new SAPS provincial organisational structures, including functional structures were finalised and will be presented to Top Management and should be launched in early 2008.

Courts

A total of 22 additional courts are currently functioning in support of the case backlog reduction project. Twenty new sites were identified for development. This is in addition to the current twenty one development sites. Between 1 November 2006 and September 2007, 3 434 cases were permanently removed from the rolls through these additional courts. During the same period 2 199 cases had been finalised with a verdict of guilty in 79.9% of the cases, with 104 plea bargaining processes being concluded.

Training

Training was provided for lower court prosecutors and magistrates.

Children in Conflict with the Law

There has been progress with regard to the establishment of secure care centres for children in conflict with the law – in Bloemfontein in the Free State and Mogale City in Gauteng. Twenty thousand children have been diverted from the criminal justice system to these centres. Digital Court Recording Solutions were installed in all courtrooms, excluding children's courts which are fitted with CCTV systems.

ID Track and Trace System

The new ID track and trace system is being piloted as an internal management tool within the Department of Home Affairs. The project was designed to help to tighten security and to eliminate corruption.

Magistrates Conference

The Magistrates' conference held on 15–16 September 2007 was a milestone in many respects. For the first time, all levels of the judiciary met to discuss lower court transformation, and in particular, issues of accountability and independence. The concept of a single judiciary was also discussed in detail. Converging and conflicting views were presented. Overall, the conference was a dynamic space, alive with knowledge, intellect and passion for the social and judicial transformation.

Launch of the Victims Charter

The implementation plan of the Victim Services Charter was launched on the 8th of December 2007. The launch took place during the 16 Days of Activism campaign against women and child abuse. An integrated implementation plan attempted to show a commitment by the government to deliver victim-friendly services to those affected by crime.

UPHOLDING NATIONAL SECURITY

Sea Border Control

Bases were improved at Simonstown and Richards Bay for Sea Border Control.

Cargo Scanner

Negotiations were completed and an order placed for the first cargo scanner in Durban in May 2007 to help with the detection of illegal goods.

CRIME AND BUSINESS

The scourge of crime in South Africa is by no means limited to violent crime. The moral decay also manifests itself in the proliferation of crimes being committed in the business sector. The effect of this kind of crime is not always highlighted, but it is widely accepted that it also contributes to the denial and limitation of rights of South African citizens. What is also of concern is the relative impunity with which these so-called white collar crimes are being committed. There are, however, positive signs that the tide is turning and that a new urgency in tackling white collar crime is on the cards.

The Commission commenced its March 2007 Human Rights Month activities with focused community dialogues within the provinces in order to engage communities on the issue of fighting crime within the context of their specifically situated challenges. Several recommendations relevant to the business sector were made and tabled at the national conference referred to below, including the monitoring of alcohol sales, inter-sectoral programmes and awareness campaigns and increased partnerships among all community stakeholders.[124]

On the 22nd and 23rd of March 2007, the Commission held a conference on the theme of "Crime and its Impact on Human Rights: Ten Years of the Bill of Rights." Both Business Against Crime and AGRISA made presentations. Business Against Crime discussed the strategies, policies and partnerships underlying their commitment to fighting crime, emphasising partnerships between business and the government.[125] AGRISA then made representations on behalf of their agricultural sector members. Several recommendations were made, including proposal for the

124 See South African Human Rights Commission. *Crime and its Impact on Human Rights: Ten Years of the Bill of Rights*. Human Rights Month Report - Dialogues at 36–39, March 2007.

125 See South African Human Rights Commission. *Crime and its Impact on Human Rights: Ten Years of the Bill of Rights.* Crime Conference Report at 30-31, 22–23 March 2007.

establishment of a ministerial position located within the office of the Deputy Presidency to specifically focus on the fight against crime.[126]

The Competition Commission and the Bread Cartel

In December 2006, complaints were lodged with the Competition Commission by bread distributors in the Western Cape alleging price-fixing activities by, inter alia, Premier Foods, Pioneer Foods and Tiger Brands, which affected consumers directly.[127] In its press statement of the 12th of November 2007[128] the Competition Commission confirmed its finding that these actions contravened section 4 (1) (b) (i) of the Competition Act, 89 of 98 concerning prohibited restrictive horizontal practices, which provides that:

4. (1) "An agreement between, or concerted practice by, firms or a decision by an association of firms, is prohibited if:

(b) It involves any of the following restrictive horizontal practices:

(i) Directly or indirectly fixing a purchase price or any other trading condition."

Ismail Mukaddam, who runs a business in Elsies River near Cape Town, said that price-fixing "had an immediate impact on our business … and we had to pass that loss on to the consumers."[129] While COSATU stated that they would support an action against the perpetrators,[130]Tiger Brands chief executive blamed the illegal actions on "renegade" staff.[131]

Although fines will be imposed upon guilty parties, greater emphasis needs to be placed on the real cost of companies' anti-competitive behaviour from a human rights perspective. Firstly, anti-competitive behaviour should not be characterised as a more civilised form of illegal corporate activity. Anti-competitive practices taint businesses to the same extent as criminal findings of fraud and corruption perpetrated by companies and individual employees. Secondly, especially when dealing with basic commodities like bread, one cannot separate the illegal activities of companies from their impact on the economic and social rights of the communities who comprise their customer base and from whom they derive their profit. The human rights obligations of business and the impact of their policies and actions cannot be segregated from their core business.

The Effect of Crime on Small, Medium and Micro Enterprises

Addressing the issue of crime from a different perspective, it is important to note that individual businesses are also negatively affected by crime in South Africa. A short note in the press reminds us that small, medium and micro-enterprises are at great risk of suffering losses due to

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126 *Idem* at 32.
127 Competition Commission of South Africa. "Tiger Brands admits to participation in bread and milling cartels and settles with Competition Commission" http://www.compcom.co.za/resources/media2007.asp, 12 November 2007.
128 Ibid.
129 *Business Report.* "Bread distributors, Cosatu consider class action against Tiger Brands," http://www.busrep.co.za, 13 November 2007.
130 Ibid.
131 *Business Report.* "Bread maker to hand over dough," http://www.busrep.co.za, 13 November 2007.

crime.[132] In fact, a study conducted by Fujitsu Siemens Computers and Standard Bank between March and August 2007 revealed that one of the main concerns facing these businesses is that of crime and not financial fears.[133]

Corporate Fraud on the Rise

Another perspective from which to view the problem of crime and its impact is that of corporate fraud, having both internal repercussions for businesses and knock-on effects for consumers and stakeholders. In October 2007, Pricewaterhouse Coopers published its fourth biennial Global Economic Crime Survey.[134] The survey was undertaken in forty countries. More than 5 400 interviews were conducted with executives responsible for white-collar crime related monitoring and prevention activities.[135] The findings revealed that 72% of South African companies included in the survey were the victims of economic crime. This is significantly higher than the 42% global average.[136]

Although the incidence of economic crime in South Africa has decreased since the last survey, South Africa still recorded a figure higher than the global average.[137] Bribery and corruption are perceived to be the most prevalent crimes in South Africa, while money laundering is seen as being on the increase.[138] There has been a 110% increase in the number of economic crimes reported in South Africa,[139] and various detection mechanisms do not seem to serve as a deterrent to make a significant difference to the number of incidences uncovered.[140]

As for the future, the survey revealed that respondents were not optimistic, risk mitigation would remain a problem, and that mechanisms themselves were insufficient without an appropriately entrenched culture and ethical guidelines.[141]

Conference on Crime and its Impact on Human Rights

As mentioned above, the Commission hosted a conference entitled *Crime and its Impact on Human Rights* in March 2007. By hosting the Conference, the Commission wanted to contribute to the prevention and eradication of crime in South Africa. The Commission is also hopeful that the recommendations from the Conference would contribute to policy development and the adoption of new strategies by the government, law enforcement agencies, as well as communities in dealing with crime. The official conference report was launched on 24 October 2007 and was submitted to Parliament as well as other government departments and

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132 *Business Report*. "Crime, not finance, is top worry – survey," http://www.busrep.co.za, 3 October 2007.
133 *Ibid*. See Standard Bank, Fujitsu Siemens Computers *SME Survey: What Keeps you up at night?* October 2007 http://www.smesurvey.co.za/small_company_big_voice/.
134 http://www.pwc.com/extweb/home.nsf/docid/29CAE5B1F1D40EE385257 36A007123FD. See *Business Report*. "Corporate fraud on the rise," http://www.busrep.co.za, 16 October 2007.
135 PricewaterhouseCoopers Advisory Services (Pty) Ltd. *Economic crime: people, culture & controls.* October 2007. http://www.pwc.com/za/eng/pdf/pwc_global_crime_survey_report_07.pdf, at 2.
136 *Ibid*, at 2.
137 Ibid.
138 *Idem*, at 3.
139 Ibid.
140 *Idem*, at 4.
141 Idem, at 7.

stakeholders. The crime report contains a lot of recommendations which emerged out of various group discussions, and these include:

Improved Co-ordination of the National Crime Prevention Strategy and Crime Prevention Efforts.

There is a need to review the National Crime Prevention Strategy and policies and legislation should be revisited to improve integration, co-ordination and co-operation across the criminal justice system and ensure a more holistic approach to the participation of the Secretariat for Safety and Security in the Integrated Development Programmes, especially with regard to the role and empowerment of Community Policing Forums. In addition, the government should take the primary leadership responsibility to create an enabling environment to review the criminal justice system and explore how integration and co-ordination across the system could be strengthened. It was suggested that the co-ordination should take place at the office of the Deputy President.

Improved Police Efficiency and Effectiveness

Immediate steps should be taken to improve police effectiveness and efficiency, improve effectiveness and accessibility to the courts as well as systems to monitor and hold institutions accountable. This would include exploring mechanisms to create partnerships between communities and the government for the purposes of providing security to communities.

Improvement of Crime Statistics

While crime statistics are important and appreciated, it was also acknowledged that they are also challenging as they do not always reflect the accurate state of affairs. Some statistics are only based on reported cases. Unreported case statistics may bring different perspectives and understanding of what is going on in the country in terms of crime. To that effect, the Conference resolved that in order to give a more balanced view, statistics should also consider, for example, cases that failed to make prosecution. This will assist in assessing the level of the effectiveness of the police.

Review of Alcohol Advertising

Alcohol and drug abuse were highlighted as some of the challenges that contribute to crime within families and communities. It was reported that in the Northern Cape, every sixth child in a classroom was born with Foetal Alcohol Syndrome. This may cause the child to become dependent on alcohol and eventually commit crime. It was agreed that the advertisement of alcohol should be educational and precise in spelling out the side effects of alcohol.

Review of Batho-Pele Principles and Corruption

The Batho-Pele Principles should be revisited to review the extent to which there are service level agreements between different departments as well as how performance indicators for different departments were aligned with each other. In addition, it was suggested that corruption should be

dealt with by putting in place measures such as appointing appropriate people to relevant positions to look into the salaries of the police.

Review of Economic Policies

In order to address socio-economic concerns in the country, there is a need to move from macro-economic strategies to micro-economic policies. This would strengthen small and medium enterprises so that communities can benefit from economic growth.

Review of Crime Communication Strategy and Improving Stakeholder Relations

A communication strategy to involve various stakeholders in an effort to prevent and eradicate crime should be developed. This would invariably strengthen relations amongst stakeholders and assist in improving community participation. The communication strategy could also be used to reach inmates in prisons to create awareness about the value of citizenship responsibility. A monitoring and evaluation strategy could be developed to assess the impact of the communication strategy and all other interventions.

Victim Empowerment

Victim empowerment programmes should be improved. At the moment victims of crime feel marginalised. There is a perception that the law favours the rights of perpetrators at their expense. This perception and other concerns that lead to the loss of confidence in the criminal justice system need to be tackled. In addition, the development of a Bill of Moral Ethics should be considered.

Education System

The recent escalation of violence in schools was highlighted as another area needing attention. For example, there are dysfunctional schools which provide fertile ground for crime and violent activities. Youth Committees that were previously effective in bringing education and instilling a culture of responsibility among young people should be resuscitated.

Reviewing Community Police Forums

Strategies developed should take into account the diversity in the country. For example, the model of Community Policing Forums may need to be reviewed to accommodate various community peculiarities. In addition, it was recommended that the government should create an environment that is conducive for people to report crime, especially in rural areas where there are no telephones and accessible police stations.

RECOMMENDATIONS

Actively Promote Crime Prevention through Social Development

The current crime prevention strategies are focused on the protection of the person and property. It is imperative, therefore, to move away from defensive crime prevention towards a more engaging crime prevention strategy with social development activities at its core. Defensive crime prevention strategies fail to engage with the social problems underlying crime and rarely have

initiatives that are geared towards positively influencing potential offenders. Crime prevention activities and the social development needs of the community should thus be integrated to create a more cohesive and sustainable response to the challenge of crime prevention strategy.

Improve the Quality of Policing with Greater Emphasis on Crime Intelligence

Although it is important to increase the numbers of our law enforcement community, more emphasis should be placed on increasing the quality of policing in South Africa. Improving the detective and forensic capabilities of the police should be prioritised in order to ensure that more cases make it to prosecution, and to make sure that a strong message is sent out that crime does not pay. Increased capacity in the gathering of crime intelligence coupled with a closer and more sincere working relationship between the police and the community will also aid this effort.

Establish Community Safety Fora to Deal with Crime Comprehensively

The current structure of Community Policing Fora is too limited in scope to effectively assist in the reduction and prevention of crime, and primarily because of its narrow focus on policing aspects alone. The establishment of Community Safety Fora should bring together a wider array of skills and interventions that goes beyond mere policing by engaging and addressing the root causes of crime. Community Safety Fora do not only have to be confined to the collection of crime intelligence but should also assist in the identification and nurturing of at-risk youth, as well as playing a hands-on role in the social reintegration of parolees in order to minimise recidivism. The Community Safety Fora will thus be made up of members from various government departments and institutions (most notably the South African Police Service, the Department of Social Development, and the Department of Correctional Services), as well as diverse community representatives, both in terms of skills and demographics. Adequate financial backing should be provided for such Community Safety Fora to increase their effectiveness.

Appoint a High-Profile Person or Committee to Oversee the Restructuring of the Criminal Justice System

The South African government should show its commitment to making safety and security a priority by appointing a high-profile person or committee to oversee the restructuring of the criminal justice system. The main task of the person or committee would be to secure proper co-ordination between the various government departments involved in the criminal justice system and to ensure proper and meaningful consultation with communities and all other relevant stakeholders.

Prioritise the Implementation of the Victims' Charter

Victimisation has a serious effect on victims of crime. It would only be proper that one take a closer look at this serious problem in order to better understand and assist in finding more humane and effective ways to meet the needs of thousands of victims of crime in South Africa. Currently victims of crime are an underserved constituency and every effort should be made to change the status quo. Extra-governmental social support should also be encouraged in order to

give victims of crime the special attention they deserve. Given the above, the implementation of the Victims Charter should become a genuine priority.

CONCLUSION

The levels of crime and violence experienced by ordinary South Africans on a daily basis, and the complete disregard of their fundamental human rights is leaving a huge stain on the cloth of our constitutional democratic dispensation. Addressing the scourge of crime should become one of the biggest priorities of the government as the primary guarantor of rights as set out in the Bill of Rights. The Commission must therefore call on all South Africans to live up to the spirit of the Constitution by joining hands with the law enforcement agencies in the fight against crime. This will go a long way towards a peaceful South Africa where respect for the bodily integrity, property and the dignity of others will prevail. The policies and legislation should be revisited to improve integration, co-ordination and co-operation across the criminal justice system and to ensure a more holistic approach to the participation of the Secretariat for Safety and Security in the Integrated Development Programmes, especially with regard to the role and empowerment of Community Policing Fora.

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CHAPTER THREE:

THE RIGHT TO EQUALITY

INTRODUCTION

The right to equality is the first substantive right in the Bill of Rights. It forms the cornerstone of South Africa's democracy and features in the preamble, founding provisions, sections 9 and 39 of the Constitution. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (Equality Act) has been enacted in terms of section 9 (4) of the Constitution to give effect to the letter and spirit of the Constitution and, amongst others, provide measures to facilitate the eradication of unfair discrimination, hate speech and harassment, particularly on the grounds of race, gender and disability.

The main objective of the Equality Act, as denoted in its title, is to promote equality and to prevent unfair discrimination, thereby transforming South Africa into a society based on respect for the dignity and equal worth of all human beings. It further acknowledges the inequalities and discrimination that are embedded in our social structure, practices and attitudes.[142] Concomitant, the importance of the Equality Act on the prevention, prohibition and elimination of unfair discrimination on the ground of race, gender and disability lies in its expressed intent to prevent unfair discrimination and promote equality through the use Equality Courts and other measures.[143] The Equality Courts are informal and participatory institutions that provide easy access for victims of unfair discrimination to obtain appropriate relief.[144]

This chapter critically engages with the key developments of 2007 in race, gender and disability by assessing court decisions and implementation measures that advance the cause for equality. Reference is made to international and domestic policy and legislation. It also reflects on the challenges in realising equality at the grassroots level and outlines the great need for education and awareness-raising on the Equality Act and the use of Equality Courts.

RACE

Although we live in an era where the expression of explicit racism is taboo, the effect of racism on South African society is more profound than meets the eye. Its legacy pervades all areas of human activity and as much as we have gained in the field of promulgating relevant legislation to deal with institutionalised racism, intolerance and racial discrimination have shifted to other fields[145] such as racial exclusivity, racial intolerance and intra-racism. It manifests in the form of cultural and ethnic discrimination as well as material and political gains.

The discussion on race below is based on the notion that the government and all other interest groups should integrate an anti racism strategy that identifies and eliminates the structures and

142 Ntlama, N. The Equality Act: Enhancing the Capacity of the Law to Generate Social Change for the Promotion of Gender Equality. *Speculum Jums. 2001. Volume (21) (1).* p. 113.
143 The promotional regulations have not been promulgated as yet.
144 Albertyn, C. et al. *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000*.
145 Harris, L. *Key Concepts in Critical Theory-Racism. 1999.*

systems that continue to perpetuate racism.[146] The discussion further questions whether the legislative framework is sufficient to address the different forms of racism emerging in South Africa. The purpose is to make human rights a reality for all by empowering people to access their rights and to create a culture of racial tolerance.

Prohibition of Unfair Discrimination on Ground of Race

The prohibition of unfair discrimination in terms of section 7 of the Equality Act means that no one can be unfairly discriminated against on the ground of race. In its preamble, the Equality Act makes reference to South Africa's international obligations in terms of the International Convention on the Elimination of Racial Discrimination. The Convention affirms the necessity of speedily eliminating racial discrimination in all its forms and to secure the understanding of, and respect for, the dignity of people. It encourages universal respect for the observance of human rights and freedoms for all without distinction as to race, sex, language and religion. South Africa ratified this Convention on the 10th December 1998.

Racism in South Africa

Despite South Africa's transformation agenda, it is clear that the envisaged constitutional non-racist society has not as yet been attained. Inhumane and racist conduct such as that reported at the University of Free State[147] is perhaps indicative of a flawed legislative framework in respect of the enforcement, promotion and protection of equality. For example, sections 25–28 of the Equality Act place a general duty and responsibility on the state and persons in public domain to promote equality. It serves effectively as a monitoring mechanism on government, public and private bodies. However, it is not enforced.

Such lack of enforcement led to the bizarre use of the repealed Group Areas Act in a lease agreement in the *Brown Ellen Gerber v Dunmarsh Investments Pty (Ltd)* case to enforce the exclusive use of a building by white people. Gerber, the complainant, was denied accommodation on the basis that her husband is Indian. Although the lease agreement provision is obviously unconstitutional, it is indicative that much more must be done to redress the legacy of immense inequalities based on race. A similar case of racial exclusivity in terms of section 7 (b) and (c) was reported in an article in the Sunday Times[148] indicating the existence of racial segregation on allocation of university accommodation. The article reported that university residences are still racially segregated and when black students apply for accommodation in a predominantly white residence, they would be advised against it, thus allowing for the exclusive occupation of that university residence by white students.[149] This is a form of indirect discrimination that is referred to in the Equality Act.

146 NAC at the UN World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance.
147 The emergence of a racist mock initiation by white students on black workers made world headlines.
148 Govender, P. In *Sunday Times*. "Race still rules in some campus hostels."
149 The racist video at the University of Free State was made by white students to deter black students from applying for accommodation at predominantly white residences, April 2007.

Other unfair racial discrimination cases presented before the equality courts in 2007 are indicative that people continue to be victimised on basis of their skin colour. Racial intolerance, negative racial perceptions and racial slurs continue to find their way in the corridors of South African society. The case of Salah Akasha[150] was a matter of racial harassment in terms of section 7 (a) of the Equality Act. In this case the complainant (black), who was a new member of a golf club, was harassed by white golf club members and accused of loitering in the ground. Without inquiring about his membership status, police were called to arrest him. Upon raising his concerns with the golf club management his golf club membership was terminated. The case was filed in the Equality Court and an out of court settlement in favour of the complainant was reached and made an order of court. The racial slur case of Zandile Magubane is further evidence that racism and many of its other attributes may be with us for longer than anticipated.[151] Zandile Magubane, a 36 year old domestic worker alleged that her employer referred to her as a 'kaffir bitch'[152] in a cellular phone text message intended for the employer's wife but sent to Magubane's cellular phone. Her employer claimed that it was a mistake as the message was intended for his wife. Magubane alleged that she found numerous missed calls and messages on her cellular phone from her employer. One of the messages was, "*I tried to get hold of that kaffir bitch ….*"[153] The employer apologised to Magubane who did not accept his apology and instructed the Commission to take her matter to the Equality Court.

These cases are cogent signs that the legislation has done little to eliminate racism and racial discourse in South Africa. One can argue that the failure to implement the provisions of the Equality Act in respect of monitoring the promotion of equality freely allow those unwilling to let go of the old order to continue practicing systemic racial discrimination with impunity. Continued racial exclusivity at universities also shows the dearth of awareness and lack of empowerment of the student population in resisting racism as unconstitutional. The above cases further underscore the lacuna in the legislative framework of failing to acknowledge the multiple manifestations of racism in South Africa. The architecture of the legislation seems to be more focused on dismantling institutionalised discrimination but has not taken into account how to address the various forms of subliminal racism on a practical level. Similarly, blatant racism appears to be on the increase. This is perhaps a reflection of the trajectory of the prevailing racial discourse in South Africa that has fuelled both inter and intra racism rather than ameliorating it. Consequently, it has posed serious challenges in respect of racial integration at schools. Schools are institutions of primary socialisation but evidence of racial violence and ethnic tensions is suggestive of very little success is fostering racial integration. A key factor in the racial discourse is the racial categorisation which, by any stretch of the imagination, is exclusionary. Blacks are

150 *Salah Akasha v Piet Retief Country Club.* Case number 01/2006. Piet Retief Equality Court.
151 *Zandile Goodness Magubane v Cameron Forsyth.* Case number 01/2008. Durban Equality Court.
152 Ibid.
153 Ibid.

categorised as African and by extension every other racial category is therefore non-African. Is this categorisation not discriminatory and is the unintended consequence further racial intolerance?

The question as to whether the legal framework is successful in eliminating racism cannot be answered without considering the effectiveness of the redress mechanisms put in place by the Equality Act. The Equality Courts, which according to the Equality Act, are supposed to be structured in such a way as to render them user friendly and less formal do not seem to be effectively assisting the eradication of racism. Those who were previously disadvantaged do not seem to be making adequate use of the Equality Courts. However, when they do make use of these courts, the respondents, who are generally not financially viable, appear with legal representation. As a result, the financial disparity often renders access to the court and access to justice difficult for the poor.

It is therefore clear that although the legal framework is progressive and advanced, without a genuine acknowledgement of the multiple manifestations of racism ideas of non-racism will not be embraced. In this respect, it is important that form follows function. The truth of the matter is that until the legislative framework has enforced the practice of social responsibility exploitation of the most vulnerable racial groups will continue. It is therefore evident that legislation alone cannot succeed in eliminating racism. Deeply entrenched social attitudes are reproducing new forms of racial prejudice. It is submitted that the elimination of racism may require that the same amount of energy levelled towards the enforcement of the provisions of the Equality Act be met with the corresponding responsibility and duty to empower people. It is only then that senseless killings of one race by another[154] and racial harassment, that lately seem to be the rule rather than the exception, can be eradicated.

GENDER

Gender equality is often misunderstood as the right to equality for women. Gender equality simply means that women and men enjoy the same status. It means that women and men should have equal conditions for realising their full human rights and potential to contribute to all spheres of political, economic, social and cultural development and to benefit from the results. It is the equal valuing of similarities and differences between women and men and the varying roles that they play. If gender equality means that women and men enjoy the same status, surely receiving a pension at the same age would be considered as gender equitable. *Roberts v the Minister of Social Development* (case unreported), confronts that this matter deserves commentary as it contributes to the development of gender equality in 2007.

Government pension is given to women at the age of 60 and to men at the age of 65. The point of contention in this case arose from section 8 (d) of the Equality Act. This case was brought to

154 Reference here is made to the alleged murder of black people by a white teenager in Swartruggens.

court by group of elderly men who wanted to test the validity of the state pension that is paid to men from the age of 65. The Social Assistance Act 13 of 2004 entitled men to apply for a state old age pension, based on a needs test, when they reach the age of 65, but entitles women to start receiving the pension at the age of 60. The Legal Aid Board's Port Elizabeth Justice Centre argued on behalf of the elderly men. The Commission, the Centre for Applied Legal Studies of the University of the Witwatersrand and the Community Law Centre of the University of the Western Cape (represented by the Public Interest Law Department at Webber Wentzel Bowens) were admitted as friends of the court. The team argued that the Bill of Rights states that nobody may discriminate on the basis of age, race or gender. It was argued that the Social Assistance Act discriminated against poor men between the ages of 60 and 64 and excluded them and their families from social assistance which would ensure their very survival. In addition, it was argued that the state had failed to apply its mind and simply ignored the plight of this group of disadvantaged citizens, who were being discriminated against based on their gender. The team also argued that the government had resources to accommodate this group of poor men and could find the R2.7 billion that was needed. The friends of the court argued that the pension should be given to everyone at the age of 60 in terms of the right to social security and equality in the Constitution.

The matter was heard in the Pretoria Court on the 13th of September 2007. At time of writing this chapter, the court's judgement was reserved. If this matter is won, it will be a landmark decision against gender discrimination.

South Africa's Constitution is one of the most progressive in the world in respect of gender equality. The Constitution guarantees the right to bodily integrity and it supersedes customary law should there be a contradiction between the two. In addition to the Constitution, the Equality Act prohibits, in section 8 (c), (d) and (e), discrimination that arises under customary and religious law. The case of *Shilubana and Others v Nwamitwa 2007* (14) CC, underscored the discrimination against women arising from customary law and the extreme patriarchy in society.[155] This case challenged the customary law concept that only men may be chiefs. Tinyiko Shilubana and Sidwell Nwamitwa each insisted that they are the rightful head of the Valoyi tribe in a dispute sparked off by the death of Shilubana's father, Hosi Fofozwa, in 1968. Fofozwa did not have a male heir, so his title was passed to his brother Richard Nwamitwa, and his son Sidwell, who had expected to take over from him when he died. However, in later years, while Nwamitwa was still alive, the tribe decided that it was unconstitutional to exclude women from succession and agreed that Shilubana should become chief and that the Fofozwa line be reinstated.

The Pretoria High Court and the Supreme Court of Appeal found in favour of Nwamitwa and therefore the matter was taken to the Constitutional Court on the point of gender equality. Customary law does allow for making choices and for changing circumstances, and in this case

155 See chapter 1 on International Treaties, page 13 for additional information.

the principle of constitutionality was the circumstance. If Shilubana's argument were to be applied, the position of Fofozwa's sister, who was also overlooked at the time of succession, would have to be reviewed. Judgment in this case is reserved.[156] If the judgment finds in favour of Shilubana, it will give effect to the letter and spirit of the Constitution, particularly the equal enjoyment of all rights and freedoms by every person, the promotion of equality and the value of non sexism.

The difficulty of such cases is how to reconcile culture and tradition with human rights, equality and the Constitution. South Africa is a society stooped in traditional culture and rites of passage. But such traditions are often deeply patriarchal and paternalistic. In a similar fashion to racism, patriarchy and paternalism are deeply embedded within the social structure and social system of the South African society. Therefore, South Africa finds itself in a rather tenuous and contradictory position as the suppression and subjugation of women is prohibited in law but in fact the pervasive nature of patriarchy in every facet of cultural life means that many women continue to fall prey to gender-based violence and exploitation. For many women the prohibition in law has done little to ease their suffering when the right to culture supersedes the right to equality in fact. It is therefore important to interrogate such contradictions and find a way to reconcile the right to equality with cultural tradition.

South Africa has among the highest levels of gender-based violence in the world, despite the legislation that specifically protects the rights of victims of gender-based violence. The South African court system is still ill-equipped to deal with gender-based violence cases quickly and sensitively. The legislation in place includes:

- The Domestic Violence Act 116 of 1998, the purpose of which is to afford domestic violence victims the maximum protection from domestic abuse as provided by the law. Under Section 7 of the Act, the court can issue a protective order prohibiting the abuser from committing any further acts of abuse or entering a residence shared by the abuser and the victim. It is therefore an important legislative tool for women in abusive relationships to attain protection and redress through the criminal justice system, as well as access to the appropriate support from other sectors, such as health. According to the Act, domestic violence includes intimidation, harassment, stalking, damaging of property, entry into the residence of the victim without consent where the parties do not share the same residence or any other controlling or abusive behaviour towards a victim, where such conduct harms, or may cause imminent harm to the safety, health or well-being of the victim.[157]
- The Sexual Offences Act 32 of 2007 has undergone reform since 1996 and was signed by the President on the 13 December 2007. It creates a range of new offences and addresses a wide range of matters relating to the management of sexual offences. In the

156 *Legal Brief*, 12 November 2007.
157 Department of Justice, Domestic Violence Act 116 of 1998, Government Gazette, Cape Town, Vol. 402, No. 19537. 2 December 1998,

Act the definition of rape is extended to include the penetration of the mouth, anus and genital organs of one person with the genital organs or another body part of another person, or an object or part of the body of an animal. The Act recognises the seriousness of oral and anal penetration and recognises the seriousness of the sexual violation of boys and men. In a country like South Africa where domestic violence, sexual assault and rape are common occurrences, the Commission applauds the decision to recognise oral and anal penetration. The Act further introduces a range of crimes that relate specifically to the sexual exploitation of children and people with mental disability. These include sexual grooming, sexual exploitation and the use of children or people with mental disabilities in pornography or the display of pornography to children. It creates tighter laws relating to consenting acts between teenagers and criminalises any sexual activity no matter how light between teenagers under the age of 16 in spite of the willingness of both parties.

In addition, the Equality Act in section 8 prohibits unfair discrimination on the ground of gender. It provides that no person may unfairly discriminate against any person on the ground of gender in any form, be it, gender-based violence, pregnancy or the limitation of access to services. The purpose of this section is to ensure that men and women are treated equally and that gender equality is established and upheld in our society. Section 8 of the Equality Act states that no person may unfairly discriminate against any person on the ground of gender, including:

- Gender-based violence;
- Female genital mutilation;
- The system of preventing women from inheriting family property;
- Any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and well-being of the girl child;
- Any policy or conduct that unfairly limits access of women to land rights, finance, and other resources;
- Discrimination on the ground of pregnancy;
- Limiting women's access to social services or benefits, such as health, education and social security;
- The denial of access to opportunities, including access to services or contractual opportunities for rendering services for consideration, or failing to take steps to reasonably accommodate the needs of such persons; and
- Systemic inequality of access to opportunities by women as a result of the sexual division of labour.

In accordance with section 8 of the Equality Act, South Africa has also passed and implemented legislation to further protect women and children by empowering them with access to resources and legal status. Among others, laws relating to inheritance include the Recognition of Customary

Marriages Act 120 of 1998; Maintenance of Surviving Spouses Act 27 of 1990; Intestate Succession Act 81 of 1987; Divorce Act 70 of 1979; Administration of Estates Act 66 of 1965, the Maintenance Act No. 99 of 1998 and the Termination of Pregnancy Amendment Act No 38 of 2004.

However, such legislation is not enough. This is evident in the numerous cases that have been reported in the newspapers, to the Commission, as well as in Equality Courts. Some of the cases are mentioned below:

- In July 2007, Sizakele Sigasa and Salome Mosooa, two lesbian women, were murdered in Meadowlands, Soweto. At the time of writing the chapter, police were still investigating and no arrests were made.[158]
- In April 2007, a 16 year old black lesbian, Modoe Mafubedu, was raped and repeatedly stabbed to death. At the time of writing this chapter, the police had not made an arrest.
- On 22 July 2007, the body of a 23 year old lesbian, Thokozane Qwabe, was found by people herding cattle in a field in Ladysmith. Her clothes were laying about 70m from where her body was found. The body had a number of wounds to the head suggesting she had been stoned to death. A suspect was arrested and charged with murder.[159]
- A complainant alleged that the amount of maintenance money she received from her husband was not enough to sustain her and their two children. She alleged that she had opened a case against her husband, but on every occasion when her husband was subpoenaed to appear before the court, he defaulted.[160]
- A student constable complainant, in the employ of the SAPS, was suspended because she fell pregnant before the completion of her probation period. Preliminary investigations by the Commission pointed to *prima facie* discrimination on the basis of pregnancy in terms of section 9 (3) of the Constitution. The complainant elected to opt for a settlement offer without engaging the Commission. The offer is being discussed between her and the SAPS including amending the SAPS recruitment policy which is to be monitored by the Commission for Gender Equality.

The occurrence of these crimes on the ground of gender in 2007 alone affirms that South Africa should draft legislation that addresses the issue of hate crime and further promote and uphold the existing legislation. South African law does not recognise a separate category of hate crimes and are consequently handled as ordinary criminal offences. However, there are still many challenges of hate crimes based on gender/sex violence. As a result, gay, lesbian and transgender people are still perceived as a threat to the normative social order by seeking to exercise autonomy over their body and sexuality.[161] Hatred of gay, lesbian and transgender people is completely overlooked within the criminal justice system. There is therefore a need to develop legislation that

158 http://www.sapsjournalonline.gov.za/dynamic/journal_dynamic.aspx?pageid=414&jid=2088
159 www.sangonet.org.za
160 January 2007, H, N. GP/2006/00101 - (DM).
161 www.sangonet.org.za

will address hate crimes within the arena of equality to allow all people to exercise their rights without fear. However, legislation will not be enough and gears need to shift toward action and from patriarchy to changed attitudes. Therefore, there must be a consideration of implementation plans that bring results and a meaningful statistical reduction on gender based violence.

However, attitudes are slowly changing. This is evidenced by an increase in the discourse around gender equality amongst men through initiatives such as the Fatherhood Project and Men as Partners in the fight to end gender violence. This is clear from the South African 2007 United Nations Country Report to the Commission on the Status of Women (CSW). The report highlighted the needs and challenges that face South Africa with regard to gender equality and some of the key themes to emerge from the 2007 UN Country Report were:

- The growing number of men taking a stand against gender based violence and for gender equality;
- The occurrence across South Africa of the groundbreaking work with men to achieve gender equality;
- There is visible support by some senior government officials for work with men – but more sustained commitment is needed;
- There is a need for greater clarity of purpose about the goals of work with men, as well as increased co-ordination and planning;
- Men's violence against women remains unacceptably pervasive;
- Greater dialogue and accountability between organisations working with men and women's rights organisations is needed;
- Efforts to increase men's involvement in achieving gender equality rely too heavily on workshops and community outreach;
- Efforts to involve boys in achieving gender equality should be expanded;
- South African funding for gender equality work with men is insufficient while some international funding comes with strings attached; and
- Not enough work with men was taking place in rural parts of the country or with traditional leaders.[162]

South Africa has committed itself to the implementation of mechanisms to involve men and boys in the achievement of gender equality. This was done at the 48th session of the Commission on the Status of Women in 2004 and shows South Africa's commitment to the Convention on the Elimination of All Forms of Discrimination Against Women.[163] The Convention identifies specific areas where there has been extensive discrimination against women, for example, in regard to political, economic, socio-cultural and civil rights. In these and other areas, the Convention spells out specific goals and measures that are to be taken by state parties to facilitate the creation of a global society in which women enjoy full equality in relation to men and thus full realisation of their

162 http://www.genderjustice.org.za/sub-project/south-africa-country-report-to-the-un-csw-2007.html
163 CEDAW.

fundamental human rights. It sets out, in a legally binding form, internationally accepted principles on the rights of women. The basic legal norm of the Convention is the prohibition of all forms of discrimination against women. In addition to demanding that women be accorded equal rights with men, the Convention goes further by prescribing the measures to be taken to ensure that women everywhere are able to enjoy the rights to which they are entitled. The Convention was signed by South Africa in January 1993 and ratified on 15 December 1995.

In assessing gender equality in 2007 against the objectives of the Equality Act, it is clear that in terms of section 2 (b) the rights women have are still being violated on the basis of gender-based violence. The measures that are in place are not adequate and because of this, forms of gender-based violence such as the trafficking of women and children are on the increase. South Africa also has a very high number of people living with HIV/AIDS, the majority of whom are female. The pandemic further exacerbates the already huge burden of care that women shoulder. Women still constitute the majority of poor, homeless, jobless and dispossessed. These conditions are exacerbated by the AIDS pandemic.[164] State maintenance systems are highly bureaucratic and involve lengthy delays while women and children are often without food and shelter. Women, particularly young women, are most vulnerable to the HIV/AIDS pandemic because of their powerlessness to negotiate safe sex. This requires changing attitudes so that the status of women is changed, which will lead to their empowerment.

In terms of section 2 (c), there are no measures to facilitate the eradication of unfair discrimination between culture and law with regard to women's rights. However in terms of section 2 (e), progress has been made in raising awareness and challenging gender stereotypes within the media. This needs to continue in order to achieve the type of society that is gender sensitive.[165] In summary, South Africa has not seen the kind of development on gender equality that is needed for it to progress towards eradicating gender inequality. Issues such as poverty need to have a gender focus. In addition, legislation needs to be developed that talks specifically to issues of gender inequality, gender-based violence and HIV/AIDS.

DISABILITY

South Africa played an active role in the drafting of the Convention on the Rights of Persons with Disabilities. In March 2007, South Africa was one of the first countries to sign the Convention. The signing was symbolic of the commitment to the rights contained in the Convention. South Africa ratified the Convention and its Optional Protocol in November 2007. Many of the articles contained in the Convention already appear in the Constitution. However, there are also articles that are particularly important because they are disability-specific, such as accessibility, personal mobility, and rehabilitation. The Convention highlights the need to prioritise the rights of persons

164 Parents die from AIDS or AIDS related diseases leaving behind their children who are often left to the care of grandmothers. This is also linked to the increase in child headed households with the oldest female caring for younger siblings.

165 http://www.info.gov.za/speeches/2007/07041016151001.htm

with disabilities. People with disabilities are the largest minority group and the Convention is a shift towards a human rights based approach to disability away from the social and medical model.

The purpose of the Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity. It reaffirms the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms and the need for persons with disabilities to be guaranteed their full enjoyment without discrimination. Its principles are respect for inherent dignity; individual autonomy, including the freedom to make one's own choices and the independence of persons; non-discrimination; full and effective participation and inclusion in society; respect for difference and acceptance of persons with disabilities as part of human diversity and humanity; equality of opportunity; accessibility; equality between men and women; respect for the evolving capacities of children with disabilities; and respect for the right of children with disabilities to preserve their identities.[166]

In line with this, section 9 of the Equality Act prohibits unfair discrimination on the ground of disability. It provides that no person may unfairly discriminate against any person on the ground of disability, including:

- Denying or removing from any person who has a disability any supporting or enabling facility necessary for their functioning in society;
- Contravening the code of practice or regulations of the South African Bureau of Standards that govern environmental accessibility; and
- Failing to eliminate obstacles that unfairly limit or restrict persons with disabilities from enjoying equal opportunities or failing to take steps to reasonably accommodate the needs of such persons.

In addition, the Mental Health Act asserts the right to respect, human dignity, privacy, consent and equality for persons with mental disabilities. Its key achievement is the establishment of the Mental Health Review Boards which act as protective and monitoring instruments for persons with mental disabilities within health institutions.

The objects of the Mental Health Act are to:

a) Regulate the mental health care in a manner that
    i. Makes the best possible mental health care, treatment and rehabilitation services available to the population equitably, efficiently and in the best interests of mental health care users within the limits of available resources;
    ii. Co-ordinates access to mental health care, treatment and rehabilitation services to various categories of mental health care users;

166 Convention on the Rights of Persons with Disabilities.

iii. Integrates the provision of mental health care services into the general health services environment;

b) Regulate access to and provide mental health care, treatment and rehabilitation services to:
   i. Voluntary, assisted and involuntary mental health care users;
   ii. State patients; and
   iii. Mentally ill prisoners;

c) Clarify the rights and obligations of mental health care users and the obligations of mental health care providers; and

d) Regulate the manner in which the property of persons with mental illness and persons with severe or profound intellectual disability may be dealt with by a court of law.

The Mental Health Act, the Equality Act and the signing of the Convention led to a National Disability Summit which took place in July 2007. The purpose of the Summit was to engage all stakeholders involved in addressing disability issues. The summit discussed the following:

- The establishment of a National Disability Machinery (NDM);
- The Review of the Integrated National Disability Strategy (INDS); and
- Implementation of the UN Convention on the Rights of Persons with Disabilities.

THE CRITICAL RESOLUTIONS OF THE SUMMIT

National Disability Machinery

- The Office on the Status of Disabled Persons (OSDP) is responsible for the budget for the NDM and its processes and deliberations.
- The NDM must establish a presidential working group, of a maximum of ten people, with emphasis on self-representation.
- The final terms of reference for the NDM incorporates appropriate and relevant comments from the Summit such as clarifying the legal status of the machinery.

Economic Empowerment

- The disability sector must promote the establishment of a Disability Fund to support the economic empowerment of people with disabilities.
- The OSDP must engage with relevant government representatives on the establishment of the Disability Fund.
- DPOs must re-align their strategic approach, policies and programmes to government's programmes and the goal of halving poverty and unemployment.
- The Thabo Mbeki Development Trust establishes a disability economic empowerment forum, in conjunction with partners such as NAFCOC and SETA's, that will facilitate and increase the participation of people with disabilities in mainstream economic activities, including through skills development and capacity building.

Social Inclusion

- There must be a preference for disability mainstreaming over disability special projects, unless disability special projects further the social inclusion of people with disabilities.
- The Commission must implement a programme that will assess the current extent of social and economic inclusion and participation of people with disabilities, and identify the gaps that need to be addressed in realising the full and equal human rights of people with disabilities.

International Obligations

- The OSDP must develop an implementation plan for the Convention, taking into account the inputs made at the Summit.

CASE LAW

In 2007, the Access for Citizens Committee instituted proceedings against Top Presteerders (Pty) Ltd. in the Hermanus Equality Court, in terms of section 20 of the Equality Act. The complainant alleged that the renovations at the Village Square (owned by the respondent) were not disabled-people friendly and did not comply with the provisions of the Equality Act. The conduct of the respondent in denying proper access to people with disabilities to the Village Square Centre constituted unfair discrimination on the ground of disability. Such unfair discrimination is expressly prohibited by section 9 (c) of the Equality Act. The Commission acted for and on behalf of the complainant and a settlement agreement was reached between the parties and made an order of court. In terms of the settlement agreement the respondent would, inter alia, comply with the Equality Act and other enabling legislation and also appoint a disability consultant who will assess and report on the progress of the renovation and compliance issues. The renovations would be monitored and a final report lodged with the Court once it was completed.

This case reflects the general trend of complaints received by the Commission. Matters of unfair discrimination on the ground of disability mainly focused on physical access to buildings and other facilities that are necessary for the disabled people to exercise their rights and livelihood like any other able bodied member of the society. Other matters dealt with stigmatisation on the grounds of HIV/AIDS and mental health and thus affecting the disabled people's right to education.

In general there appears to be a greater awareness of mainstreaming disability. However, implementation and service delivery is sparse and there is inadequate research to inform proper planning. The Office on the Status of Disabled Persons is in the process of finalising the National Disability Policy Framework and Guidelines for Implementation documents. It is hoped that this will provide clarity for the way forward. The National Disability Machinery will also be highly

influential in moving the disability agenda forward, due to its effective representation of government departments, disabled people's organisations, business, labour and chapter 9 institutions.

RECOMMENDATIONS

- The current trend of training and awareness raising needs to be reviewed and restructured. This includes the changing of current training methods and adapting training material for specific audiences. There is an urgent need for attitudes and perceptions to change regarding issues of equality. The Commission should be the driving force in this by reviewing its training needs, material and methods.
- To adequately grapple with the discourse of equality, the Commission should engage with the public in terms of public enquiries.
- Schools should become a priority in terms of training on equality issues. This can be done by recommending to the Department of Education to allocate time within the school day to train the youth on matters of equality, human rights, and cultural diversity.
- Research and public inquiries to engage South Africans to genuinely acknowledge dialogue about the multiple manifestations of race, gender and disability.
- The Commission to work on the level of attitudes and prejudice and effectively contradicting the ideology of superiority.[167]
- The Commission to use the existing policy frameworks to strengthen co-ordination and planning to achieve the goals of equality.
- There needs to be effective monitoring of government by the Commission with regards to race, gender and disability plans.

CONCLUSION

This report captured the developments in Equality with regard to race, gender and disability for the year 2007. These include court cases, media reports and cases lodged with the Commission. In assessing the developments in equality, one can see that there have been developments, especially around Equality Court cases. This is indicative of a level of awareness on the Equality Act and Equality Courts, including the remedies that are available. However, the media reports for 2007 show the contrary. The media reports that were discussed above do not refer to the use of Equality courts or the Equality Act in any way. This is a serious concern and calls for awareness to be raised as a priority in South Africa. Achieving success in enforcing the right to equality in South Africa will depend on the effectiveness of the law to bring about social change.

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CHAPTER FOUR:

ACCESS RESTRICTED? THE PROMOTION OF ACCESS TO INFORMATION ACT AND IMPEDIMENTS TO DELIVERY

INTRODUCTION

The Promotion of Access to Information Act[168] (PAIA) is a relatively new piece of legislation in South Africa. The legislation, which is explored in greater detail below, places positive obligations on the public sector and on private entities to provide access to information to requesters and to report on their compliance with PAIA. Underpinning the motivation for PAIA is its necessity in the amalgam of elements desirable for a progressive democracy. Its key elements, therefore, encompass both the principles of good governance and informed public scrutiny. These laudable principles are meant to inform the frameworks for democratic transformation and delivery, but whether any tangible delivery on PAIA has been achieved is questionable.

With regard to the obligations it places upon the public sector, the legislation bears some resemblance to other legislation emanating from Parliament during this time.[169] The similarities between such legislation, however, end at this point, since the PAIA legislation is the only one of its kind globally to place positive duties on both public and private entities with regard to accessing information.

The Commission has a specific mandate dictated by the provisions of PAIA. These provisions in turn, confer obligations which are specific to the Commission and are supplemented by certain broader, but separate, directives targeting the implementation and the popularising of the legislation. The Commission thus has the dual function as a custodial and monitoring body, and a catalyst in the implementation of the Act. The implementation of the legislation insofar as promotion, education and monitoring functions are delineated, therefore also finds its seat at the Commission.[170]

Historically, the right to access information is an acknowledged fundamental right, finding its formal roots in the Universal Declaration of Human Rights[171] and also in a limited sense, the African Charter on Human and Peoples Rights,[172] and, subsequently, in the South African Bill of Rights.[173] Promulgated in line with the constitutional directive for its enactment in 2000, the legislation acknowledges the critical role it plays in the South African context for individuals in the assertion of their rights, as a catalyst to attain governmental reform and to advance informed public scrutiny. In this sense, the access to information legislation is a key vehicular right for the assertion of other fundamental rights. Despite its formal entrenchment, however, practical delivery in terms of PAIA is impeded by a number of complex factors.

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168 The Promotion of Access to Information Act 2 of 2000. The right to access information was encompassed in the Draft Open Democracy Bill 67 of 1998.
169 The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, the Financial Intelligence Center Act 38 of 2001, Financial Advisory and Intermediary Services Act 37 of 2002.
170 The Commission was formally launched in March 1996.
171 The Universal Declaration of Human Rights, Article 19.
172 Article 9.
173 The Bill of rights is part of the Constitution of the Republic of South Africa, Act 108 of 1996.

The Constitution, in line with the Paris Principles ensures that the mandate conferred on the Commission is one which is executed without fear, favour or prejudice and independently from government interference. However, both the Constitution and PAIA require the Commission to report on its activities to the National Parliament annually. PAIA requires a specific report on the activities of the Commission in relation to its broad PAIA responsibilities and specifically with regard to its monitoring and custodial role in terms of the reports submitted to the Commission in terms of section 32 of PAIA. The Paris Principles are, however, departed from on the question of resources. With regard to the latter, the activities of the Commission are significantly circumscribed by resource restrictions. The financial resources required by the Commission to execute its custodial functions under PAIA are far from realistic. Resource restrictions dictate the spread of the interventions the Commission has the capacity to undertake. These limitations also impact significantly on the realisation of the PAIA objectives for the public, and are discussed more fully in the considerations made with regard to legal reform and litigation in particular.

The issue of accessibility and enforcement as impediments to the implementation of PAIA is also placed within the context of the emerging jurisprudence with regard to access to information matters. At present, traditional judicial enforcement mechanisms continue to inform the need to rescue PAIA from being exclusionary and elitist. To this end, a brief summary and discussion of key case law is included in the chapter. PAIA based litigation is therefore an area of grave concern and presents a number of impediments to the tangible realisation and assertion of rights. The challenges emanating from the enforcement mechanism form a common thread in the substance of the chapter.

Apart from formal impediments restricting the enforcement of PAIA, the chapter explores implementation within the three tiers of government. The section 32 reports submitted to the Commission allude to grave implications for its implementation. However, a section 32 report is not a conclusive tool in assessing implementation. It reveals at a minimal level that the processes and degree of operational efficacy within the public sector is weak. Specific instances of non-compliance, accessibility and quality of delivery under PAIA are noted. Related criticisms levied at implementation and enforcement therefore ground the report and the suggested recommendations arise from these issues.

POLICY AND LEGISLATIVE FRAMEWORK: DOMESTIC AND INTERNATIONAL

The process of reform and transformation post-1994 saw the development and formation of policies to entrench and advance the new democratic constitutional dispensation. These policies found form in “primary legislation” to give substance to specific rights listed in the Bill of Rights. South Africa’s PAIA is an example of legislation born of a constitutional directive. The time of its enactment also places it within the rapid global mass of states enacting access to information laws. Information laws have been enacted most rapidly in the course of the decade by states classified as ‘developing nations’. The shift to formally entrench an information regime is

sometimes attributed to being the response of developing nations to the dictates of organisations which influence international policies. The adoption of information laws for purposes of compliance with international agendas underscores concerns about the actual government commitment to legislation like PAIA. The increasing trend to create information regimes is mirrored on the continent as well.[174]

The right to access information is entrenched in both South Africa's interim and final constitutions. Traditionally finding its roots in the Universal Declaration of Human Rights, the contemporary utility of the right-now underpins good governance. The preamble to the legislation records the import of the Act as an instrument which in one breath recognises the history of the country and which sets out an aspirational intent for the future by fostering a culture of transparency and accountability within an informed South African society.[175] In the South African context, access to information, as it is formally expressed in PAIA, is accorded an extended utility beyond good governance, specifically when it is engaged in the realisation of socio-economic rights.

The regulation framework established in terms of PAIA dictates:

- The process through which information may be accessed from the public and private sectors;
- The circumstances and grounds on which access may be justifiably refused;
- Recourse for dispute resolution where access is contested; and
- Mandatory reporting obligations for public and private sectors.

In terms of the legislative framework, PAIA closely mirrors freedom of information regimes globally. It does, however, contain two significant differences from these regimes. One of these rests on the right of requesters to access information from private bodies. This expansion of access characterises PAIA's unique distinction from access to information frameworks globally. The second key difference between PAIA and comparative international information regimes rests with the mechanisms for enforcement. In most comparative jurisdictions, dispute resolution and enforcement mechanisms are centrally located in the offices of an information commissioner or information ombudsman.[176] By contrast, in terms of PAIA, ultimate enforcement powers are accorded exclusively to the courts.

While the existing framework to facilitate access to information has been celebrated in PAIA, the latter is not without limitation. Its practical utility as a tool to realise and assert rights in the South African context is not above challenge. Its rather legalistic processes and onerous reporting

174 Uganda passed its Access to Information Act in 2005. Other countries in the course of developing their legislation include Kenya, Nigeria, Angola, Malawi and Sierra Leone. The following websites list FOI developments globally: http://www faculty.maxwell.syr.edu/asroberts.foi/links.html .
175 The Preamble to PAIA.
176 The Canadian, Irish, Norwegian and Australian models with Information Ombudsman and Information Commissioners differ significantly from the South African model in this respect.

obligations have informed popular perception, and this could see PAIA relegated to the status of a white elephant if not addressed adequately.

PAIA encompasses a broad right to access information and the state is viewed as a custodian of information to which the public is entitled. Its impact is seen in the general unqualified right to access of public records and information for the requester. Access may be refused only exceptionally under PAIA. However, even these exceptions may be overridden when the public interest clauses are engaged. The PAIA legislation impacts integrally on all the tiers of the public administration.[177] It has the potential, and often does appear, to be inconsistent with legislation enacted before 1994 and sometimes with contemporary legislation as well. In these circumstances, PAIA is to be read as prevailing over inconsistencies between its provisions and that of other legislation.

In the South African context, PAIA underpins transparency, good governance, and informed decision making. It is also viewed as a critical instrument in seeking and securing the attainment of socio-economic rights. The utility herein needs to be viewed as more than a happy coincidence. Access to information in South Africa is potentially much more than a mere accession to the dictate of international institutions of power. It has a tangible and necessary role to play in the developing landscape of the country.

LAW REFORM AND JURISPRUDENTIAL DEVELOPMENTS

PAIA related legislative and jurisprudential developments are informed through three key processes. The first of these addresses formal amendments submitted to the Department of Justice and Constitutional Development on specific issues impacting on application, interpretation and compliance provisions. The Commission has played an instrumental role in securing reform to accelerate implementation and enforcement of PAIA.

Technical amendments in the form of regulations amending certain provisions of PAIA abound. These have been primarily initiated through recommendations by the Commission and interest groups in the course of law reform. An example of such an amendment is the regulation amending the timeframes within which public bodies are to submit reports to the Commission. Submissions have also been made with regard to the delegation of duties by Information Officers to deputy information officers (DIOs). This amendment permits heads of departments who are designated Information Officers to delegate the duty of receiving and processing requests for information to appropriate personnel.

While the recommendations cited above have improved application and implementation to some degree, a key recommendation as yet awaits address by the Department of Justice. The

177 Traditionally the three tiers of government in South Africa are the National, Provincial, and Local Government / Municipalities. The fourth category includes Parastatals and other Government entities.

proposed amendment directly impacts on accessibility and enforcement of PAIA and is explored further in the discussions on enforcement challenges and recommendations tabled below.

Legislation monitoring is the second component informing law reform. The process entails monitoring new and amended legislative drafts, to ensure consistency with access principles with regard to information. Its necessity must be seen in the context of the evolving and dynamic area of legislative reform in South Africa.[178] The Commission plays a vital role in this regard, ensuring both consistency with PAIA in relation to legislative enactments and amendments; and as a champion of the right to access information itself. To date a number of submissions have been made to drafting committees within Parliament and to specific ad hoc review committees constituted to review regulations, practice, procedure and legal review. These proposals have scrutinised legislation with due regard to its potential impact on the right to access information despite the PAIA provisions which are deemed to override those in other pieces of legislation to the extent of the inconsistency with PAIA. The submissions[179] have included recommendations on fee structures, the classification of documents by state security departments, the impact of PAIA in relation to the Protection of Personal Information Act, and the Key Installations Act.[180]

The third component in informing legal developments arises primarily from the monitoring of case law on PAIA. Reliance on judicial interpretation remains a fundamental interpretative tool in South Africa's dynamic constitutional democracy. Judicial precedent from lead cases are summarised and included in this discussion to highlight issues which have arisen for resolution and interpretative trends in decision making.

COMPLAINTS TO THE COMMISSION

The Commission's role and constitutional mandate have resulted in an overlapping and reinforcing of functions when viewed in the context of PAIA. The Commission has not been accorded any specific traditional judicial functions under the Constitution or under PAIA.[181] These jurisdictional factors dictate how PAIA based complaints to the Commission are processed.

However, the Commission's powers as a human rights watchdog, together with its powers in terms of PAIA, lend statutory weight to its obligations to assist members of the public and private bodies. Thus the complaint resolution mechanisms employed by the Commission dictate the type of assistance provided in terms of PAIA.[182] The approach of the Commission in executing this

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178 The African Peer Review Mechanism (APRM) report on South Africa ,puts the number of legislative enactments in the country since 1994 to 800. The report may be down loaded from:www.nepad.org, May 2007.

179 Some of which are already discussed in preceding paragraphs. Others include submissions made to the Ministerial Review Commission on intelligence;

180 The Protection of Personal Information Act 84 of 1982, National Key Points Act 102 of 1980 and the Asmal Ad hoc Review Committee on Chapter 9 and Associated Institutions.

181 The litigious capacity of the Commission is hugely undermined by its lack of adequate resources in this regard. Litigation which is PAIA based is therefore routed through the Legal Services Programme of the Commission. It has however, recently been decided that on a policy level, PAIA-based litigation is to be accorded key priority.

182 Most complaints also reach the Commission through mail, telephonically and electronically through the PAIA email

function is dictated largely by its resource capacity. Its resources, both financial and operational, impact significantly on the volumes and nature of litigious matters and mediatory services it can realistically render.[183] The preferred route for dispute resolution has therefore been through mediatory services offered to the parties. The profile and credibility of the Commission has contributed hugely to its success in this regard and this soft approach has therefore resulted in an effective non adversarial means of providing recourse to requesters. The overwhelming success rate enjoyed by the Commission in this regard has informed its recommendation that inexpensive and expeditious resolution can be attained through an intermediary structure before ultimate recourse to the courts.[184]

JUDICIAL PRECEDENT

The PAIA-based litigation is fraught with a number of difficulties. In essence, litigation is complex, costly, and time consuming, rendering most action out of bounds for ordinary litigants. Private individual requests are notably fewer than litigation by interest groups[185] and corporations. It would seem that in matters before the provincial high courts, access to information applications are made in conjunction with, or as peripheral applications to, the central issues being litigated. At present only a few PAIA-based matters have gone to the highest courts on appeal or as direct urgent applications. Interestingly, these matters have focused largely on the classification of records by state security departments,[186] privacy rights,[187] and freedom of the press. The more recent of these matters have included public figures and have drawn significant media attention. Earlier matters have focused on definitional and interpretational issues.[188]

Albeit that the jurisprudence on PAIA has not been prolific, the emerging jurisprudence indicates a trend towards advancing the right to access information by the repeated and emphatic pronouncements of the courts that the right of access to information can only be limited when there is justification for such a limitation vis-à-vis other fundamental rights considerations.

Brief summaries of PAIA specific cases are presented below. These cases highlight the considerations made by the country's highest courts with regard to the right to access information. The precedent and interpretative value of the rulings impact on how PAIA is interpreted and implemented. It is anticipated that, over time, the provisions of PAIA will increasingly be tested and a strong body of precedent will result. In most matters it becomes apparent that requesters require expensive representation to litigate; and that the actual final

box. Internal referrals are sometimes made by the Commissions legal services programme.

183 A diverse range of matters have been referred to the Commission. They are typically cases where sensitive or contentious records are sought. Requesters have ranged from NGO's and CBO's, but are most often indigent members of the public with requests to service delivery agents within government. Matters referred are not limited to those ripe for litigation. Inasmuch as several of these matters are at the internal appeal stage, there have been cases where assistance is sought even after judgment is pronounced.

184 The average time taken to conclude such matters is approximately eight weeks.

185 A key organization in this regard is the South African History Archives which lodged a record 120 PAIA-based cases in the initial years of the coming into operation of the Act.

186 Ministerial Review Commission on Intelligence, July 2007.

187 *Mantombazana Edmie Tshabalala-Msimang and Another v Mondli Makhanya and Others,* WLD Case Number 18656/07.

188 *Transnet Ltd and Another v SA Metal Machinery CO,* 2006(4)BCLR473(SCA).

rulings of the courts are delivered some time after the initial lodging of a request.[189] These factors have serious implications for the enforcement of PAIA.

Mittalsteel SA (Ltd) (formerly ISCOR Ltd) v Hlatshwayo [190] (Private Requester/Public Body)
The case decided by the Supreme Court of Appeal focused on the definition of a public body. A student requested access to minutes of meetings held by an entity before it had become private. In essence, definitions of a public body are contained both within the constitutional provisions and within PAIA itself. The PAIA provisions closely mirror the provision in section 239 of the Constitution.[191] But whether 'institutions' referred to in the PAIA provision permitted the inclusion of bodies such as the appellant within its definition required an assessment of comparative law and jurisprudential precedent.

The court examined both the control and function tests in assessing the relevancy and applicability of these tests to the facts of the case. In as much as the court considered the tests discussed above, it advanced the argument that the developments in trade and commerce which permit the privatisation of public services may render the tests inapplicable as gauges. The court pointed out that due to the mixture of control and function inherent in the operations of such privatised entities neither test should be relied on exclusively in making a classification. Despite a ruling in favour of the requester, actual delivery was set at some forty days after the date of judgment.

Transnet Ltd and another versus SA Metal Machinery Co [192] (Public Body/Private Entity)
A requested document was made available to the requester with pricing details omitted. The omissions were defended by the public body on the basis of prejudice to the contracting private party. The court found in favour of the requester on the facts of the case, and was alive to the fact that "parties cannot circumvent the terms of the Act by resorting to a confidentiality clause."[193] The court also felt that the appropriate interpretation of the confidentiality sections is one where a necessary proportional balancing of competing rights should be made. The court stated that once the tender had been awarded, the confidentiality element no longer remained an issue to be considered. By virtue of confirmation of award, the tender document became open to scrutiny because an organ of state is obliged to conduct its operations transparently and accountably.[194]

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189 In discussions with Eskom, it was established that in the matter against it by Biowatch, the estimated cost to Eskom is approximately one million rands, spanning a period of two years before the courts. The matter is currently on appeal.
190 *Mittalsteel SA (Ltd) (formerly ISCOR Ltd) v Hlatshwayo* 2007 (1) SA 66.
191 Section 239 of the Constitution gives the meaning 'of organ of state'. The definitions 'organ of state' means , any department of state or administration in the national, provincial or local sphere of government; or any other functionary or institution : (i)exercising a power or performing a function in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer;
192 *Transnet Ltd and another versus SA Metal Machinery Co* 2006 (4) BCLR 473 (SCA).
193 Para 55 p 490.
194 Para55 p 489.

The court reiterated that the primary purpose of the Act was to give effect to the constitutional right of access to information held by the state.[195]

Inasmuch as the courts appear to accept that a broad right to access information exists in relation to requests to public bodies, its expectation that applications based on PAIA have to first meet formal procedural requirements under PAIA demonstrates the difficulties most requesters can expect to experience in securing final redress on their requests.

Unitas Hospital v Van Wyk and Another[196] (Private Individual/Private Entity)

A request for access to a record generated by a private hospital was lodged by the widow of a patient who had died at the hospital. The lower court granted the request for access, but that decision was appealed against in the Supreme Court of Appeal. The court pronounced on the minimum a requester has to demonstrate to gain access to the records of private entities and on the use of PAIA in the course of legal proceedings. The consideration of substantial advantage as a minimum also engaged policy considerations resulting in a substantially restrictive interpretation of the requester's right to access information guarantees.

Some of the policy-based considerations included the possible potential increase in litigation where applicants are permitted in terms of section 50 of PAIA to meet a 'less exacting standard' to avoiding speculative litigation[197] and that a less than strict approach in Section 50 matters would result in fishing expeditions,[198] causing defendants to disclose their whole case before an action is taken, to the undermining of the pre-action discovery process.[199] The latter consideration implies that PAIA will currently only be invoked before the initiation of any litigation. Requests for information during litigation will therefore be governed by the court rules for discovery. The court reasoned that since a delictual claim had already been lodged, the applicant did not require the requested information in terms of PAIA to assist in the assertion of this right.

The dissenting judgment in this matter, however, warrants closer consideration. The court acknowledged that in matters of this nature a finding was dependant on assessing the interpretation of the word 'required' in section 50, in relation to the practical facts of each case. It went further however, and balanced policy considerations with legislative intent. The dissenting judge examined the history and intent of PAIA[200] and commented on the need for bodies that are deemed to be private entities but perform public functions[201] to be transparent, accountable and to engage in effective governance. The less restrictive interpretation of section 50 is commendable for its consideration of the history and intent of PAIA with practical needs of the

195 para 58 p 490.
196 *Unitas Hospital v Van Wyk and Another,* 2006 (4) SA 436 (SCA).
197 para 20.
198 para 21.
199 para 21–23.
200 paras 30–46.
201 para 40.

requester. The rationale for such an approach is more readily appreciated when seen in the context of private entities which perform public functions, a key issue in this case.

Perhaps the most welcoming aspect of the minority dissenting judgment is the cognisance it takes of the costs of proceedings in terms of time, effort, money and other resources. This type of consideration, it is submitted, would result in decisions based on increased equity and is therefore most applicable to South African society.

CHALLENGES IN ENFORCEMENT

The courts remain the primary arbiter in PAIA-based matters. The South African courts are structured with Magistrates courts at the bottom of the hierarchy and the Supreme Court of Appeal and the Constitutional Court at the apex. The lower courts currently do not hear PAIA-related matters. The PAIA legislation does make allocation for the courts to have special jurisdiction to entertain such matters in specific circumstances.

PAIA's formal structure is highlighted by plotting a typical request from the point of inception to resolution to demonstrate the impediments in enforcement. The legislation creates specific processes for the lodging and processing of requests. In general, a DIO has a period of thirty days within which to process a request. This period may upon notification to the requester be extended to a further thirty days. When the request for access is denied, the requester may lodge an internal appeal with the same public body to which the initial request was made. Thus where no response is received after the first thirty day period, the request for access is deemed to have been declined. Denial of access is deemed to occur once no response is received from the public body after an internal appeal is lodged and the timeframe for responses have elapsed. Requesters are then obliged to pursue their claims for access before the ordinary courts.

The decision to pursue litigation is fraught with difficulties for most requesters. The key challenges in having to follow this route are the complex procedural requirements associated with litigation; significant costs in having to litigate before the high courts and the time taken from date of lodging a request to the time taken to obtain a judgment from the courts. In practice even a judgment from the courts does not translate into immediate delivery for the requester since the delivery date is usually fixed by the court. Resources and time are therefore key impediments to litigation before the courts.

Litigation also presupposes a rights conscious society. The South African populous is by and large not adequately rights-aware to pursue litigation to assert their rights. Most litigation will therefore be largely at the instance of civil society and non-governmental organisations during the transitional periods. The matters litigated are consequently dictated by prospects of success and, collective and/or public interest based as opposed to individual rights assertive litigation.

MONITORING COMPLIANCE

Assessment of Progress

The country report on South Africa, released by the African Peer Review Mechanism (APRM), states:

> *"It is imperative that the nation should facilitate and even compel local units to behave and perform as governmental bodies vested with constitutional responsibilities."*

This comment in the report captures the essence of the commitment that must be exacted from policy makers for any progress to be made with regard to achieving efficacy in PAIA-based delivery in the country. The country report also clearly identifies PAIA implementation as weak.[202] The review panel made several recommendations regarding capacity, monitoring commitment by government and specific recommendations for service delivery at local government level. Government's response to the report has been accepting the recommendations to prioritise local government service delivery outputs, but, submitted no tangible response in its budgetary evidence indicating resources to be deployed for the implementation of PAIA specifically.

On a policy level therefore, it may be argued that on the basis of authoritative recommendations made, policy makers must be alive to the need for commitment in facilitating and ensuring the implementation of PAIA throughout the public sector. The lack, however, of any PAIA-specific plan of action, budgetary allocation, or specific timeframes for delivery evidenced by the responses to the APRM panel is cause for grave concern when addressing progress in implementation at this level.

The Section 32 Monitoring Tool

The section 32 reports lodged with the Commission annually are ideally a record of statistics collated by every public entity in the country. The report must indicate the number of requests for access to information received by the public body and how these requests are processed in terms of outcomes. In this sense the reports serve as a quantitative indicator of the levels of accountability and transparency within the public sector. The reporting obligation, if complied with by the public sector, could serve as a critical monitoring and evaluating tool.

Despite its potential as a tool for monitoring and evaluation, section 32 reports carry serious substantive limitations. Some of these vulnerabilities are evidenced in the potential for inaccurate or deliberately misleading information. The report is also limited to the extent that it does not reflect requests processed telephonically. In as much as these types of requests are not formal requests, they do account for a number of requests for access to information.

202 See note 178.

The accuracy of the report content has the potential to be impacted on by the availability of resources and appropriateness of systems in place to record data.[203] Thus, in instances where requests are manually captured the risk of inaccuracies increase significantly. The vulnerability of recorded information is further evidenced by the lack of formal mechanisms to enable the testing of the veracity of these reports. These problems are further exacerbated by the fact that inasmuch as PAIA requires public bodies to submit section 32 reports to the Commission, it imposes no sanction on public bodies which do not submit reports. Submissions are therefore based largely on co-operation between the public body and the Commission.

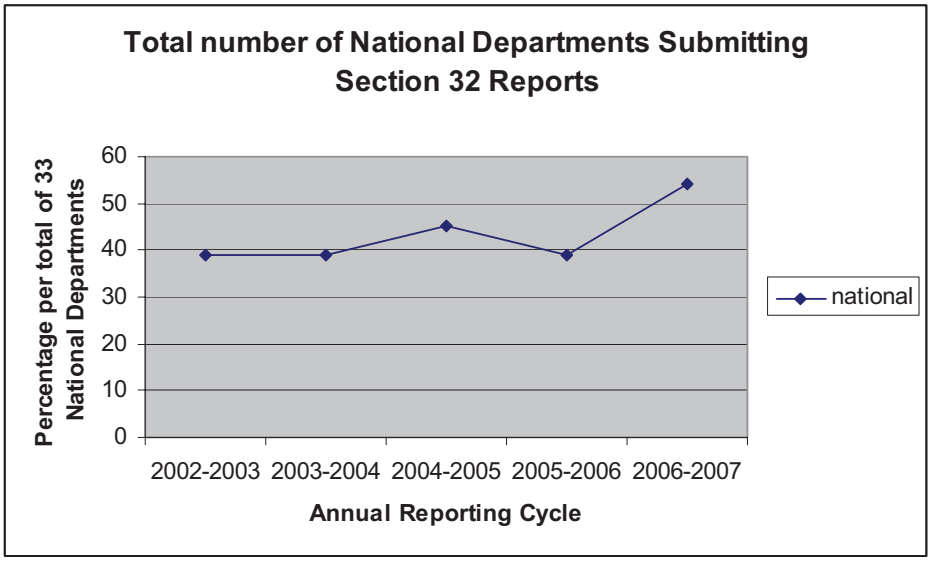
A series of graphs are tabled on the pages below. The first three graphs reflect the number of section 32 reports submitted to the Commission by the three tiers of government over a period of five years between 2002 and 2007. The statistics submitted are cause for concern. While low submission rates in the initial reporting cycles may logically be anticipated, the continued pattern of underreporting carries graver possibilities. The statistics reveal that low reporting rates are not concentrated to any particular level of public department or entity, but rather appears to be widespread for all sectors of public bodies. The slight increase in the number of section 32 reports submitted by national government departments in the 2006/2007 reporting cycle does little to alleviate the concern. Municipalities or local government departments consistently form the lowest percentage of public entities reporting. Statistics also indicate that of the municipalities which have reported in terms of section 32, rural and peri-urban municipalities rank the lowest. Primarily metropolitan municipalities have reported in terms of PAIA. Rural and peri-urban municipalities have been reporting minimally and in most cases not at all. The pie chart (Pie Chart 1) below illustrates this point. Under-reporting has been raised at the national parliamentary level on several occasions. Opposition party members have raised the under-reporting and the low percentages of departments granting access as flags indicating that government is still secretive and suspicious.[204] The identification of under-reporting as being reflective of secretive and suspicious governance must surely mobilise policy makers to accelerate delivery in the public sector.

203 At least 43% the public service departments of the sample in the survey conducted by the Public Service Commission (PSC) had not any kind of systems to manage requests. The study was conducted in 2007 and is titled: Implementation of the Promotion of Access to Information Act (Act 2 of 2000) in the public service, published by the Public Service Commission, August 2007.

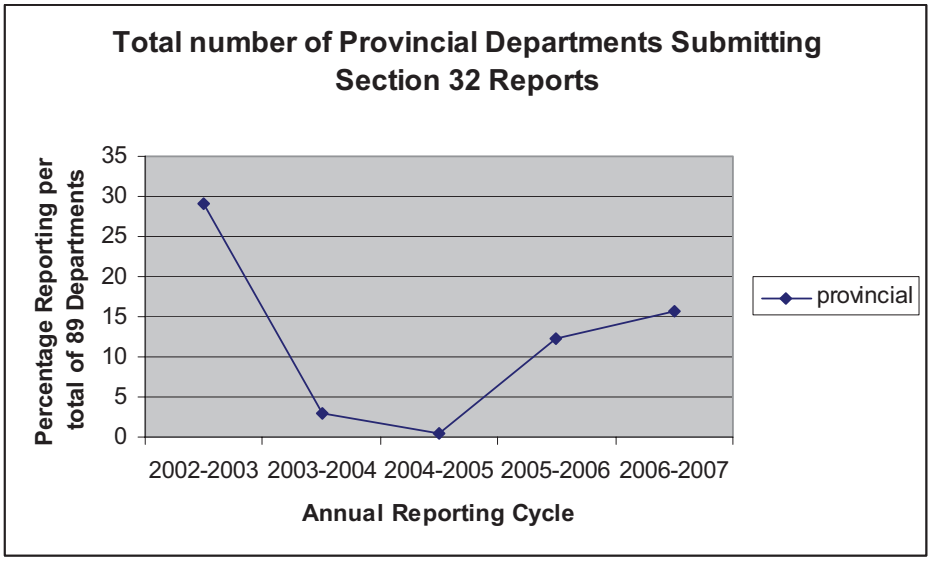
204 Wyndham Hartley. In *Business Day*).'Departments flout right to information', p.3, 2 March 2007.

Reports submitted in terms of section 32

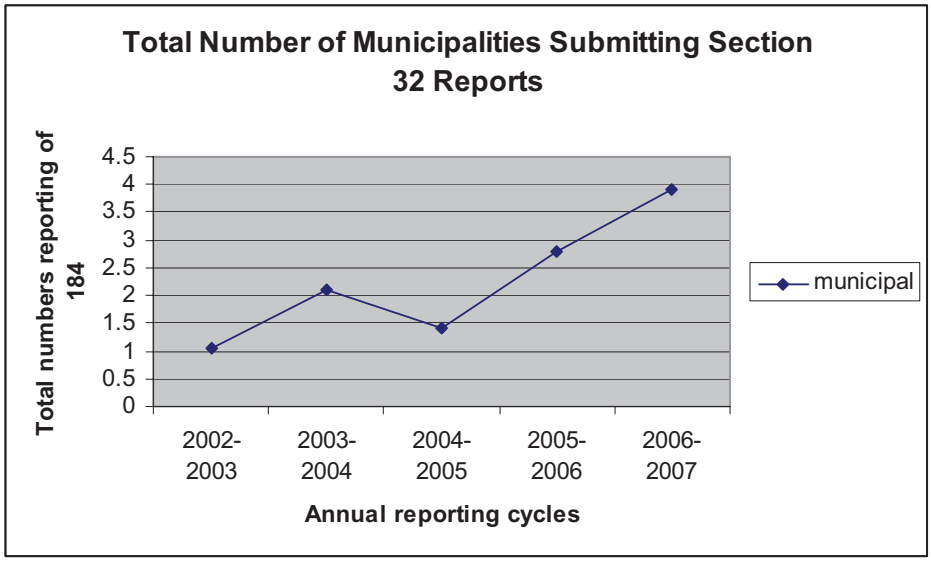
Graph 1



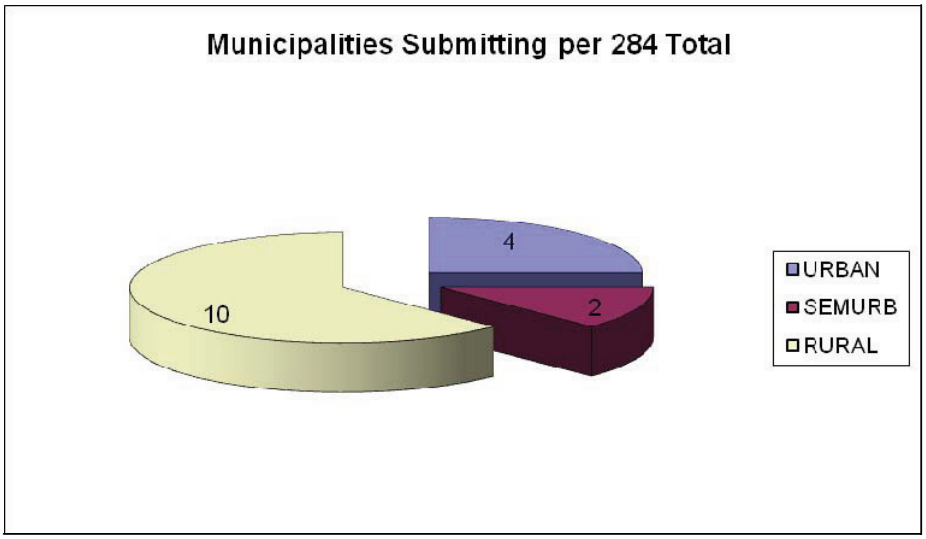
Graph 2



Graph 3



Pie Chart 1: Breakdown of Municipalities submitting Section 32 Reports



Singling Out Local Government

Local government structures are usually the first interface for the public in pursuing delivery, particularly with regard to socio-economic rights. To this end, these structures need to be operationally equipped to facilitate delivery. In particular, enhanced operational processes should address key areas like records management systems and skills development for staff to facilitate implementation and compliance. The low number of section 32 reports received from local

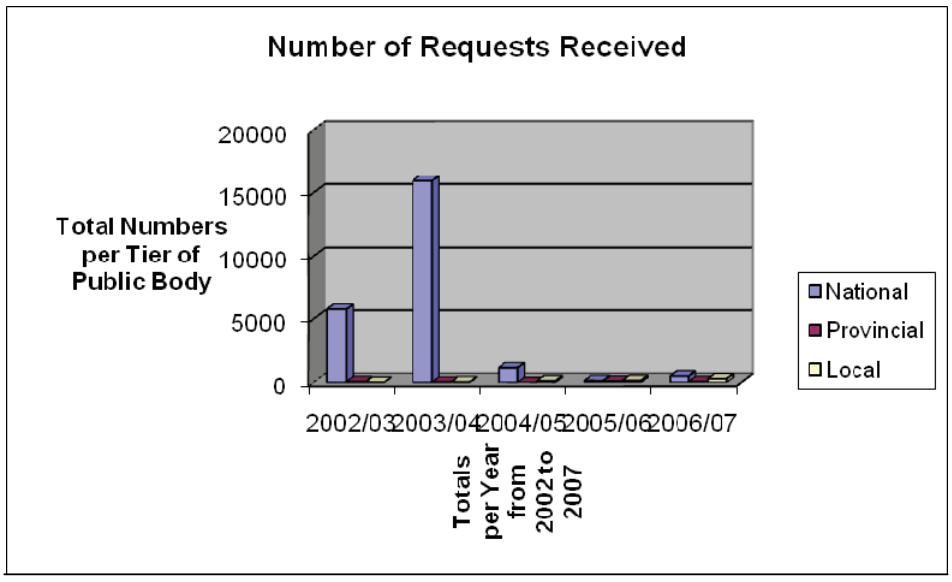
government indicates serious impediments to PAIA-based compliance and delivery. Some of the impediments to tangible delivery may be attributable to:

- The process of consolidation of municipalities and local government structures post 2000,
- Inadequate systems and processes to administer requests and monitor and evaluate specific requirements to address impediments to delivery,
- Poor records management systems,
- Insufficient resource allocations,
- Absence of a dedicated and trained PAIA component,
- Insufficient commitment from senior management, and
- PAIA is not identified as a priority service delivery area on local government agendas.

ACCESS TO INFORMATION REQUESTS STATISTICS

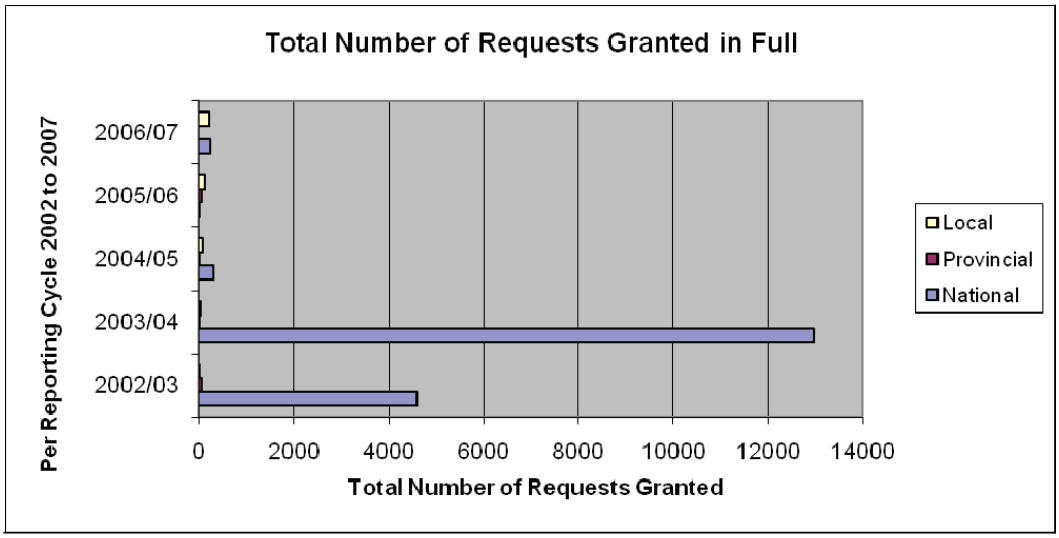
Graphs four, five and six five illustrate the total numbers of requests received, granted in full and declined respectively. The empirical data in these graphs are composite statistics from 2002 to 2007 for all three tiers of government. Notably traditional service delivery departments like the South African Police Service and Departments of Housing at the national and provincial levels respectively have consistently processed the highest volumes of requests.[205] This may be attributable to the well-entrenched administrative and information provision mechanisms already in place prior to the enactment of PAIA.

Graph 4: Total Number of Requests Received

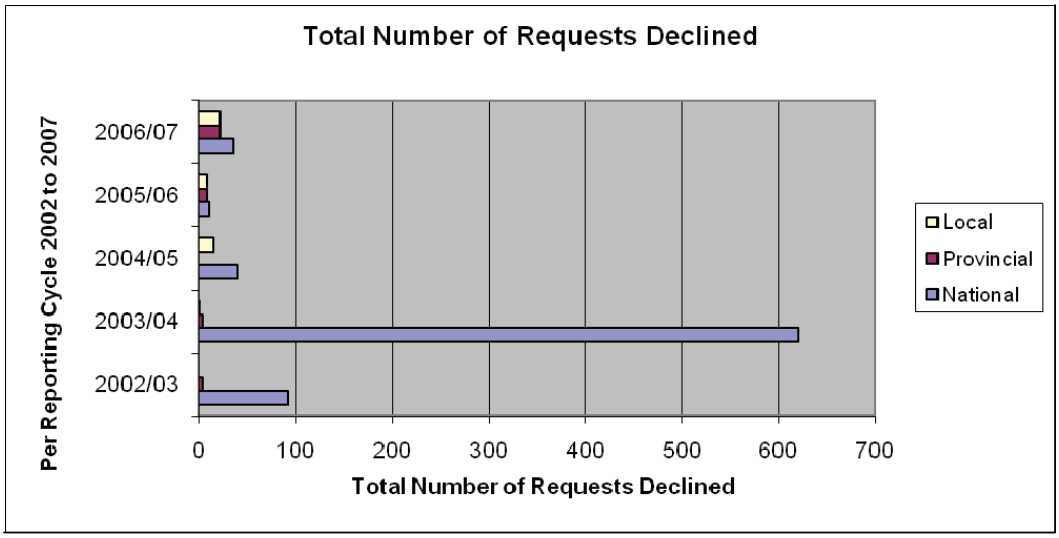


205 The Public Service Commission survey states that the SAPS employ 1210 DIOs. This type of capacity is commendable and is probably ideal for an entity processing consistently high volumes of requests.

Graph 5: Total Number of Requests Granted



Graph 6: Total Number of Requests Declined



A number of factors appear to have contributed to the low numbers of public bodies reporting under section 32. These range from a basic lack of awareness of the legislation to inefficient records management systems. One of the significant contributing factors for low reporting must however be the absence of any sanction for non compliance with reporting obligations. Interestingly, during the first two reporting cycles, the low numbers of submissions were attributed to a lack of information on the part of deputy information officers to compile reports. The Commission has since made a number of interventions ranging from training and briefing sessions with DIOs, to sending off directives to public entities reminding them of their obligation to

submit the report annually.[206] These measures have resulted only in a marginal increase in the number of national departments reporting. They have however, had little or no effect on the reporting rates of the provincial and municipal tiers.

Identified Challenges

Discernible patterns have emerged from briefing sessions with DIO's that the PAIA reporting requirements are viewed in general as overly burdensome on already scarce resources. The onerous reporting obligations, together with the common view that PAIA is too legalistic pose serious threats to its application.

Other factors which have impeded reporting, application and implementation relate to the high staff turnover within the public sector and the consequent need for ongoing training. A striking example of formal compliance attempts with legislative directive is the common occurrence in many local government structures of relegating PAIA to administration or legal officers in addition to their existing functions. There is also a detectable general reluctance by civil servant information officers to apply the provisions of PAIA with confidence. Many share the view that the release of too much information make their employers vulnerable to litigation.[207]

Inasmuch as PAIA poses implementation and application hurdles, some of which are detailed above, the formulation of the legislation presents an imposing challenge for the realisation of PAIA objectives. Admittedly, PAIA is ambitious in its ambit and while this component of its drafting is celebrated, the legislation does pose serious application challenges.

The actual use of PAIA has been critical in evidencing weaknesses in formulation, warranting reform. It is often the case however, that despite formal law reform, the reforms contained in amending regulations are not always practically implemented within the public entity. It may be said that the patterns which have emerged with regard to implementation may be categorised by virtue of two root characteristics in the public service. Broadly, these challenges may be attributable to that category which stems from a lack of commitment evidenced by public bodies to deliver on access to information objectives; and the second broad group, housing the challenges linked with operational processes and systems to overcome the first set of challenges. The realisation of PAIA deliverables can only be attained if these broad issues are addressed within the South African dynamic.

The section 32 report is by no means an entirely accurate or comprehensive tool in ascertaining the extent of use of PAIA by the general public. Nor does it provide sufficient substantive information on the manner in which the public sector is responding to requests for information for

206 The Public Service Commission survey reveals an acknowledged and pressing need by the majority of the Deputy Information Officer sample for PAIA based training.

207 Porogo, D. *Report on the Proceedings of the PAIA Indaba:* May 22–23. *Perspectives from the Department of Justice and Constitutional Development*, Jan 2004.

the reasons discussed above. However, the very lack of compliance with the reporting obligations itself appears to be indicative of a more serious systemic malaise in the public sector. What has clearly emerged is that the application of PAIA within the public sector is indeed one of the key challenges in successful implementation. The submission therefore needs to be made that despite the formal adjustments to the legislation to facilitate access and implementation, and interventions by the Commission, these have done very little to alleviate the troughs in the reports submitted.

A recent survey testing views of South Africans in metropolitan areas has revealed that more requesters in these areas are now receiving requested information quicker than those in the past year.[208] The survey also indicated that the numbers of people who have felt they needed, but were not given, information from local government on service delivery issues have dropped. These findings could possibly be following the trends evident in jurisdictions with established information regimes. The commendable response rates in these metropolitan areas however may bear some connection to the patterns in relation to compliance with section 32 reports as well.

RECOMMENDATIONS

The challenges posed by the implementation of new legislation are best assessed for resolution when approached holistically and in context. The approach must view application, implementation and enforcement within the broader South African socio-economic and political context. The right to access information as it is entrenched in PAIA poses a number of challenges on almost every level. These challenges are not limited to individual South African right holders/requesters, but extend to public and private bodies too.

The challenges for PAIA-based delivery are multi-dimensional. They arise predominantly from challenges experienced with resources and in attempting to achieve operational efficacy in implementation. To this end, it has to be borne in mind that PAIA is one of the first pieces of legislation to impose positive duties on the state. The imposition of this duty has a number of implications for the state. Primarily amongst these, is to facilitate and encourage a change in the prevailing culture of secrecy in the public sector, a throwback seemingly of the apartheid era. The recommendations targeting operational efficacy ideally should include:

- Increased resource capacity[209] to ensure adequate delivery based on a realistic costing for implementation;

208 Markinor. *Whistle Blowing, the Protected Disclosure's Act, Accessing Information and the Promotion of Access to Information Act: Views of South Africans, for the ODAC*. Available at: http//www.opendemocracy.org.za/ documents, 2007.

209 The argument for improved capacity, and therefore delivery is extended by the demonstrable need for adequate human resources in the processing of requests. The psychology and numbers of staff dedicated to this process are critical to the realisation of the right. In terms of the political and geographical terrain of the country, it often transpires that pockets of municipalities who serve rural people are vastly understaffed and under-resourced. Not surprisingly these vulnerable areas have perhaps the most critical needs with regard to access of information, specifically on socio-economic rights. Capacity-based resource considerations therefore have to be tailored to address specific needs.

- Accepted records management processes and standards;
- Co-ordinated processes and reasonable timeframes for interdepartmental references;
- Ongoing training for personnel;
- PAIA specific audits, including an annual costing for the PAIA component;
- Strategic planning ensuring implementation is not relegated to a low priority agenda; and
- Committed 'buy-in' from senior management for implementation and delivery.

Apart from recommendations for the deployment of adequate financial and human resources, are recommendations which favour self audits within each department with regard to the implementation of PAIA. Basic logistical assessments will explore capacity and infrastructural issues, such as systems to process request payments and the provision of receipts for access fees, and so forth, need to be highlighted and addressed. These assessments must begin at a threshold level from the point of inception of a request; ideally culminating with delivery impediments and successes. The inclusion of a monitoring and evaluation component cannot be sufficiently emphasised as a tool for informing enhanced delivery. A co-ordinated collaboration between potential stakeholders for audit informed delivery and implementation could see the services of the National Archives and Auditor-General integrate PAIA in their processes.

Recommendations with regard to private individuals focus primarily on the need for continued education and application of PAIA. The apparent apathy to human rights may appear at first blush to be ignorance based, but it is submitted that the lack of any readily apparent indicators to measure this should permit for other explanations. First among these would be the high levels of general poverty which results in rights prioritisation for the majority. The reference by Cameron Jacobs of the 'chronic risks' of poverty must also mean that there are chronic symptoms of poverty, which inform priorities in South Africa.[210] Rights education as a tool to ensure that the right to access information is realised must therefore include clear and accessible directions on how to assert this right in itself or as a tool to realise other rights expeditiously and economically.

The key recommendation tendered in this report impacts both on the issue of accessibility and enforcement under PAIA. Raised in the discussion under limitations, it remains an area of critical focus for law reform. The recommendation focuses largely on the manner in which requests are processed and the economy with which they are finalised. In terms of the PAIA legislation, a denial to access leaves only the courts as a forum of final redress. Litigating any matter in the high courts is an expensive, time consuming and cumbersome process.

The experience of the Commission reveals a dire need for an intermediary functionary. The Office of an Information Commissioner has been actively advocated as a workable solution to address enforcement and accessibility shortcomings in the PAIA legal framework. The advantages of such

210 See Chapter 5 in this report on Poverty Discourse and Human Rights in South Africa.

a functionary are many. This office would typically contribute to addressing the exclusive and elitist nature of the current dispute resolution mechanisms and lessen the adversarial nature of dispute resolution in access to information matters as well. It would necessarily be the point of entry for requesters who have been denied access but who wish to avoid going the route of litigation for the reasons stated above.

A number of submissions have been tendered to the relevant state department[211] for the creation of such an office. The submission made by the Commission advocates the granting of extra judicial powers to the office of the Commissioner.[212] The recommendation has also gained popular support amongst advocates for the right to access information and other interest groups. The proposal also found support from a special review committee convened to critically consider the status of human rights institutions created under the Constitution.[213]

The recommendations tendered above extend beyond the 'teething problems' evidenced in the implementation of new legislation within the public sector. Adequate implementation of PAIA must urgently be secured in the immediate short term. Implementation must also be strategically designed, within realistic timeframes for delivery, sustained efficiency and relevance in the long term through integrated organisational systems, and a commitment of resources as well as political will.

CONCLUSION

The right to access information as it is embodied in PAIA has been enacted with the key objective of fostering a culture of transparency and accountability in South Africa. It is also the key to informed scrutiny and decision making for all South Africans. To this end the right to access information may potentially be the key for the realistic realisation and assertion of other fundamental rights themselves. As a society we cannot but be extra vigilant for the successful implementation of the right to access information, to ensure that the success celebrated at its enactment is translated into a reality for all South Africans.

The milestone PAIA legislation is not without practical difficulties evidenced in application. It is, however, in line with contemporary legislation on an international level and clearly delineates norms and standards mirrored in the global arena. This alignment is disjointed if close scrutiny is not accorded to its actual implementation in the context of the South African dynamic.

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211 In terms of the PAIA legislation the state department charged with the administration of PAIA is the Department of Justice and Constitutional Development.

212 The original task team advocated an information court within each division of the provincial high courts, subject to rules which would ensure simplified procedural processes and cheaper access. The current position is that the cheaper lower courts – Magistrates courts are to have jurisdiction to hear PAIA matters. This will only take effect when the existing rules for Magistrates Courts are amended and promulgated.

213 The Asmal *ad hoc* Committee on the Review of Chapter 9 and Associated Institutions chaired by former Minister of education Kader Asmal. The findings of the Commission can be located on the following website:http//www.polity.org.za/ html / gov docs/ bills. Also see, Klaaren, J. The Right of Access to Information at age Ten. In *Reflection on Democracy and Human Rights: A decade of the South African Constitution Act 108 of 1996.*

The slow advance in implementation in the public sector and challenges impacting on enforcement of PAIA requires urgent address if tangible delivery is a realistic expectation for policy makers. The critical success in implementation will therefore be rooted in political commitment and equal priority for resources on the reform agenda. A recommended approach then must be to accelerate processes to realise delivery on PAIA for the short term at the very least. Progress on this front will impact significantly on both the fabric of South African lives internally and externally as the country increasingly engages economically through global commerce.

While compelling perspectives on poverty within dual economies, crime, HIV/Aids elicit justifiably gut-wrenching reactions for their resolution, other equally compelling needs are impacted by being relegated to the bottom end of the priority list. This type of relegation will be disastrous for access to information, which by its very nature seems inclined to suffer disaster. PAIA needs to be rescued and must be initiated through the commitment in political will to see it translated into a working reality for South Africans. Bearing characteristics of both civil and political rights and socio-economic rights, access laws with regard to information underpin and form the foundation for realisation of both groups of rights. The logical result must therefore be that the foundation grounding rights such as these must form part of the mix which underpins all South African policy, reform and redress processes. Arguments for prioritisation of particular rights at the expense of PAIA must therefore not prevail.

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CHAPTER FIVE:

POVERTY DISCOURSE AND HUMAN RIGHTS IN SOUTH AFRICA

INTRODUCTION

"… freedom translates into having a supply of clean water; having electricity on tap; being able to live in a decent home, and having a good job, to have accessible healthcare. I mean what is the point of having this transition if the quality of life of these people is not enhanced and improved? If not, the vote is useless!"[214]

"Like slavery and apartheid, poverty is not natural. It is man-made and it can be overcome and eradicated by the actions of human beings. And overcoming poverty is not a gesture of charity. It is an act of justice. It is the protection of a fundamental human right, the right to dignity and a decent life. While poverty persists, there is no true freedom …". [215]

There are a few commonalities between the above quotations. The first is a concord that one cannot do justice to political freedom without economic liberation. Secondly, poverty is about the right to, and the fulfilment of, basic resources. Thirdly, fighting poverty is about protecting the right to dignity. Poverty is further a social construction and therefore can be overcome. The above quotations and the commonalities between them shall serve as the basis around which the argument on the theme of this chapter shall be shaped, that is, freedom from poverty should be seen as a human right. This proposition is not only based on moral arguments of justice but also a legal one. The minimum legal rights to social security, housing, education, water and the like in the Constitution implies at the very least that the enjoyment and fulfilment of those rights will help the poor to escape extreme poverty and deprivation. Synergistically, it can be argued that when one puts these rights together there is a constitutionalisation of the right to basic resources and, in the context of human rights, poverty can be described as the violation of the rights to basic resources. When these rights are not fulfilled and enjoyed, extreme poverty worsens and persists. The state has an obligation to ensure the fulfilment and enjoyment of these rights both in national and international law.

This chapter will also explore the extent of the South African government's progress in fulfilling its obligations. It goes beyond the assessment of progress for 2007 to an analysis of the government's stance and interpretation of poverty in South Africa. There is no doubt that there is a commitment to poverty alleviation and a political will to help the poor. However, is there a proper understanding of poverty in South Africa? Are the various poverty alleviation projects addressing the genuine plight of the poor, and will they improve the lives of future generations of the poor? Equally important, is there a proper understanding of the dual economy thesis in South Africa? Does the first economy help or hinder the poor and is there significant mobility? Finally, does South Africa have a comprehensive policy on the poor?

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214 Tutu, D. in Gumede, W.. *Thabo Mbeki and the Battle for the soul of the ANC*. Zebra Press, Cape Town. p. 67, 2005
215 Nelson Mandela pledging his support for the GCAP, London , 3 February 2005.

These are some of the questions that merit discussion in this chapter through an analysis of vulnerability, social exclusion, marginalisation as well as the partnerships that are required to overcome poverty and ensuring development. Its overall purpose is to contribute to the discourse on poverty and human rights. It should not be viewed as a critique of government policy, or lack thereof, but rather to further an important debate as South Africa struggles to consolidate its young democracy. With this in mind, one is reminded of the adage that the journey to discovery is not to seek new landscapes but to see through new eyes. Part of seeing through new eyes is the integration of economic and social policy such that the ordinary lived experience of the poor is properly comprehended and not trapped in consumption-based and maintenance orientated social services and poverty alleviation projects.

FREEDOM FROM POVERTY AS A HUMAN RIGHT

Poverty has always been considered a degradation of human dignity as the poor are afflicted with hunger, malnutrition, ill health, unsanitary housing and living conditions, and often a lack of proper education. Poor people acutely feel their powerlessness and insecurity, their vulnerability and lack of dignity and are constantly subjected to the decisions of the non-poor and powerful in practically every aspect of their lives. Therefore, poverty and a poor person's ability to gain access to assets, and his/her ability to translate them into income, are shaped by the workings of the labour and product markets, by their access to skills, information and social networks, by norms governing resource use within and beyond the household, and by gendered power relations. It is against this background that one can appreciate the appeal for the concept of poverty to be viewed as a human rights violation.

The Universal Declaration of Human Rights was adopted on 10 December 1948; the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights in 1966. Through these instruments every human being was recognised to possess inalienable human rights and freedoms, the protection, promotion and fulfilment of which is not only the obligation of nation states but also of the international community. The Universal Declaration of Human Rights expresses a whole range of human rights and for the purposes of the present discussion, the key right is the right to an adequate standard of living in Article 25. Similarly, Article 11 of the International Covenant of Economic, Social and Cultural Rights provides that 'State parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family.'[216] In both these documents, an adequate standard of living includes food, clothing, housing, medical and necessary social services.

Therefore, if poverty can be shown to be a violation of human rights, its removal will become a binding obligation. However, is freedom from poverty a human right, and if so, how can it be protected and fulfilled? A useful point of departure is that all rights contain obligations and all

216 International Covenant on Economic, Social and Cultural Rights. Resolution 2200A (XXI).

rights contain a relationship between duty bearers and right-holders. In the context of poverty one would need to identify the agents obligated to fulfil the right as well as the beneficiaries. Secondly, it will also be important to establish an indicator of the right to poverty such that one can ascertain whether the right is being realised or not. From a human rights perspective and given that the International Covenant for Economic, Social and Cultural Rights recognises the rights to an adequate standard of living, adequate food, health, social security and education,[217] one can argue that poverty can be described as the violation of the right to these basic resources that have already been recognised in international law.

It is estimated that 850 million human beings are chronically undernourished, 1 000 million lack access to safe water and 2 600 million lack access to basic sanitation. A further 2 000 million lack access to essential medicines, 1 000 million do not have adequate shelter, 2 000 million lack electricity and approximately 781 million adults are illiterate.[218] These harsh realities have made many scholars question the existing paradigms to poverty reduction and further that poverty is not simply a matter of material deprivation but also an issue of dignity, justice and fundamental freedoms. It has also led to the discourse on the myth of human rights and the perception that covenants, declarations and global summits are mere rhetoric to maintain the global status quo. This prompted UNESCO to propose that poverty be regarded as a violation of human rights and therefore be abolished and in this manner link the first generation civil and political rights with the second generation economic and social rights.[219] The shift in emphasis can be seen as an attempt to place the relative neglect of economic and social rights on the same footing as civil and political rights. To quote Campbell, *"torture is seen as unacceptable, poverty merely unfortunate."*[220] The shift in paradigm goes beyond the moral message of poverty eradication to developing legal remedies that seek to empower the poor to obtain their rights.

In the Millennium Declaration, 189 member states of the United Nations signed and reaffirmed the commitment of the international community to eradicate poverty.[221] The Declaration is a consolidation of eight interconnected development goals and constitute a set of agreed and measurable targets and quantifiable indicators. The first Millennium Development goal is to halve extreme poverty and hunger. More precisely, the goal has two targets, namely, to halve, between 1990 and 2015, the proportion of people whose income is less than USD 1 a day. The second target is to halve, between 1990 and 2015, the proportion of people who suffer from hunger. In the World Summit Outcome in 2005, heads of state and government reaffirmed 'the right of all individuals to live in freedom and dignity, free from poverty and despair.[222] It furthermore recognised that 'all individuals, in particular, vulnerable people, are entitled to freedom from fear

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217 See Articles 11, 12, 9 and 13. In International Covenant on Economic, Social and Cultural Rights.
218 Pogge, T, (ed). Severe Poverty as a human rights violation. In *Freedom from Poverty as Human Right*. UNESCO. Oxford University Press, 2007.
219 Campbell, T. Poverty as a violation of human rights: Inhumanity or Injustice? In Pogge, T.(ed). *Freedom from Poverty as Human Right*. UNESCO. Oxford University Press. p. 57, 2007.
220 Ibid.
221 United Nations Millennium Declaration. General Assembly Resolution 55/2. 8 Sept 2000.
222 United Nations General Assembly. *2005 World Summit Outcome*. Adopted September 2005.

and freedom from want, with an equal opportunity to enjoy all their rights and fully develop their human potential.'[223] In April 2005, the Commission on Human Rights drafted Resolution 2005/16 on Human Rights and Extreme Poverty. The resolution expressed concern and reaffirmed that extreme poverty and exclusion from society constitutes a violation of human dignity.[224] The resolution further called upon states to foster participation and empowerment of the poorest people in the development, implementation and evaluation of policies that affect them.

Flowing from the resolution were the draft guiding principles on Human Rights and Extreme Poverty. The principles are comprehensive, detailing three key sections: Participation by the poor; indivisibility and interdependence of rights, and state obligations and international co-operation. The significance of the principles and its content lies in the description of poverty. It defines poverty as a 'human condition characterised by sustained or chronic deprivation of resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights. It further advocates that persons living in extreme poverty are fully entitled to demand the development of policies aimed at the eradication of poverty at both the national and international level and in turn states have the obligation to ensure effective action to eliminate extreme poverty.

Resolution 2005/16 and its guiding principles are perhaps the closest documents, and certainly represent a paradigm shift, to freedom from poverty as a human right. Conventionally, poverty is defined in economic terms as manifested in very low income and consumption per capita or per household. By extension then, the solution is to raise the level of income. The first Millennium Development goal of halving the proportion of people living on less that USD 1 per day, however well intentioned, falls into the same trap.

THE ECONOMIC AND STRUCTURAL CONTEXT OF POVERTY AND INEQUALITY IN SOUTH AFRICA

South Africa's transition from authoritarianism to democracy in 1994 was nothing less than a miracle and although there have been substantive improvements in the provision of infrastructure and the delivery of services, these have been too slow relative to expectations. In fact, it can be argued that in the fourteen years since the dawn of democracy, the state has not made any significant impact in respect of resolving unemployment, poverty and inequality in South Africa.

The Human Sciences Research Council reported in 2004 that the proportion of people living in poverty has not changed significantly between 1996 and 2001. However, it argued that the depth of poverty for those households living in poverty had increased and the gap between the rich and poor had widened. A somewhat different analysis by Meth in 2004 revealed that approximately 19.5 million people were living below the poverty line in 2002. This represents an increase of 2.2

223 Ibid.
224 Office of the High Commissioner for Human Rights, Human Rights and Extreme Poverty. Human Rights Resolution 2005/16, 2005.

million from the reported 17.2 million people living below the poverty line in 1997.[225] Meth's analysis further holds that of those living below the poverty line, between 7 and 15 million people live in utter destitution. Furthermore, the United Nations Development Programme reported in 2004 that the poverty rate in South Africa stood at 48% and this is in congruence with the report by the Taylor Commission[226] of a poverty rate of between 45 and 55%. Statistics released by the South African Institute of Race Relations in 2007[227] appear to correlate well with the studies conducted by the Human Sciences Research Council and others. Cumulatively, the data by South African Institute of Race Relations revealed that between the period of 1996-2005, poverty in South Africa had worsened as more people fell into the underclass (table 1), there was a significant increase in the proportion of people living in relative poverty (tables 2 and 3) and as well as a widening poverty gap (table 4).

Using the World Bank measure of less than a USD 1 a day of extreme poverty, the table below shows that both the percentage and the absolute number of people living in poverty in South Africa has increased quite substantially between 1996 and 2005.

Table 1

NUMBER AND PROPORTION OF PEOPLE LIVING ON LESS THAN $1 DAY, 1996 – 2005[228]		
YEAR	**NUMBER**	**PROPORTION**
1996	**1 899 874**	**4.5%**
1997	**2 243 576**	**5.2%**
1998	**2 604 366**	**6.0%**
1999	**2 931 253**	**6.6%**
2000	**3 205 217**	**7.1%**
2001	**3 653 756**	**8.0%**
2002	**4 451 843**	**9.7%**
2003	**4 374 079**	**9.4%**
2004	**4 296 654**	**9.1%**
2005	**4 228 787**	**8.8%**

225 Meth, C. In Desai, A. (2005). *Uprooting or re-rooting poverty in post apartheid South Africa? A literature Review.* Prepared for SANPAD Poverty Reduction Workshop, 2004.
226 The Taylor Commission, named after its Chairperson, Prof. Vivienne Taylor, was appointed and charged with developing recommendations on the establishment of a comprehensive social security system in South Africa.
227 South African Institute of Race Relations. *South Africa Survey 2006/2007.*
228 Ibid.

In table 2 below, people in poverty are defined as those living in households with incomes less than the poverty income which ranges from R871 per month for one individual to R3 314 for a household of eight members or more in 2005.[229] As can be deduced from the table there has been a substantial increase of people across all race groups living in relative poverty. This correlates well with the proportion of people living in relative poverty by race in table 3. Significantly, the amount of whites living in relative poverty has doubled representing a 100% increase over the ten year period. According to these statistics there has been an increase in the poor from 40.5% in 1996 to 47% in 2005. Needless to say, the poverty gap has widened quite considerably (see table 4). Among the African race, the poverty gap increased from R16 677 million in 1996 to R35 726 million in 2005, but statistically the biggest is among whites with a change of 177.8 % over the ten year period.

Table 2[230]

NUMBER OF PEOPLE LIVING IN RELATIVE POVERTY BY RACE, 1996 – 2005					
YEAR	**AFRICAN**	**COLOURED**	**INDIAN**	**WHITE**	**TOTAL**
1996	**16 316 321**	**619 664**	**66 081**	**98 654**	**17 100 720**
1997	**17 448 746**	**663 386**	**70 756**	**123 930**	**18 306 819**
1998	**18 676 149**	**710 042**	**75 734**	**132 654**	**19 594 579**
1999	**19 514 473**	**741 934**	**79 118**	**138 601**	**20 474 127**
2000	**19 831 697**	**754 787**	**80 504**	**161 836**	**20 828 824**
2001	**20 640 781**	**786 394**	**83 872**	**190 318**	**21 701 364**
2002	**21 016 828**	**800 715**	**85 407**	**193 788**	**22 096 738**
2003	**20 957 036**	**798 447**	**85 167**	**193 237**	**22 033 887**
2004	**21 381 677**	**814 615**	**86 888**	**197 154**	**22 480 335**
2005	**21 389 782**	**815 154**	**86 945**	**197 289**	**22 489 170**

229 Source: South African Institute of Race Relations. *South Africa Survey 2006/2007*.
230 Ibid.

Table 3[231]

PROPORTION OF PEOPLE LIVING IN RELATIVE POVERTY BY RACE, 1997 – 2006					
	AFRICAN	COLOURED	INDIAN	WHITE	TOTAL
1997	50.3%	16.8%	6.2%	2.0%	40.5%
1998	52.9%	17.8%	6.6%	2.5%	42.7%
1999	55.6%	18.7%	6.9%	2.6%	45%
2000	57.1%	19.3%	7.2%	2.7%	46.3%
2001	57.1%	19.3%	7.2%	3.2%	46.9%
2002	58.5%	19.9%	7.4%	3.7%	47.7%
2003	58.6%	20.0%	7.5%	3.8%	47.9%
2004	57.6%	19.7%	7.4%	3.8%	47.2%
2005	57.9%	19.9%	7.5%	3.9%	47.5%
2006	57.2%	19.7%	7.5%	3.9%	47%

Table 4[232]

POVERTY GAP, 1996 – 2005 (IN MILLIONS OF RANDS)					
	AFRICAN	COLOURED	INDIAN	WHITE	TOTAL
1996	16 677	618	56	176	17 527
1997	19 388	713	61	214	20 376
1998	22 168	816	70	256	23 310
1999	24 337	897	77	307	25 618
2000	25 504	940	81	328	26 852
2001	26 707	985	84	366	28 142
2002	28 650	1 057	91	392	30 189
2003	33 488	1 235	106	459	35 288
2004	34 216	1 262	108	469	36 055
2005	35 726	1 318	113	489	37 646

231 Source: South African Institute of Race Relations. *South Africa Survey 2006/2007*
232 Ibid.

The high poverty rate in South Africa is a direct consequence of the high unemployment rate and analysts have described the labour market situation in South Africa as chronic and structural. Statistically, the figures are alarming. By the narrow definition, unemployment was recorded at 31% in March 2003 and if one uses the expanded definition, the figure increases to 42%.[233]

Desai, however, argued that the figure is higher and cited figures released by the South African Reserve Bank that the expanded unemployment figure for males was 46.6% and that for females was 53.4%.[234] Data by the South African Institute of Race Relations (see table 5) revealed a somewhat similar analysis and showed a static unemployment trend between 2005 and 2006. By the narrow definition the unemployment figure in 2006 was 25.6% and by the expanded definition, 39%. The official unemployment figure makes use of the narrow definition and therefore only includes those economically active people who are not working but who are taking active steps to look for jobs. In contrast, the expanded definition includes discouraged job seekers that are unemployed but have stopped looking for work.

The expanded definition seems a more appropriate measure to use in South Africa because it provides a more accurate picture of a labour market that suffers from long term unemployment and therefore that the crisis is structural. The expanded definition also shows a significant number of discouraged job seekers which is indicative of the loss of hope and apathy attached to finding employment.

233 See McCord, A. & van Seventer, D. *The Economy-wide impacts of the Labour Intensification and Infrastructure and Expenditure in South Africa*. Forum Paper for the Conference on African Development and Poverty Reduction, the Macro-Micro Linkages, 13 –15 October 2004.

234 Figures from South African Reserve Bank. In Desai, A. *Uprooting or re-rooting poverty in post apartheid South Africa? A literature Review.* Prepared for SANPAD Poverty Reduction Workshop, 2005

Table 5[235]

UNEMPLOYMENT BY PROVINCE[236]				
	STRICT DEFINITION		EXPANDED DEFINITION	
PROVINCE	2005	2006	2005	2006
EASTERN CAPE	27.1%	22.1%	43.6%	36.9%
FREE STATE	30.6%	28.3%	39.1%	38.7%
GAUTENG	22.7%	23.3%	34.1%	34.3%
KWAZULU-NATAL	31.7%	29.9%	45.5%	44.0%
LIMPOPO	32.4%	35.6%	57.3%	59.0%
MPUMALANGA	27.4%	27.4%	42.1%	39.4%
NORTH WEST	28.8%	31.8%	45.6%	45.6%
NORTHERN CAPE	29.4%	23.5%	41.3%	36.3%
WESTERN CAPE	17.6%	15.9%	24.8%	23%
SOUTH AFRICA	26.5%	25.6%	40.5%	39.0%

In trying to explicate South Africa's apparent failure to make significant inroads into the unemployment rate, interpretations and re-interpretations of the dual economy thesis have emerged over the last couple of years. There is, however, much disagreement over the relationship between the first and second economies. Some observers hold that the two economies are structurally disconnected which, to them, would explain the severe limitations of the trickle-down approach to poverty reduction. Others have argued that to explain the relationship as a structural disconnection is to simplify matters since a nexus exists and has existed for a very long time. Therefore, one should perhaps speak about the articulation of the two economies, the origins of which are rooted in the creation of the migrant labour system. For example, Du Toit argues that one cannot speak of the impoverished as being 'disconnected' from the South African economy. Rather, he argues that their impoverishment is directly related to the dynamics of 150 or more years of forcible incorporation into racialised capitalism. For Du Toit, the focus of analysis should not be on the social exclusion of the impoverished, but rather the terms and conditions of their inclusion. Habib makes a similar argument and poses the hypothesis that it is perhaps the policies and interventions of the first economy that is creating the impoverishment of the second economy.[237]

235 Source: South African Institute of Race Relations. *South Africa Survey 2006/2007.*
236 Ibid.
237 Habib, A. In Desai, A. (2005). *Uprooting or re-rooting poverty in post-apartheid South Africa? A literature review*. Prepared for SANPAD Poverty Reduction Workshop, 2004

Such debate has certainly reinvigorated the discourse of poverty, inequality and underdevelopment in South Africa and what the best policy prescription should be. The argument that is presented here is that poverty, unemployment and inequality are inextricably linked and any significant inroads would require a research study that would go beyond the simple dichotomy of inclusion and exclusion.[238] This would require an analysis and an understanding of the structural dynamics of the South African society that shape the social, economic and power relations of the poor. These relations, what Du Toit[239] coins as the political economy of poverty and livelihoods, create marginality, maintain vulnerability and undermine the agency of the poor.

The definition of poverty and its measurement is a contested area and although it is unnecessary to enter such a polemic here, one must agree with Desai that it is a rather trite and hollow debate whether one must add or extract 10% of South Africa's population from being defined as poor.[240] The fact is simply that no matter how one measures or defines poverty, millions of people in South Africa are living under conditions of extreme poverty and therefore below any acceptable minimum poverty line. The evidence further suggests that both poverty and inequality have worsened over the past fourteen years. It is therefore critical to examine the political, economic and social impediments to the alleviation of poverty and inequality in South Africa by placing the policies of government under the microscope and understanding and analysing the lived experiences of those in poverty. This will allow for the development of solutions that will shift away from the pure quantitative aspects of government service delivery to the monitoring, assessment, and generation of solutions that has as its focus improving the quality of lives of the most vulnerable in society.

This can be achieved only if one internalises that poverty and people's ability to gain access to assets, and their ability to translate them into income, are shaped by the workings of the labour and product markets, by their access to skills, information and social networks, by norms governing resource use within and beyond the household and by gendered power relations within and beyond households. In other words, people are subject to a set of conditions that leave them vulnerable, and often the access to resources is shaped by their relationships with the non-poor and powerful. Wood makes the succinct point that 'poor people face chronic risks, which are institutionally and relationally generated, in the form of inequality, class relations, exploitation, concentrations of unaccountable power and social exclusion.[241]

SOUTH AFRICA'S POVERTY INTERVENTIONS

The South African government's poverty interventions have been wide ranging which shows its commitment to addressing the many inequalities inherited from the apartheid regime. A clear

238 Du Toit, A. *Chronic and structural poverty in South Africa: Challenges for action and research*. Centre for Social Science Research. Working Paper No. 121, 2005
239 Ibid.
240 Desai, A. Uprooting or re-rooting poverty in post apartheid South Africa? A literature Review. Prepared for SANPAD Poverty Reduction Workshop, 2005
241 Wood, G. In Francis, E. Poverty: Causes and Consequences in Rural South Africa. Chronic Poverty Research Centre Working Paper No. 60, 2003.

example of this is the support given through social security and social assistance grants that have increased from a total of ten billion rand in 1994 to seventy billion rand in 2006.[242] Consequently, the amount of beneficiaries has increased from the initial 2.5 million in 1994 to over 10.5 million. Further evidence of the commitment of government is the amount of poverty reduction programmes. In categorising poverty reduction programmes based on programme type, the Audit of Government's Poverty Reduction Programmes and Projects by the Public Service Commission revealed 40 programmes that contain more 29 900 projects.[243] However, what is concerning is that the audit revealed that the government does not possess its own integrated database on poverty reduction programmes. It has further revealed that many projects do not have budget information attached to them as well as the amount of beneficiaries said to benefit from the programmes. This implies that many departments can unknowingly be duplicating projects without the necessary information of the success of the project. The lack of budget information could further imply a waste of resources and without proper data one cannot be sure whether the projects are making a qualitative difference.

Table 6: Major types of existing programme interventions in South Africa

PROGRAMME TYPE	PROGRAMME
SOCIAL SECURITY	• **CHILD SUPPORT GRANT** • **OLD AGE PENSION** • **DISABILITY GRANT** • **FOOD PARCELS**
FREE/SUBSIDISED BASIC HOUSEHOLD SERVICES	• **WATER AND SANITATION** • **ELECTRICITY** • **TRANSPORT** • **REFUSE REMOVAL**
SUBSIDISED INDIVIDUAL SERVICES	• **EDUCATION AND TRAINING** • **HEALTHCARE**
HOUSING	• **RECONSTRUCTION AND DEVELOPMENT PROGRAMME HOUSING**
LAND REFORM	• **LAND REDISTRIBUTION** • **LAND RESTITUTION** • **LAND TENURE REFORM**
INCOME GENERATING PROJECTS AND SMALL MEDIUM MICRO ENTERPRISES	• **PROGRAMMES BY DTI** • **VARIOUS DEPARTMENTAL PROGRAMMES**
PUBLIC WORKS	• **COMMUNITY-BASED PUBLIC WORKS PROGRAMME** • **WORKING FOR WATER** • **LANDCARE** • **COASTCARE** • **OTHER COMPONENTS OF THE** • **EXTENDED PUBLIC WORKS PROGRAMME**

242 Public Service Commission , *Report on Audit of Government's Poverty Reduction Programmes and Projects*, 2007.
243 Ibid.

Table 7: Breakdown of projects in Audit database according to programme category

PROGRAMME CATEGORY	NUMBER	SHARE
SOCIAL SECURITY	16 697	63%
INDIVIDUAL SERVICES	122	0.5%
LAND REFORM	2 513	9.5%
INCOME GENERATING PROJECTS AND SMME'S	2 014	7.6%
PUBLIC WORKS	3 682	14%
NOT CATEGORISED	1 348	5.1%
TOTAL	26 276	100%

Government thinking on poverty, as alluded to in the previous section, has been around the dual economy thesis. In 2004 President Thabo Mbeki addressed Parliament about the three pillar formulation of addressing poverty:

"At the core of our response to all those challenges is the struggle against poverty and underdevelopment, which rests on three pillars. These are: encouraging the growth and development of the First Economy, increasing its possibility to create jobs; implementing our programme to the challenges of the Second Economy; and building a social security net to meet the objective of poverty alleviation."[244]

The Public Service Commission's analysis is correct that the formulation does reflect the government position to foster a stronger and inclusive economy. Secondly, it is also clear that there is a distinction between the welfare interventions that are required and the developmental interventions that are needed in the second economy. However, the discussion in the previous section has suggested that unless one's analysis of the dual economy thesis is correct, the targeted poverty reduction projects will do no more than temporarily and superficially decrease the depth in poverty and therefore it will continue to shift from one generation to the next. Despite the wide-ranging government poverty reduction programmes and projects, there is no agreed government definition on poverty and there is still contestation over what the poverty datum line should be. To a certain extent, this may explain why there is no comprehensive policy on poverty in South Africa. Is the three pillar formulation based on the dual economy thesis appropriate in addressing poverty in South Africa?

Consider that almost half of the South African population survive on earnings below the "poverty datum line" and that over 8 million people are unemployed, 70% of whom are unskilled. Within the first economy, 44% of those employed in the formal sector earn R2500 or more. Fifteen percent of South Africans in formal employment earn less than R1000 per month. A study conducted by Devey, Skinner and Valodia[245] revealed two important things. Firstly, there is a lot

244 Address of the President of South Africa, Thabo Mbeki, of the first joint sitting of the third democratic Parliament, Cape Town. 21 May 2004.

245 Devey, R., Skinner, C. & Valodia, I. *Second Best? Trends and Linkages in the Informal Economy in South Africa*. Development Policy Research Unit. Working Paper 06/102, 2006.

of job swapping at the lower end of the salary scale and therefore a lot of movement between the formal and informal sector. This is in contrast to the common assumption of a structural disconnection and little mobility. Secondly, the above statistics show that poverty exists quite strongly within the formal sector. In this regard Andries du Toit has posed the following comment: *"All too often, the situation of those on the margins of the formal economy was framed in normative and teleological terms, as if the problem was with the informal sector itself, and as if enough economic growth was the solution. What if informal is normal? What if the marginalisation of hundreds of millions of people in today's informal economy is not a function of 'not enough development' and 'not enough growth'? What if it is a structural feature, a function of the present nature and direction of growth itself?"*

How can one make sense of this? The dual economy thesis is perhaps a false dichotomy and perhaps one needs to reconfigure the informal economy as part of the overall formal economy. If one were to change one's mindset then it is entirely possible that the focus is misplaced. The point is that economic marginalisation can have a different meaning, depending on one's frame of reference. It could mean an outcome or a process. If it is a process, it refers to the adverse integration into market or state structures. If this is the case, then it is not a question of social exclusion but a matter of the terms and conditions of incorporation.

In South Africa, the concept of social exclusion has become a buzzword, but very few have taken the time to interrogate what it means and whether it is appropriate to use the language of social exclusion to describe poverty and propose developmental solutions. Furthermore, it makes the assumption that integration, incorporation and inclusion are the panaceas for chronic poverty but no proper analysis is entered into about how such integration will affect the poor.

More importantly, there is no discursive analysis on the complexity of the economic, political, ideological and social power relations embedded in the functioning of the market economy. As a result, there is incomprehension of how poor people are inserted within the broader formation of powers.[246] As Du Toit argues, this requires attention to be paid to both the vertical and horizontal links, the reconfiguration of discourses on race, gender and identity; a proper conceptualisation of 'social capital' relationships and the reconceptualisation of the poor as passive objectives of delivery.[247]

Therefore, for policy planners the focus would be to look at the monopolistic structures that marginalise the poor and design interventions or programmes that will alter the terms and conditions of their incorporation. It is in this social context in which a comprehensive policy on the poor has to be formulated and implemented.

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246 Du Toit, A. 'Social Exclusion' Discourse and Chronic Poverty: A South African Case Study. *Development and Change*, 35 (5): 987 -1020, 2004.
247 Ibid.

RECOMMENDATIONS

As a result of the above analysis, the Commission recommends the following:

- The state hosts a frank and robust discussion about the real nature of poverty in South Africa.
- The core of such a discussion should be around the state meeting its constitutional and international obligations in respect of economic and social rights through the development of a comprehensive policy on the poor.
- The state develops certainty on what it means by poverty alleviation, poverty eradication and poverty reduction in its policy documents as well as to develop certainty on the associated variables.
- The state reviews its current approach to poverty reduction programmes.
- The state develops certainty on what the poverty datum line in South Africa is.
- The state ratifies the International Covenant on Economic, Social and Cultural Rights.

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CONCLUSION

Jo Mdhlela

As we conclude this volume, let us highlight and restate the constitutional imperative of the Commission as the promoter, protector, monitor and assessor of human rights, and our endeavour to inculcate the culture of dignity and respect for human rights at every level of our life as a community. Much progress has been made in this project of human rights development but it must be emphasised that more must be done.

The recent incident in which a group of white students at the Free State University displayed raw and unmitigated racism in which elderly black women were subjected to humiliation and indignity is a constant reminder of a nation that is in danger of regressing in respect of human rights. Human rights are about the affirmation of human dignity, equality and freedom. As a nation we need to do more to inculcate and imbibe a human rights ethos.

The same can be said of the killings that took place at Skielik, Swartruggens, in the North West. In that racist tragedy, innocent black people were allegedly gunned down by a 17 year old white man for no apparent reason. Incidents of racism replicate easily. They reflect fixed racial attitudes of racial hatred and stereotyping; they are pervasive in every facet of our common life – be it in schools, universities, informal settlements or businesses. They are to be found in every nook or corner of our life, and are clear indicators that the work of the Commission to champion the gospel of human rights must be taken to new levels.

The work of promoting respect for human rights is the mandate of the Commission. The Human Rights Development Report has reflected widely on the mandate and on the areas in which the Commission engages in its efforts to promote a human rights culture. We also have to state that the failure to carry out this mandate aggressively may have the consequence of retrogression – almost taking back the country to the dark ages of apartheid and colonial years.

The reflections in this report illustrated the importance of the country's constitutional journey on a variety of human rights issues. In addition, parallels and connections are drawn between the theoretical understanding and appreciation of human rights and the lived experience of communities who are the supposed recipients of human rights. Do the people enjoy human rights as prescribed by the Constitution, or is this an idealised dream far removed from their day-to-day lived experience? The five chapters that form this report – Poverty and Treaty Body Monitoring, Crime and Human Rights, Equality, the Promotion of Access to Information – attempt to provide answers to this question. In part, the answers can never be straightforward – they are complex because the issues are complex.

However, we cannot, and dare not, oversimplify our world. Creating a human rights culture fourteen years into the country's democracy still presents a huge challenge. It took more than 300 years to perfect colonialism and apartheid. This becomes even more challenging if one considers that the cultures of colonialism and apartheid have been structural, not to speak anything about the social engineering that was contrived to exclude the majority from the mainstream politics and economic and social spheres of life.

We trust this report will contribute to a better understanding of where South Africa should be in relation to a proper development of a human rights ethos. There are many challenges that still lie ahead. As we march together towards the promised land of justice and fairness and equality in which the culture of human rights will be second nature, effortlessly practiced and lived out in every sphere of our human existence, we hope for real transformation that will engender the spirit of justice in South Africa.

Crime, a chapter in this report, is having paralysing effects on all South Africans. It has no respect for race, creed or colour. In its wake it leaves a trail of destruction and hopelessness, while at another level it is becoming a single factor that is denying millions of South Africa the right to safe communities. In the words of the Commission's Chairperson, Jody Kollapen, "*Violent crimes affect the right to life, the right to personal security, the right to dignity and the right to personal integrity*." If crime is having so much negative impact on the country, we need to see it as a human rights violation that needs to be eradicated. We hope, after reading the reflections on crime, the country will strive to develop strategies to fight for its eradication.
Similarly, poverty is a scourge that is also a violator of human rights that needs eradication. For as long as the resources of the land are unevenly distributed, so will socio-economic disparities continue to widen. Again, the chapter on equality should help us to grapple with the issues of equality, and wrestle with a difficult question: why is there so much inequality in our land? We trust all the country's institutions – all tiers of government, universities, research institutions and Non-governmental Organisations (NGOs) and Faith-based Organisations (FBOs), among others, will work together to develop strategies to eradicate underdevelopment which is a breeding ground for all forms of inequality.

In conclusion, we hope that the Human Rights Development Report will prove a useful resource to all who will read it, serving as resource for purposes of research, as we all strive to make South Africa a country conscious of issues of human rights.

ANNEXURE B
Promotion of Access to Information (PAIA) Report

Set out in Section 184 of the Constitution and amplified by the Human Rights Commission Act 54 of 1994, the mandate of the Commission is further detailed in the Promotion of Access to Information Act 2 of 2000 (PAIA). This mandate can broadly be said to encompass the promotion of and education on PAIA, the monitoring of PAIA and the protection of the right of access to information.

The PAIA legislation provides the legal framework giving effect to the fundamental right of access to information, as set out in section 32 of the Bill of Rights. The promotion/education, monitoring and protection fields are detailed in sections 10, 83, 32, 14 and 51 of the PAIA legislation. The section 32, 14 and 51 provisions largely inform the formal monitoring function of the Commission by placing an injunction on the private and public sectors to submit reports and manuals to the Commission. In this instance, the Commission's mandatory function is expanded to include compliance monitoring and being a custodial repository of the reports and manuals submitted.

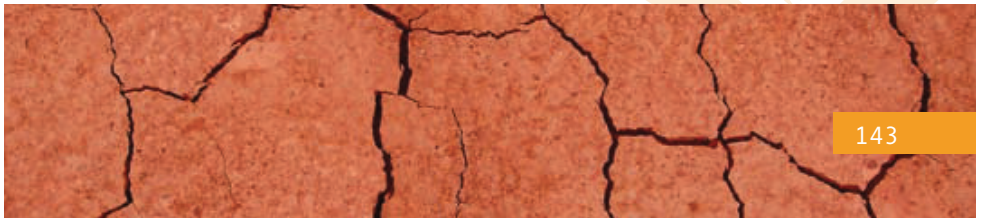
The awareness, training and educating fields are fulfilled by the injunction in PAIA for the Commission to undertake interventions to train and promote PAIA within the multiple levels of government, all 'other' public bodies, and communities nationally. Statistical data plotting the Commission's work in this regard are detailed below.

Section 83 requires the Commission to provide support to public bodies to enhance the implementation of PAIA in the sector. To this end the Commission employs a range of interventions informing the type of support it provides. Compliance auditing of public bodies has been instrumental in testing levels of implementation, supplementing awareness interventions, monitoring and providing focused support to the sector.

Together with the ongoing monitoring of new legislation, the Commission is actively engaged in scrutinising existing freedom of information models and global trends in freedom of information to advance law reform. The Commission's submissions to the Justice Portfolio Committee of Parliament and its annual recommendations for reform to the Department of Justice and Constitutional Development are detailed later in this report.

The protection of fundamental access rights is engaged through the assistance provided by the Commission to ordinary individuals, communities, civil society organisations and Deputy Information Officers (DIOs) in both the private and public sectors. Assistance provided to the latter two groups usually takes the form of advice on compliance matters, the interpretation and application of PAIA in relation to existing legislation, and on PAIA itself.

The range of the Commission's work with regard to PAIA, although separated into key outputs for strategic monitoring and evaluation purposes, is closely inter-related. The sub-programme ensures that these inter-related interventions are also integrated into the broader ongoing work of the Commission. To this end, the programme has made a number of interventions with visiting international delegations, study tours, public hearings convened by the Commission and the Commission's research and development projects. The sub-programme has also actively sought to secure the Commission's own organisational compliance with PAIA. These interventions are detailed later in the report.



Support and Assistance to Requestors

Assistance is provided to a range of requestors, including DIOs, private individuals, the private sector, and civil society organisations. Requests for assistance are received electronically through the PAIA mailbox as well as telephonically, via referral by the Commission's provincial offices and programmes, through regular postal mail, and 'walk-in' clients.

Most requests from the public sector hinge on matters of compliance interpretation of PAIA provisions and application. Issues of application in the face of existing legislation and regulations that govern specific departments pose the most significant application challenges in the sector. Assistance has also been sought on the operational implementation of PAIA within certain bodies such as SASSA and the pension fund. Request trends are analysed and recurring problem areas are incorporated into training sessions with public bodies.

Civil society and individual requestor trends range from interventions directed primarily at supporting requests already submitted where information holders have simply ignored the request (mute refusals) or where information holders unjustifiably refuse access. The Commission responds in these instances through engaging on behalf of requestors with the public body in question to hasten or facilitate the gaining of access to information, or by submitting requests on behalf of requestors to begin the process of accessing information.

Most private sector requests relate to issues of compliance with the provisions of Section 51 and the development of the manual required in terms of Section 51. Practising attorneys and auditing firms have often requested assistance in interpreting the exemption which exists until 2011 in determining the compliance needs of their private sector clients.

During the financial year, a total of 278 requests were responded to by the sub-programme. The number of requests per category of requestor is tabled below.

Requestor	Number of requests
Public bodies	99
Private bodies	87
Individuals	120
Total	306

Audits

The audit process remains a key tool through which the Commission is able to gain accurate insight into the levels of PAIA implementation and barriers to effective implementation within public bodies. It facilitates a closer engagement with senior officials and implementers within public bodies and allows for a candid exchange on perceived and actual impediments to compliance and implementation. The audits have therefore been instrumental in enhancing formal monitoring and in shaping the Commission's responses to the needs of the sector in providing it with support for optimal delivery in terms of PAIA.

Public bodies are randomly selected from strategic focal areas for auditing. These areas are determined on the basis of the level of service delivery the body is engaged in, its position of influence in relation to other public bodies, and where monitoring by the Commission evidences general tensions connected with service delivery. Only five audits were undertaken during this financial year due to budgetary constraints.

The lack of an adequate budget has meant that audits were limited to the Gauteng region, which was inexpensive for the Commission to reach. The range of audits clearly has an impact on the reach of the Commission's work and the reliability of the data generated for general application in determining common challenges to implementation of PAIA in the sector. Ideally, the Commission should be able to audit key departments within all regions and local government structures in the country. In keeping with its strategy, this will have the effect of encouraging lead departments to set and drive best practice for PAIA implementation in their respective regions. It will also provide the Commission with data identifying region-specific challenges, if any.

The audit process is initiated through notice by the Commission and the administration of a questionnaire. The latter is a comprehensive tool covering the following areas for engagement with the body being audited:

- Human resources and accountability of DIOs
- PAIA budgetary allocations
- Formal compliance with sections 14, 15, 16 and 32
- Awareness levels and proficiency of personnel
- Proactive disclosure levels
- Integration of PAIA in Integrated Development Planning (IDP)
- Systems and policies supporting PAIA implementation
- Challenges and identified needs for support
- Records management.

After submission of the questionnaire, responses are tested through independent research undertaken by the Commission prior to the audit meeting. These submissions and research findings are then examined more closely during the actual audit meeting.

Audit Findings

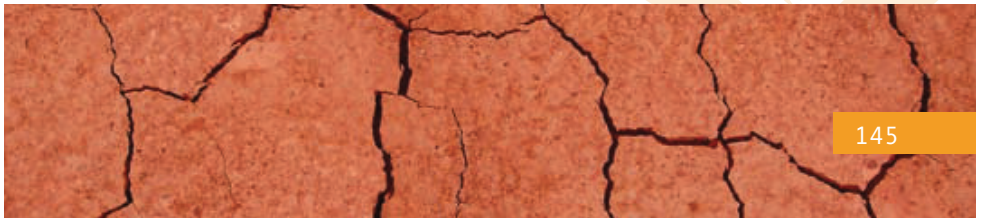
The trends identified during the initial audits conducted in 2007 remain largely unchanged during 2009. Key findings emerging from the focus areas of the audit areas listed above reveal that compliance and implementation remain generally poor within multiple levels of government.

Summary of Findings

Most DIOs have been delegated PAIA functions over and above their key portfolios. These usually entail record management or corporate service portfolios. The identity of DIOs is generally not readily known by personnel within an organisation, in particular by frontline officials.

None of the public bodies audited have clear budgetary allocations for PAIA implementation. The lack of an adequate PAIA implementation budget impacts on the levels of responsiveness of the public body to requestors, the accessibility of forms for requests, the production and development of information manuals in terms of Section 14, levels of awareness and proficiency of staff, and the integration of PAIA into the mainstream work of public bodies.

Community and personnel awareness interventions have not been accommodated in budgetary planning and systems to facilitate expeditious responses to requests, and compliance reporting through the tracking and monitoring of requests has not been invested in. Most public bodies view the allocation of a budget for the implementation of PAIA to be dependant on the volumes of requests they receive.



Formal compliance by the audited public bodies remains low and linkages between formal compliance and the PAIA objectives do not appear to have been fully appreciated by public bodies. Most demonstrated attempts at beginning the process of developing their information manuals in terms of Section 14, but have not finalised these due to delays in obtaining the necessary approval from senior management and councils, as well as delays in translating services provided by the Department of Arts and Culture, and poor records management. No manuals had been produced in braille. None of the public bodies audited had been compliant with Section 32 reporting obligations in terms of PAIA.

Levels of proficiency with PAIA were in general extremely poor, with some prior knowledge of application evidenced by the legal services personnel in the respective public bodies, but this knowledge did not extend beyond formal compliance. Prior knowledge in these instances was limited to specific application on a case-by-case basis. An understanding of the objectives of the legislation and its implications for their organisations and individuals was poor. Most personnel who were charged with processing requests were completely unaware of the legislation. Personnel also indicated and affirmed previous findings that the legislation is perceived as onerous and complex. None of the public bodies engaged with had undertaken any internal training or awareness activities. Similarly, frontline staff were unaware what a request for access to information meant or to whom requestors could be referred to for assistance.

Proactive disclosure: PAIA places an obligation on public bodies to provide free access to certain records; in this instance, access in terms of PAIA is termed 'automatic access'. The Commission found that very few public bodies had gone beyond making annual reports, promotional material and media releases automatically available to the public. Development planning and project-related information had in general not been made public and implementers demonstrated their reluctance in deciding whether documents such strategic plans could be made public. The IDPs, Imbizo processes, Community Development Worker (CDW) structures and ward councilors had not in any way been conscientized on PAIA injunctions to share as much information as is possible with communities. Furthermore, none of the public bodies audited demonstrated firm plans or policies relating to proactive disclosure.

Integration of PAIA into IDP processes: The audit revealed that none of the public bodies audited had mainstreamed PAIA into their daily operations. Levels of awareness and commitment from senior management appear to have significantly impacted on the level of priority accorded to PAIA in the general scheme of delivery. The audit process itself created an opportunity for the Commission to advance and highlight the connection between PAIA, public participation and enhanced service delivery. Most respondents demonstrated a fuller appreciation of the role information sharing can play in the integrated development planning process and how this in turn impacts on the level of accountability and transparency, and degree of confidence their constituents can place in their structures and delivery.

Systems, policies and supporting implementation: Apart from a chain of accountability during the referral process of a request from records management to corporate legal services, none of the sample had clear policies or systems specifically for access to information. Other research by the Commission suggests that internal policies, which are actively communicated and supported within public bodies, remain key to improved implementation and compliance with PAIA. Again, most public bodies expressed the view that the allocation of resources for systems aiding the processing of PAIA was dependant on the PAIA demands placed on the public body.

Records management: Most of the sample group had basic records management policies and plans in place. Over 90% of the sample indicated, however, that actual implementation had been hampered by a buy-in from personnel and delayed responses from the Provincial and National Archives. These delays have impacted on

registry activities and the disposal of records, etc. The merging of and changes to departments were also cited as key challenges in the effective implementation of records management practices and policies. All respondents within the respective bodies demonstrated a clear appreciation of the need to manage records to facilitate their referral and production in response to PAIA requests.

Challenges and Recommendations

All of the sample groups audited were in agreement that awareness and training was necessary to increase confidence and to appreciate more fully the PAIA objectives in their daily spheres of operation. They also expressed the desire to have senior management trained to facilitate the integration of PAIA into their organisations' strategic planning.

The Commission issued each of the public bodies audited with comprehensive recommendations for improved implementation in the focus areas. The most commonly recurring recommendations have focused on the need for compliance, creating accessibility to information for a diverse range of people, sustained personnel training cycles, budget allocations, and the need for PAIA to be integrated through IDP processes into the mainstream activities of the work of public bodies.

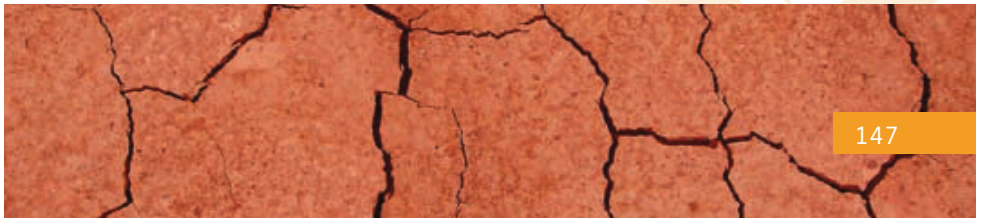
Law Reform, Legislation and Case Law Monitoring

Interventions directed at law reform as well as legislation and case law monitoring seek to ensure that emerging and existing legislation is in harmony with PAIA and that access to justice for ordinary individuals is facilitated through reform interventions. These usually include submissions on emerging legislation to the Justice Portfolio Committee and the Department of Justice and Constitutional Development, and engaging in litigation where resources permit.

The Commission submitted substantive recommendations on the Protection of Personal Information Bill to the Justice Portfolio Committee during 2009. These submissions were supported by oral presentations before the Committee. The nub of the Commission's submissions in this regard centred on the mandate of the envisaged Information Protection Regulator in so far as PAIA is concerned. The Bill proposes a transfer of the Commission's current mandate in terms of PAIA to the envisaged Information Protection Regulator. While the Commission is firm in its support of an intermediary dispute resolution mechanism for PAIA matters, it expressed concern over the maturity of the new body to simply take over its PAIA mandate, and the potential for a conflict of interest in instances where both data protection and access to information are presided over by the same body.

In addition, the Commission expressed concern over the lack of substantive provisions in the Bill identifying the duties, powers and obligations of the Regulator in relation to PAIA, as these matters have been relegated in the bill and are to be pronounced on at an unidentified future date. In the submissions of the Commission, this position will have the effect of increasing uncertainty in the sector and nullify gains it has already achieved. The recommendations to the Committee were therefore directed at securing substantive changes to the bill before PAIA is moved over, in the alternative that an independent Commission be located with the Commission to mediate PAIA matters, together with the resources necessary for these functions to be executed.

The Commission also submitted substantive recommendations to the Department of Justice and Constitutional Development during 2009. These submissions in essence reiterated the request for clarity on the moratorium on private bodies reporting to the Commission in terms of section 51 of PAIA. The Commission is inundated with calls from the private sector seeking clarity on the status of section 51 manual submissions.



Other recommendations emphasized the need for access to justice to be improved in terms of PAIA. The Commission highlighted the barriers to accessing justice and asserting access to information rights through magistrates' courts. Although extending the jurisdiction of the Magistrates Courts in PAIA matters is welcomed, factors such as costs, perception and attitudinal barriers, time and congested court rolls still mitigate against the traditional court system as an appropriate forum for PAIA-based dispute resolution.

The need for a review of the penalty provision for non-compliance with PAIA was restated. The Commission expressed the need for an amendment to PAIA to included sanctions for non-compliance with section 32 reporting obligations, as is presently done with section 14. Together with a non-compliance penalty provision for section 32, the Commission has requested clarity from the Department of Justice and Constitutional Development on the process of enforcing the penalty provision for non-compliance with section 14.

The Commission stressed that the Department of Justice and Constitutional Development needs to undertake a review of certain PAIA provisions with some urgency – in particular, section 22(8)(a) of Schedule One, which sets threshold limits to be considered when exemption from fee payments can be claimed by persons who earn below a certain limit annually. The schedule amounts were determined in 2004. The amounts that can be considered for deductions include R1000 for rentals and mortgage installments. The Commission is of the view that these amounts are unrealistic given inflation over time and should be increased to ensure that indigent persons and low income earners are not adversely affected by the thresholds currently in place.

The submissions with regard to fees have been expanded to include a recommendation that the Department of Justice and Constitutional Development reconsider the imposition of fees for the purposes of lodging a request. Fee payments should be restricted to the search for, and reproduction (if any) and preparation of records only.

Based on the monitoring of comparative freedom of information regimes, the Commission also recommended that the Department of Justice and Constitutional Development consider amending the legislation to permit the submission of anonymous requests. This trend, which has enjoyed success in comparative jurisdictions such as India, has a number of advantages for freedom of information. Key amongst these is that it addresses both perceived bias and actual prejudice or bias in the processing of and response to requests.

The Commission's lack of resources to deliver on its PAIA mandate in the range and quality which it deems necessary has been central to submissions to the Justice Portfolio Committee in previous reports and in presentations on the POPIA Bill, as well as to the Department of Justice and Constitutional Development. The Commission emphasized the impact that resource constraints have on its capacity to monitor and promote PAIA adequately.

These constraints impact on the undertaking of community-based and local government interventions and also impact on rights assertion and the demand for information at the grassroots level. Compliance auditing is severely hampered by the inability to include public bodies in audit samples in other provinces. Similarly, limited resources have a negative impact on monitoring with regard to adequately harnessing Information and Communication Technologies (ICTs) and physical infrastructure for the administration of reports and manuals. Resources have also been a key factor informing the Commission's capacity to litigate on behalf of ordinary members of the public in so far as access to information is concerned.

Case Law and Litigation

While a few PAIA matters were litigated during 2009, the most important decision of the year was a pronouncement by the Constitutional Court in the matter of *Brummer v the Minister of Social Development.*

Despite a severe lack of resources, the Commission was able to join the proceedings as *amicus curiae* by virtue of the support of *pro bono* attorneys and counsel. These resources were fortuitous to the extent that both the attorneys of record and counsel found the matter to be of sufficient public interest as to waive standard costs in the matter. The litigation, however, highlighted the impact that a lack of resources has on the Commission's capacity to litigate on behalf of ordinary individuals in PAIA matters, where the issues being disputed are based on fact and not strategic issues of law.

Poor litigation rates by the Commission in so far as PAIA is concerned have a number of adverse implications for the Commission and for the manner in which PAIA is perceived by the public and by information holders. At present, the number of instances where litigation is embarked on for strategic purposes far out-numbers instances of ordinary litigation. In this sense, the perception that PAIA rights are luxury rights and that it is elitist in nature are reinforced, dropping demand and permitting information holders to withhold information with relative impunity. Ordinary requestors will therefore continue to be deterred from seeking assistance in asserting their access rights through bodies such as the Commission.

The Brummer matter highlighted the difficulties inherent in attempting to secure access rights and emphasized the constraints experienced by poorly funded organisations and individuals in using the PAIA framework to assert their rights in terms of court processes, complexity, resources and timeframes. These challenges with the PAIA framework reveal that although PAIA is a law that is celebrated internationally as being a 'gold standard', the barriers to its effective implementation will only become clear in time and with use.

The Constitutional Court was aware of these factors. It found that the contested 30-day period cited in Section 78(2) of PAIA was unconstitutional in that ordinary requestors would not be able to access courts adequately within the short time frame prescribed. It ruled that the 30-day period be extended to 180 days to give requestors the time needed to be able to seek assistance for representation and access the courts. Formal amendment to the provision is awaited from the Department of Justice and Constitutional Development.

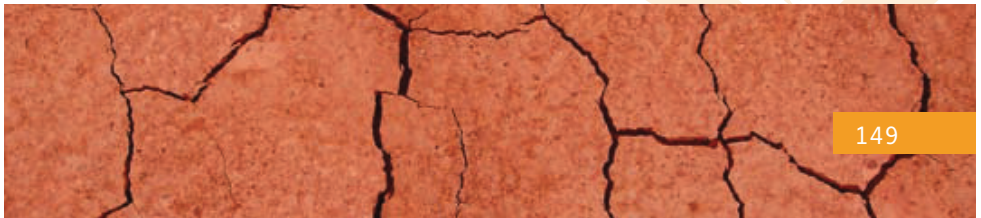
Publications

The Human Rights Development Report is published annually by the Commission. The sub-programme contributed to the publication, providing a snapshot of the state of access to information during 2009. The report included statistical data and analysis and is cited as an important resource on access to information.

The Commission submitted a chapter to Femnet on the status of women's organisations and access to information in South Africa. The chapter is included with other country studies on the theme and identifies strategies women's rights organisations can adopt in using access to information to achieve their objectives. The book was launched by UNESCO, to much acclaim. The Commission also participated in panel presentations at the launch and engaged in subsequent 'brainstorming' sessions that followed thereafter on advancing freedom of information in Africa.

A chapter entitled *Barriers to Effective Implementation – 10 Years On* was commissioned by the Open Democracy Advice Centre (ODAC) as part of its 10-year review of PAIA. The Deputy Chairperson of the Commission participated in the panel discussions of experts during the presentations of the various chapters on access to information. The event and compilation provided a number of interesting insights, including case law and litigation, private sector compliance and the Protected Disclosures Act (whistle-blowing).

PAIA infoshare is a quarterly publication of the Commission, directed at members of the information community. The publication carries topical news on both local and regional developments with regard to information sharing,



insight into interpretation and application, best practice models and updates on PAIA events. Due to resource constraints, the Commission produces the publication internally and distribution occurs electronically.

Compliance monitoring and auditing, as detailed above, have revealed consistently low levels of awareness of PAIA within public bodies. Low awareness is particularly pronounced in the case of frontline officials who are often the interface between the requestor and the public body in question. The Commission has, together with ODAC, developed a training reference manual for frontline officials in response to these findings. The manual is to be launched mid 2010.

Monitoring Compliance

Formal monitoring by the sub-programme is undertaken primarily on the basis of the submission of section 32 reports and section 14 manuals.

Over time, monitoring has consistently yielded data that provides a barometer on the levels of formal adherence to PAIA in the public sector. Section 32 reports provide a fair example of its utility as a monitoring tool. The Commission emphasizes, however, that section 32 reports in themselves provide only limited insight into the levels of compliance and responses of public bodies to requests processed by them. Limitations in securing higher submission volumes have also proved to be a drawback in the depth of analysis that can be drawn from them. The low compliance rates however permit one unqualified conclusion, and that is that most public bodies remain unaware of their compliance obligations.

An analysis of compliance with section 32 reports for multiple levels of government over the decade since PAIA's passage into law has provided clear evidence of poor levels of compliance with its provisions. These levels of compliance point to a low level of awareness, a lack of accountability for non-compliance and the importance (or lack thereof) accorded to PAIA in the sector. It may therefore be surmised that if mandatory reporting obligations are being ignored despite interventions by the Commission to secure reports, then public bodies accord implementation the same importance as they do reporting.

Formal monitoring by way of section 32 has, in this sense, reinforced and supported other monitoring interventions undertaken by the Commission through audits, training sessions and research.

Section 32 Compliance: Limitations

The mandatory annual submission of Section 32 reports to the Commission requires public bodies to provide the Commission with statistical data on their responses to the requests they processed during the financial year.

Despite repeated reports to Parliament and the Department of Justice and Constitutional Development, the Commission has not been allocated adequate resources with which to drive compliance to section 32. These constraints have meant that the Commission has not been able to harness the advantages of ICTs to communicate with public bodies *en masse*, nor to issue automatic acknowledgements, and so forth. This mode of operation is undertaken by public bodies submitting reports and it is extremely labour intensive.

Resource constraints have meant that the veracity of reported statistics cannot be tested. This inability to test the accuracy of reports means that many public bodies submit reports reflecting zero returns, despite evidence from civil society organisations that requests had indeed been lodged with the specific public body. Such limitations defeat the objectives of the legislation and the monitoring of compliance.

Section 14 Compliance: Limitations

The Commission has been unable to adequately monitor progress and compliance with section 14 of PAIA. Based on current monitoring data generated primarily through one-on-one contact with public bodies, compliance rates remain extremely low.

Website research undertaken in the course of the year reveals that under five percent of all public bodies have updated PAIA section 14 manuals. Most public bodies indicate that the development of updated, accurate manuals is hampered by poor records management practice and policy. The absence of approved file plans and registries is cited as a key impediment.

Changes to various departments have also hampered the development of manuals, which requires records of bodies to be reconciled and of changes to Information Officer details.

Other recurring challenges cited by public bodies with regard to section 14 manuals include the absence of a budget to reproduce manuals for distribution and production in braille, and a delay in the approval of manuals by the executive and political heads of departments.

Section 14 monitoring by the Commission needs to be bolstered by the necessary physical infrastructure and human resources. These are required in order to evaluate the content of manuals and the provision of guidance to public bodies on a range of issues including accessibility, translation and the physical housing of the manuals in a registry designed for this purpose.

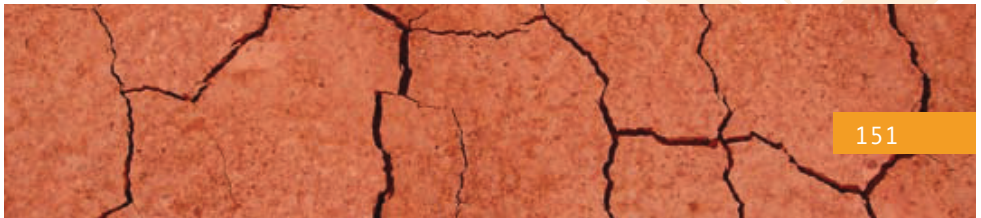
Integrating PAIA into the Work of the Commission

The sub-programme has worked actively to ensure that other interventions by the Commission are aligned with and integrate PAIA in their outputs. It has also been engaged in ensuring the Commission's organisational compliance with PAIA.

The scope and range for PAIA integration has been diverse and comprises a wide range of activities. The key impetus within the Commission for PAIA being included in its various platforms and spaces of engagement emanates from an increased internal appreciation of its role in facilitating and advancing public participation, as well as enhanced service delivery, and its utility in addressing corruption and increasing transparency. The usefulness of PAIA in facilitating the attainment of these objectives has meant it has increasingly been integrated into the work of the Commission's various programmes.

As a result, the sub-programme has participated actively in the public hearings on economic and social rights, and has made substantive submissions in its subsequent report on the role that PAIA can play in policy formulation through informed public participation, transparency and accountability within the public sector. Special interest was accorded to PAIA with regard to the extractive industries during the hearings and these were responded to in the Commission's report on the hearings.

The sub-programme was invited to assist the Department of Social Development (DSD) with drafting its new rights-based policy. Through this process, the Commission was able to include information sharing as a central issue in the processes of the DSD's policy. Further engagement with the DSD at the regional and local levels created an opportunity for the sub-programme to raise awareness of PAIA with the different stakeholders within the department.



The sub-programme undertook a number of further interventions with regard to the work of the Commission. These included submissions in its Health Report, development of the HIV and AIDS resource manual, submissions to its portfolios on crime and national security, participation at internal lekgotlas, reviews of internal policies and the Commission's general compliance with PAIA. Presentations on PAIA were made to visiting delegations, while a study tour was undertaken of the Office of the Information and Privacy Commissioner of Canada. The latter provided valuable insight into the submissions of the Commission on the data protection legislation before the Justice Portfolio Committee during October 2009.

At present, the sub-programme participates in a group of experts that provides and shares information on access to information with three other African countries. The purpose is to create an opportunity for peer learning, as each of the three countries is currently located at a different point in the process. South Africa has had legislation in place since 2000, but has had to be creative in finding solutions to implementation challenges; Uganda has recently passed such legislation, but has yet to implement it; while Ghana was giving serious consideration to passing such legislation. These sessions are facilitated by the International School of Transparency via the University of Cape Town. They provide a critical resource for countries in the region that have legislation in place but have yet to enact and implement it.

These interventions have had the added advantage of expanding the ongoing work of the Commission, and have heightened awareness of PAIA internally.

Awareness, Training and Education

Section 83(2) of PAIA requires the Commission to develop educational programmes aimed at heightening awareness of the right to access information. Section 83(e) further requires the Commission to provide training to information and deputy information officers within public bodies to enable them to implement and administer the legislation accordingly. The Commission's mandate in so far as promotion of the right of access to information is concerned is not limited to public bodies, but extends to private bodies and members of the public.

In response to its mandate, the Commission has developed educational material and provided training to Information Officers (IOs) and DIOs in the public sector as well as the private sector. The Commission has extended its reach by providing training to community groups and community-based organisations. Taking into consideration the scarcity of human and capital resources, the Commission has been strategic in its response to training requests and awareness-raising interventions. The primary mechanism through which awareness of access to information is raised are through requests for training emanating from all tiers of government as well as CBOs, parastatals and private bodies.

The Commission has been strategic in its response to requests for training to ensure that the maximum output is achieved from minimal resources. The Commission has therefore prioritised the public sector to ensure that implementers are equipped with the necessary knowledge and skills for proper implementation and administration of the right to access information. Monitoring of the implementation of PAIA within the public sector by the Commission has shown that users are often unable to fully exercise their right to access information, largely because public bodies are unable to assist users.

Groups targeted for training include frontline staff and implementers (DIOs, who are responsible for processing the requests). These groups are targeted on the basis of research which reveals that users are unable to access government institutions easily when wanting to access information, as frontline officials are not aware of this right to request information. The Commission has developed a training manual for frontline officials in state institutions.

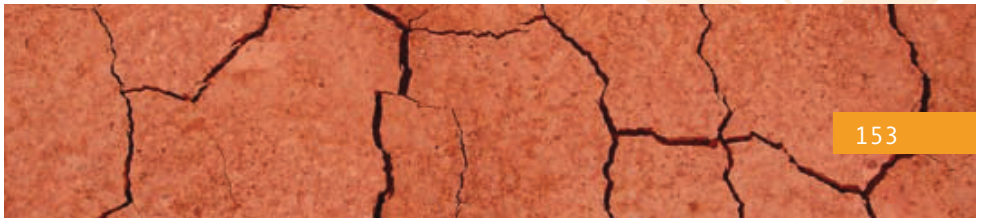
Using simple everyday language and illustrations, the manual provides a step-by-step guide for frontline officials who are at the interface between state institutions and requesters. Through the distribution of the manual it is envisaged that frontline officials will gain an understanding of PAIA and be better placed to assist requesters in exercising their right to access information.

The second group identified by the Commission comprises DIOs and other officials within public institutions who are charged with administering and processing requests for information. Monitoring conducted by the Commission has shown that these officials are not formally trained on PAIA, and in many instances they are inclined to refuse access or to refer requests to legal departments and in doing so, frustrate the access objectives. Training sessions are therefore structured to increase the confidence of implementers in their work with the legislation. Furthermore, the training sessions are aimed at sensitizing implementers to the importance of access to information in a democratic era, by associating access to information with the Batho Pele principles of transparency, accountability, public participation and service delivery.

The third target group within the public sector largely comprises senior and executive management of institutions. This group is of critical importance as it informs an institution's commitment to implement and deliver on its mandate in terms of PAIA. Compliance audits conducted by the Commission reveal that a lack of buy-in from senior management is often the cause of non-compliance with PAIA, which often leads to maladministration or ignorance of the legislation. In response to this shortcoming, the Commission has developed presentations specifically for officials in senior and executive management positions. These presentations provide a snapshot of the right to access information and PAIA, and focus on operational requirements for the implementation of PAIA. Institutions perform better in instances where compliance is driven by the leadership of the institution.

During the reporting period, the PAIA sub-programme facilitated thirty six (36) workshops, reaching an audience of 1080 people. Training was provided across the board nationally, including the Office of the Presidency and the Offices of the Limpopo and the Eastern Cape Premiers. Key service delivery agents, such as the Northern Cape Department of Human Settlements, Gauteng Department of Health and Gauteng Department of Education, received training. Interventions on behalf of various municipalities and community groups were also undertaken. These interventions were the key mechanism for raising awareness in lead institutions, including the Presidency and the Offices of the Limpopo and Eastern Cape Premiers. Through this approach, it is anticipated that securing compliance and raising awareness within the lead institutions will result in the filtering down of information to all other national, provincial and local departments. The Office of the Premier in Limpopo is an example of best practice through its active championing of PAIA within provincial departments. The province secured one hundred percent (100%) compliance with reporting obligations for the second consecutive year. The Commission's continuous training of its officials and the commitment of provincial departments has led to the Limpopo province being one of the best performers with regard to access to information.

Other training interventions with government departments, such as Environmental Affairs and Tourism, have yielded fruitful results. In particular, this department has requested ongoing training for its officials, based on the volume of requests being processed and the nature of the information generated by the department. The department has, since its interaction with the Commission, committed resources to ensuring that requests are processed accordingly. Moreover, the development of an electronic system to track and process requests for information has demonstrated the impact of the training sessions provided by the Commission and the department's commitment to PAIA implementation.



Research conducted by the Commission and an analysis of the requests for assistance by DIOs has shown that some areas of the legislation are perceived as problematic and that levels of compliance with Section 14 of PAIA are low. In response to these challenges, the PAIA sub-programme developed a guide on how to compile a Section 14 manual, and developed hypothetical case examples and reporting templates to help DIOs understand the legislation and to meet compliance obligations.

Seminars and interviews on various community and local radio stations have accelerated general awareness of PAIA and other legislation impacting on PAIA. During this reporting period, the PAIA sub-programme in collaboration with the Commission's legal services programme hosted a seminar on Cyber Law and Access to Information. The seminar was in response to cyber-related complaints received by the Commission. The seminar explored cyber law, the right to privacy and the right to access information.

Radio interviews were of critical importance in enhancing efforts to raise awareness. In particular, through interviews broadcast by community radio stations, rural communities were reached and the legislation was more effectively popularised. Articles were submitted to popular newspapers in the course of the year on the International Right to Know Day on compliance and access to justice.

The Commission's training interventions have led to the development and sustaining of fruitful relations with key stakeholders. The Commission has collaborated with institutions such as ODAC with ongoing training for dommunity development workers, partnered with the South African History Archives in providing training to Community Based Organisations (CBOs) such as the Khulumani Support Group, and worked with the Department of Health and Social Development in developing human rights-based policies.

Training interventions have afforded the Commission an opportunity to engage with implementers and to provide the support that is needed for the implementation of PAIA. The PAIA sub-programme will, in the coming year, continue with awareness-raising interventions, with a specific focus on communities, CDWs and CBOs.

Information Officers (IO) Forum and Golden Key Awards

The 2009/10 financial year saw the continuation of a successful partnership between the Commission and ODAC in hosting the National Information Officers Forum and the Golden Key Awards. Launched in 2003, the forum of information and deputy information officers gathers annually to commemorate the international Right to Know Day, celebrated on the 28th of September. The forum is served by a coordinating committee (CC) of representatives elected from the DIO membership, with the Commission serving as the secretariat. This framework affords the CC an opportunity to influence the work of the Commission in terms of PAIA, through consistent engagement on DIO issues and the development of interventions aimed at responding to the needs of DIOs.

The 2009 forum provided a platform for members of the information community to share information and best practice models on implementation, and to establish networks amongst themselves to discuss the challenges they face when implementing PAIA.

The focus of the 2009 forum was access to information and service delivery. The theme, enhanced service delivery through access to information, was informed by the widespread service delivery protests in the country. Noting the crucial role played by government in making services available to communities, the Commission and its partners deemed it fit that the 2009 Forum highlights access to information as a fundamental tool in accelerating and enhancing service delivery.

Key participants included Advocate P Tlakula, special rapporteur on Access to Information and Freedom of Expression to the African Commission and Advocate N. Ramatlodi, Chairperson of the Justice Portfolio Committee of Parliament. Highlighting the importance of the right to access information, both speakers urged implementers to remain committed to the principles of transparency and to commit to advancing democracy by properly implementing PAIA within their institutions.

Robust discussion highlighted persistent implementation challenges and provided further insight into administrative shortfalls. The 2009 forum also saw the election of a new CC. The CC comprises five individuals from various government departments and non-government institutions. Members will serve for a period of two years and the election of a new CC will take place at the 2011 Forum.

The Golden Key Awards ceremony brought closure to the day's proceedings. The awards ceremony has become the key accolade for DIOs in the public sector. Aimed at incentivising openness and transparency, the awards are presented to individuals and organisations for outstanding performance in terms of PAIA implementation.

Awards are accorded on merit and the performance of institutions is measured by research conducted by ODAC and the Commission prior to the ceremony. An expert panel picks the winners based on the findings of the research. The selection criteria and categories of the awards are tabled below.

The Commission and ODAC have produced a report on the National Information Officers Forum and the Golden Key Awards ceremony. The reports provide extensive detail on the proceedings, research and findings, and serve as a yardstick for measuring implementation of access to information within the public sector.

Having reached a critical mass of 180 participants, the Information Officers Forum remains a prominent and critical event in the information community. The Commission and ODAC look forward to increased participation at the 2010 Forum.

Criteria and Category Assessments

Winners were assessed for the following award categories in terms of the Access to Information Index.

a) The Openness and Responsiveness Award (Best Institution)

This award is accorded to the institution that demonstrates the highest level of internal readiness to realise the PAIA objectives in terms of policies, systems, processes and resources. This award was accorded to ESKOM for its commitment to the PAIA objectives. An award was also presented to Eddie Laubscher (ESKOM) for his commitment to PAIA, and for driving compliance within his institution and his work within the CC.

The following criteria were used in deciding the recipients of the award:

	Guiding question
Roadmap	Is there a list of all documents which can be disclosed and those which cannot?
	Is the process for submitting requests readily available to requestors?
	Are contact details regarding the office which handles requests provided? Are there provisions for receiving requests using different methods?
Records management	How are records organised and stored?
	What are the rules governing the generation of information?
	Is there a practice of automatic disclosure where records are disclosed as soon as they are generated?
Reporting	Is there a system for recording and reporting on the number of requests received?
	Does the report reflect open practice?
Internal mechanisms	Are requests recorded accurately?
	What internal guidelines exist for frontline officials on how to handle requests?
	What internal procedures exist for processing requests and communicating with requestors?
	What is the procedure for assisting disadvantaged requestors?
	Is there an implementation plan which operationalises the Act?
Resources	What financial resources are allocated to implementing the Act?
	What human capacity has been appointed/trained to facilitate access to information?
	Is there a unit established to monitor and co-ordinate the implementation of the Act?
	What incentives are in place to ensure that staff comply with the Act?
	What sanctions are in place to ensure that staff comply with the Act?

b) The Deputy Information Officer of the Year Award

The best performing public official working with PAIA is the recipient of this esteemed award.

In assessing the nominees for best DIO, Ms S Maumela from the Limpopo Department of Health and Ms Gomomo from the City of Cape Town were ranked highest in terms of their interaction with requestors, the availability of internal PAIA guidelines for members of the public, the transfer of requests to other departments where necessary, support provided to other DIOs within the institution, and ability to engage with broader issues that influence the implementation of PAIA.

Ms Maumela and Ms Gomomo were awarded cash prizes of R10,000.

In addition to the criteria mentioned above, the following assessment was used as a guideline.

Guidelines
Gives reasons for administrative decisions to those affected
In response to specific requests, the release of information relating to their policies, actions and decisions and other matters related to their areas of responsibility
Provision of information at no cost to the requestor
Ensures that the organisation publishes in accordance with Section 15 of PAIA
Information is provided as soon as practicable while the target for response to simple requests for information is 30 days from the date of receipt
Transfers requests to relevant institutions where necessary and informs the requestor, in writing, of the transfer
Does not require a PAIA form for every single request even if it relates to records which should be available in terms of Section 15
Has acted as a 'champion of access to information' within his/her institution
When s/he couldn't find the records requested, s/he has compiled an affidavit detailing efforts that have been made to find the document and has given the affidavit to the requestor
Has assisted a requestor fill in the form correctly, when occasion called for it

c) Requestor Award

This award is in recognition of an organisation or person prominently using and promoting PAIA in any capacity. There was no best requestor category for 2009.

d) The Best Media Engagement Award with PAIA

This award acknowledges the most engaging media coverage on access to information.

The award for best journalist recognises media practitioners who have engaged with PAIA either by covering the Act itself and news relating to it or by using it for investigative purposes.

The following elements are considered in assessments for this award:

- Efforts made to expose issues that structures of government, business and civil society may have intended to keep secret;
- Public interest in the media coverage of the issue;
- The extent to which the journalist's work has contributed to creating more public awareness on issues of accountability, transparency and openness;
- The number of PAIA requests submitted in investigating matters for reporting; and
- The number of times the journalist has covered the usage of PAIA.
- For his active interest in and writing on access to information matters, Earnest Mabuza of The Business Day newspaper was awarded R10,000 as the best journalist.

Special Recognition Awards

Special recognition was accorded to the following:

- Municipalities: The Theewaterskloof Municipality
- Most Improved: The Frances Baard District Municipality
- Consistently outstanding performance from a DIO: Amelda Crooks (South African Police Service)

Section 32 Statistics

Section 32 Compliance

The PAIA provisions create mandatory obligations for the public and private sectors to submit manuals on an annual basis. Public bodies must also submit annual returns to the Commission in terms of section 32 of PAIA. These section 32 reports are largely statistical in content and provide a snapshot of the number of requests submitted to public bodies, projecting the responses of the entities to these requests statistically.

Despite their potential as a tool for monitoring and evaluation, section 32 reports also carry substantive limitations. Some of these vulnerabilities are evidenced in the potential for inaccurate or deliberately misleading information. Reports are also limited to the extent that they may not reflect requests processed telephonically. In as much as this type of request is not formal, it accounts for a percentage of the requests for access to information.

The accuracy of submitted reports may be affected by a lack of resources and the inadequacy of systems in recording data. The vulnerability of recorded information is further evidenced by the lack of formal mechanisms to enable the testing of the veracity of these reports. These problems are exacerbated by the fact that in as much as PAIA requires public bodies to submit section 32 reports to the Commission, it imposes no sanction on public bodies which do not submit reports. Submissions are therefore based largely on cooperation between the public body/entity and the Commission.

The graphs, tables and reports below reflect compliance rates with section 32 per tier of government from 2002. Local government structures are reflected separately in Table 3, with projections for each type of local government reflected for the 2009/2010 period in Graph 3. The total number of requests received, granted and declined is projected for the eight-year period of monitoring in Graphs 4, 5, 6 and 7. All tables showing the names of public bodies in highlighting reflect consecutive or repeated non-compliance. Section 32 statistics are considered, together with information obtained from audits and training sessions, as well as the monitoring of Section 14, to provide insight into the challenges experienced in implementing PAIA in this sector.

Section 32 statistics

Despite attempts by the Commission to drive compliance within multiple levels of public bodies, the rate of compliance with reporting obligations was low. The Commission placed advertorials in the Government Digest, issued repeated electronic reminders and provided telephonic assistance to assist public bodies with the completion of their section 32 reports. These interventions resulted in submissions by a small number of public bodies and even then, 80 percent of these submissions were submitted six weeks after the reporting deadline. The ongoing low level of compliance strongly suggests that PAIA is not accorded the same priority as other legislation such as the PFMA. It is possible that this apathy may be addressed only if non-compliance with mandatory reporting obligations is met with penalties or sanctions equivalent to those of the PFMA.

While the statistics continue to indicate widespread non-compliance with section 32 reporting obligations, the high concentration of non-compliance at the provincial and local government levels warrant particular concern. The offices of the Premiers in most provinces did not comply and there is a reasonable expectation that these offices should have set standards and driven implementation.

Similar leadership roles could reasonably have been anticipated from all metropolitan municipalities, which serve as the leading institutions within metropolitan cities and district municipalities. Despite a number of awareness-raising interventions undertaken with the offices of the Premiers and metro municipalities, their compliance with section 32 has not increased significantly in the past two years. Only three out of six metro municipalities submitted section 32 reports. The Ekurhuleni and City of Tshwane municipalities were audited by the Commission and both gave their assurances that formal reporting obligations would be met, but they have repeatedly ignored their reporting obligations.

In stark contrast to the other provinces, Limpopo Province showed One hundred percent (100%) compliance for the second consecutive year. Successful compliance from this province was attributed largely to its political leadership and support for access to information from the Premier and personnel tasked with PAIA implementation within Limpopo's various provincial departments. Driven through an organised structure from the Office of the Premier, all PAIA and records management personnel are trained regularly and are accorded supportive internal environments through which to deliver on PAIA. This model has evidenced the success that may be attained through the commitment of the leadership and executive management in the public sector.

Provincial compliance for the rest of the country is concentrated within three of the most densely populated provinces, with 44 percent of all provincial departments submitting section 32 reports in 2009/10 (See Table 2 and Graph 2 below). The Western Cape accounted for three submissions, with Gauteng submitting five and KwaZulu-Natal submitting two provincial reports. The Eastern Cape, Northern Cape, Mpumalanga and North West provincial blocks submitted no section 32 reports. The Eastern Cape has been non-compliant for five consecutive years while North West has been non-compliant for two consecutive years. Compliance with section 14 mirrors these trends within the provinces.

Although the reconfiguration of the provincial departments may have had a role in the low response rates, the Commission is of the view that the executive leadership at the provincial level needs to play a firmer oversight role on the issues of compliance and implementation of PAIA.

National department section 32 statistics are reflected in Table 1 and Graph 1 below. While compliance rates at the national level have increased minimally, of cause for concern is the large number of key national departments that continue to ignore their reporting obligations in terms of PAIA. No less than 13 national departments have repeatedly ignored their compliance obligations. Key service delivery departments such as Home Affairs, Public Works, Finance and Social Development rank amongst these errant public bodies. Their non-compliance is exacerbated by the fact that many have been trained in and audited on PAIA implementation and compliance in the past.

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Request Statistics

Graphs 4, 5, 6 and 7 illustrate the total number of requests received, granted in full and declined respectively. The empirical data in these graphs are composite statistics from 2002 to 2010 for all three tiers of government.

Interestingly, the statistics (Tables and Graphs 4 and 5) show that national and provincial request volumes have decreased sharply since 2007/08, with local government remaining quite steady. These drops may be attributable to generally low levels of implementation, poor response rates and a concomitant drop in requestor confidence.

The statistics appear to indicate that the refusal rates at the national and provincial levels are dropping. The refusal rate at the provincial level has dropped by approximately 50%. This rate is line with decreases in refusal rates noted at this level last year. Refusal rates at the local government level have risen, however. The average number of requests per department at the national and provincial levels is approximately 45 per year. This average would decline considerably if the SAPS statistics were excluded from the calculation.

Both provincial and national departments are now less inclined to grant requests in full. The national statistics for requests granted in full have dropped by a worrying total of 3500 when compared to the previous financial year. Local government appears to be granting more requests in full this year, however.

The low demand volumes continue to pose a concern for levels of transparency, accountability and public participation. It is quite clear that the low volume of requests often forms the justification for the lack of resource allocation to PAIA implementation within public bodies. Low volumes evidenced by the high number of zero request returns from local government in particular do not bode well for demand-based responses to provide an impetus for improved implementation.

Local Government

Most metros that had been audited and trained and that participated in the Golden Key Award ceremony detailed earlier complied with reporting obligations. These metros reported relatively high demand volumes in terms of formal requests submitted. Many also submitted request registers, which is of significant value to the Commission.

In general, trends at the local government level remain of some concern, however. District municipalities, which comprise 18 percent of the total number of local government bodies, remained largely non-compliant across the country. Many of the district municipalities have been non-compliant in the past as well (see Table 3). Only one percent of the total of 18% of district municipalities complied with reporting obligations this year.

Of the remaining sample, 79% comprises local municipalities. Only four percent of this 79% complied with Section 32. The rate of non-compliance with Section 32 has also increased since last year. Local municipalities form the highest percentage of repeat offenders since 2007. Together with other bodies, they also account for the highest number of zero returns on request volume data.

Despite concerted interventions at the local government level, to date most have not demonstrated adequate budgetary planning for PAIA implementation. A lack of internal policies and the absence of adequate resources have in turn impacted on the degree and quality of responsiveness and transparency at this level. Poor operational environments within most local government structures and a lack of senior management buy-in continue to present the primary impediments to PAIA compliance and implementation.

Overall, more than 80% of the local government structures remain non-compliant with PAIA. More significantly, reports from local government also reveal a worrying trend of reports indicating zero requests. There are a number of conclusions to be drawn from such returns at the local government level. The most obvious is that members of the public are not using the legislation enough and that local government is not contributing to increasing community awareness through its integrated development planning initiatives, designed especially with this objective in mind. Alternatively, zero returns are simply a form of malicious compliance. Both of these conclusions warrant concern, particularly because local government remains the first interface between communities and government.

The key tenets of participatory democracy require active communities and mutually constructive relationships between key service delivery agencies, structures and government. If local government is not able to fully embrace the objectives of PAIA, service delivery – which is its mainstay – will continue to be critically impeded.

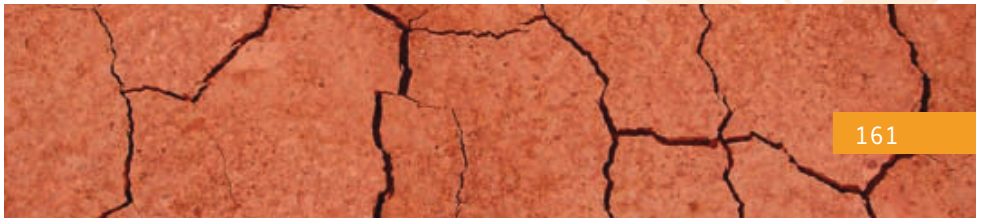
Key areas for accelerating compliance with and implementation of PAIA at the local government level and which merit urgent attention include the following:

- measures to sustain fully capacitated personnel, including frontline staff and staff at customer care service centres;
- improved records and document management systems;
- adequate budgetary allocations;
- reporting and accountability on PAIA delivery;
- improved systems and processes to administer requests;
- monitoring and evaluation of specific requirements to address impediments to delivery;
- increased commitment from senior management contextualising PAIA within service delivery priorities and standards; and
- the integration of PAIA into the IDP process and community structures within each geographical area.

These changes address both operational and orientation needs to enhance PAIA compliance and implementation but need to be addressed urgently to overcome entrenched patterns of behaviour within local government structures.

Other Bodies and Chapter 9 Institutions

Compliance rates for 'other bodies' rose significantly against postings for 2008. Most other bodies complying cited pressure from the Auditor General as the key reason for their submission of Section 32 reports. While other bodies' reporting rates have increased, two trends merit consideration. One of these is that most of these bodies required assistance in completing their submissions and secondly, most of them posted zero returns for requests received values. A number of entities which have consistently submitted reports in the past have not submitted reports this year, however.



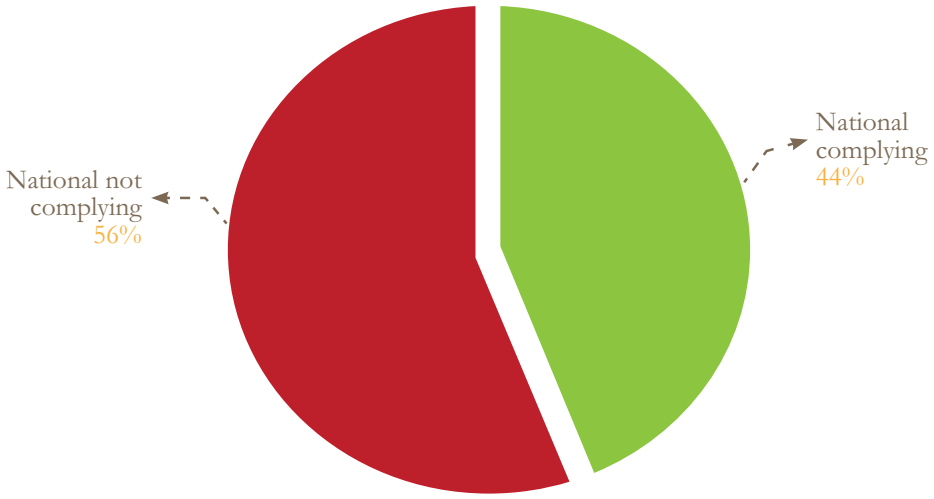
Chapter 9 institutions have also demonstrated a worrying trend with regard to Section 32 compliance. All chapter 9 institutions listed in the table have been non-compliant with reporting obligations for more than three consecutive years. This trend is of particular concern since these institutions are regarded as champions of human rights. There is an expectation that openness, transparency and accountability prescribed by PAIA would have secured an increased commitment from them to comply with PAIA as a whole.

Public Bodies NOT Complying with Section 32 of PAIA National Government Departments (2009/2010)

Table 1

National	
Department of Transport REPEAT	Department of Defense and Military Veterans REPEAT
Department of Rural Development and Land Reform	Department of Water Affairs and Forestry REPEAT
Department of Tourism REPEAT	Independent Complaints Directorate REPEAT
Department of Home Affairs REPEAT	Secretariat for Safety and Security REPEAT
Department Arts and Culture REPEAT	Department of Cooperative Governance and Traditional Affairs
Department of Minerals and Energy	Department of Social Development REPEAT
Department of Public Works REPEAT	Department of Mining
Department of Basic Education (new department but previously non compliant)	Department of Higher Education and Training REPEAT
Department of Finance REPEAT	Department of Energy REPEAT
Department of Economic Development REPEAT	
Department of Public Enterprises REPEAT	

Graph 1: National Departments Compliance

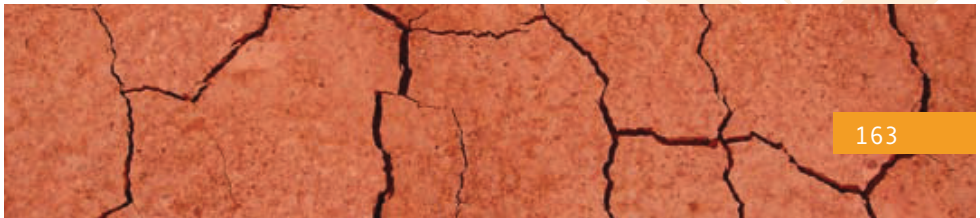


Provincial Departments:

Repeat Offenders First time non-compliant departments

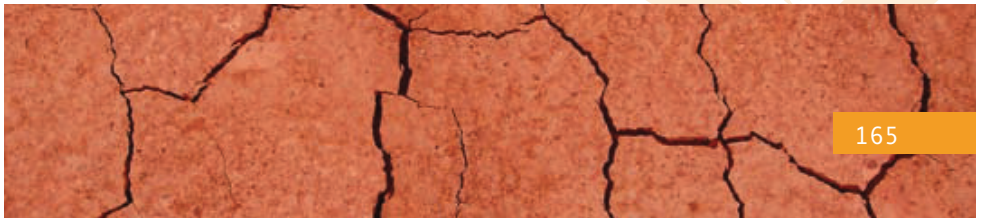
Table Two

Eastern Cape	Free State	Gauteng	Kwazulu-Natal	Mpumalanga
Office of the Premier*	Cooperative Governance and Traditional Affairs	Sport, Arts, Culture and Recreation*	Office of the Premier*	Office of the Premier*
Agriculture and Rural Development*	Agriculture*	Housing*	Social Development	Agriculture and Land Administra-tion*
Finance, Economic Development and Environmental Affairs*	Provincial Treasury	Economic Development and Planning	Education*	
Finance	Education*	Community Safety*	Transport and Community Safety and Liaison*	Cultural Affairs, Sport and Recreation*

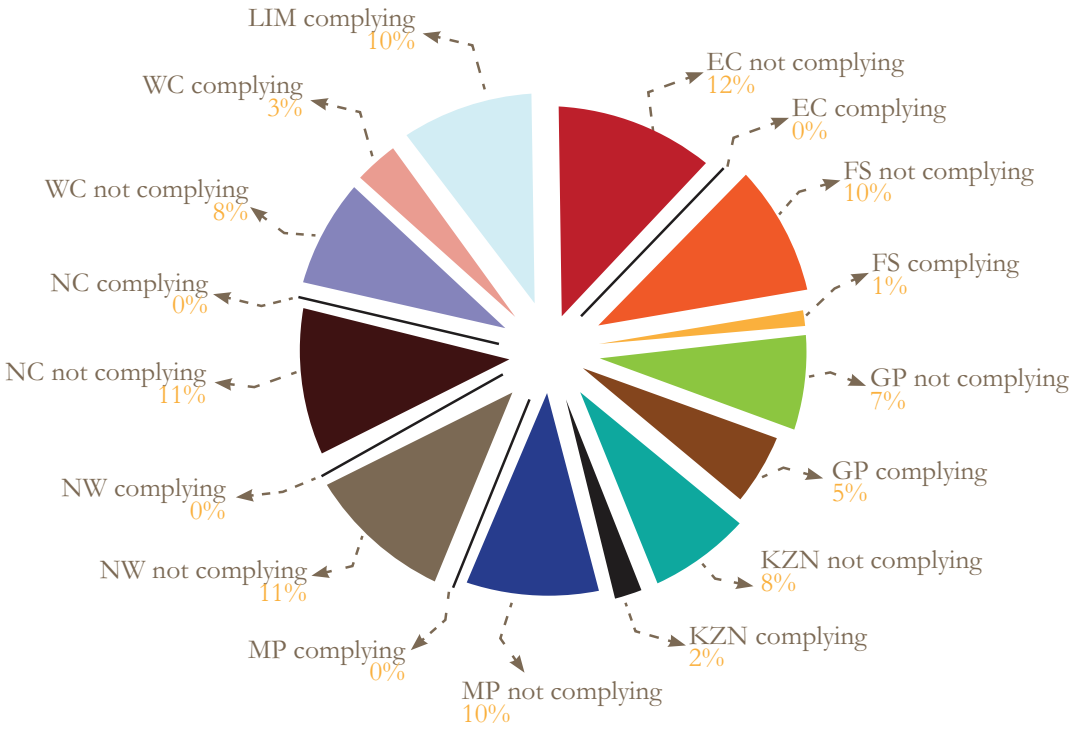


Eastern Cape	Free State	Gauteng	Kwazulu-Natal	Mpumalanga
Housing	Police, Roads and Transport	Infrastructure Development	Public Works*	
Education*	Health*	Local Government	Finance	Economic Development and Planning*
Health*	Public Works and Rural Development	Roads and Public Transport	Human Settlements	
Local Government and Traditional Affairs	Social Development*		Local Government and Traditional Affairs	Education*
Roads and Public Works*	Sports, Arts, Culture and Recreation		Health*	Health and Social Development*
Safety, and Liaison	Economic Development and Tourism and Environmental Affairs			Finance*
Social Development*	Human Settlements			Safety and Security*
Sport, Recreation, Arts and Culture *				Public Works*
Transport				Roads and Public* Transport*
				Housing

North West	Northern Cape	Western Cape
Office of the Premier*	Office of the Premier*	Office of the Premier*
Agriculture, Conservation and Environment and Rural Development*	Agriculture , Land Reform and rural Development*	Education*
Human Settlements	Treasury	Finance, Economic Development and Tourism
Economic Development and Toruism*	Environment Affairs and Nature Conservation*	Local Government, Environmental Affairs and Development Planning
Education*	Education*	Social Development*
Finance*	Finance, Economic Affairs and Tourism*	Cultural Affairs and Sport *
Health Social Development**	Health*	Transport and Public Works*
Local Government And Traditional Affairs*	Co-operative Governance, Human Settlements and Traditional Affairs*	Agriculture
Public Works, Roads and Transport*	Transport, Safety and Liaison*	Treasury
Public Safety*	Social Services and Population Development*	
Sport, Arts and Culture	Sport, Arts and Culture*	
	Roads and Public Works*	



Graph 2: Provincial Departments Compliance Rates



Municipalities Not Complying

Municipalities per Province

Table 3

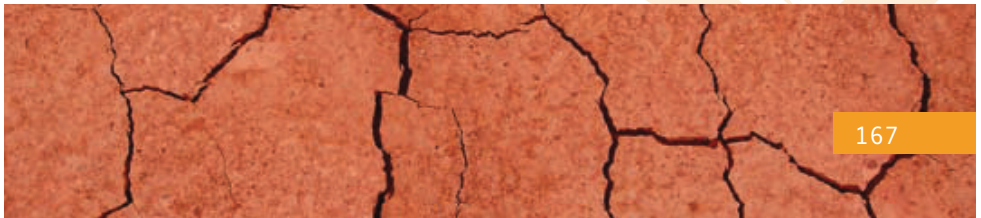
Western Cape				
Breede Valley Local	Swellendam Local	Kannaland Local	Oudshoorn	Knysna Local
Breede Rivier/ Winelands Local	Witzenberg Local	Cederberg Local	Bitou Local	Prince Albert Local
Cape Agulhas Local	Beaufort West Local	Matzikama Local	Swartland	Eeden District
Stellenbosch Local	Laingsburg Local	George	Bergrivier	West Coast District

Northern Cape				
Thembelihle Local	Magareng Local	Siyancuma Local	Kgatelopele Local	Khai – Ma Local
Tsantsabe Local	Phokwane Local	Gamagara Local	Khara Hais Local	Kamiesberg Local
Namakwa (district)	Kareeberg Local	Renosterberg Local	Hantam	Dikgatlong Local
Mier Local	Sol Plaatjie Local	GA Segonyana Local	Kheis local	Kgalagadi District
KA Garib Local	Karoo Hoogland Local	Moshaweng Local	Richtersveld Local	Siyanda District

North West			
Mafikeng Local	Ramotshere Moiloa Local	Malopo Local	Tswaing Local
Kgetleng River Local	Greater Taung Local	Naledi Local	Ventersdorp Local
Moretele Local	Kakgisano Local	Ratlou Local	City of Matlosana Local
Moses Kotane Local	Mamusa Local	Ditsobotla Local	Maquassi Local
Merafong Local	Tlokwe	Bophirima (district)	
Ngaka Modiri Molema-Southern (district)	Bojanala (district)	Central District	Southern District

Mpumalanga			
Mkhondo Local	Thembisile Local	Govan Mbeki Local	Thabo Chweu Local
Msukaligwa Local	Lekwa Local	Albert Luthuli Local	Emakhazeni local
Emalahleni Local	Bushbuckridge Local	Depaleseng Local	DR J Moroka Local
Nkangala District	Gert Sibande District	Ehlanzeni (District)	Nkomazi
Umjendi Local	Delmas Local		

Limpopo				
Mogalakwena Local	Groblersdal Local	Greater Letaba Local	Mookgophong Local	Thulamela Local
Aganang Local	Greater Marble Hall Local	Greater Tzaneen Local	Fetagkomo Local	Modimolle Local
Blouberg Local	Tubatse Local	Maruleng Local	Thabazimbi Local	BA-Phalaborwa Local
Lepelle – Nkumpi local	Makhudutamaga Local	Makhado Local	Motale Local	Greater Letaba Local
Molemole Local	Capricorn (district)	Waterberg (district)	Greater Giyani Local	Sekhukhune (district)
Polokwane Local				



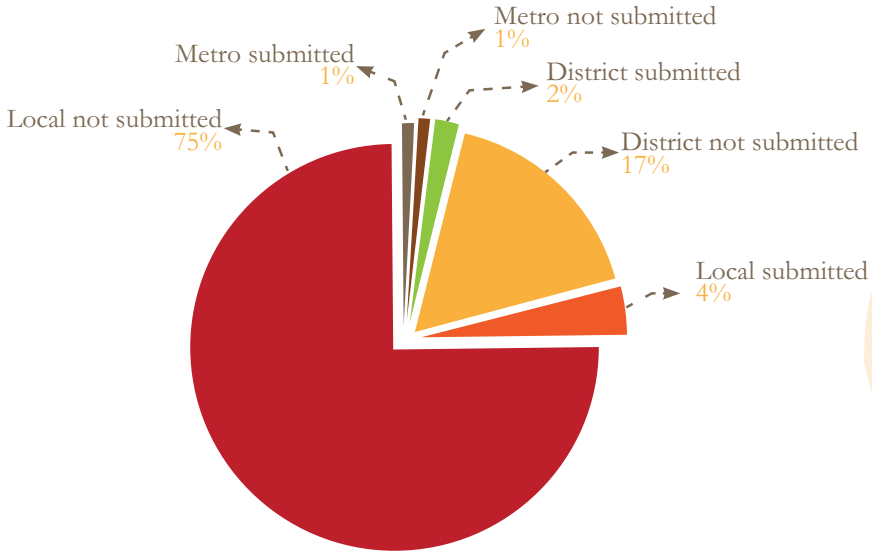
KwaZulu-Natal				
Nkandla local	Izinqoleno Local	Ndwendwe Local	Ubuhlebezwe Local	Umtshezi Local
Dannhausser Local	Umziwabantu Local	Mbonambi Local	Umzimkhulu Local	
Indaka Local	Mthonjaneni Local	Greater Kokstad Local	Ntambanana Local	Mkhambathini Local
Emadlangeni Local	Mandeni Local	Okhahlamba Local	Umdoni Local	Mpofana Local
Hibiscus Coast Local	Kwadukuza Local	Umvoti Local	Umzumbe Local	Msunduzi local
Umgeni Local	Maphumulo Local	Edumbe local	Vulamehlo Local	Richmond Local
Umshwati Local	Umhlabuyalingana Local	Emnambithi-Ladysmith Local	Uphongolo	Msinga local
Nongoma Local	The Big Five False ay Local	Imbabazana Local	Endumeni	Nquthu Local
Hlabisa /Impala Local	Abaqulusi Local	Ingwe local	Umlalazi	Mtubatuba Local
Jozini Local	Endumeni Local	Newcastle local	Amajuba District	Umzinyathi
Umkhanyakude District	Ugu District	Uthukela District	Ilembe District	Sisonke District
Umgungundlovu District	Zululand			

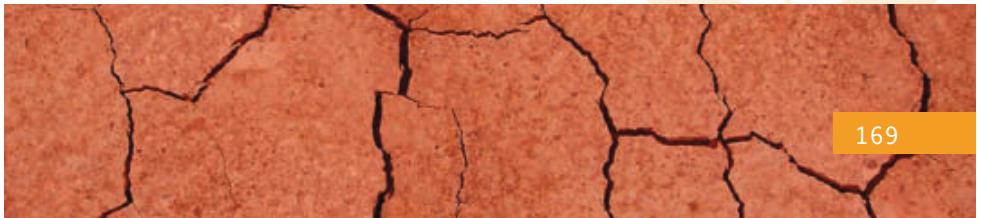
Eastern Cape				
Ntabankulu Local	Nxuba Local	Ndlambe Local	Elundini Local	Mnquma Local
Matatiele Local	Port St Johns Local	Sunday's River Valley Local	King Sabatha Dalindyebo local	Ngqushwa Local
Umzimvubu Local	Baviaans Local	Ingquza Hill Local	Mbizana Local	Nkonkobe Local
Nyandeni Local	Blue Crane Route Local	Engcobo Local	Mhlonto Local	Tsolwana Local
Maletswai Local		Senqu Local	Lukhanji	Amathole District
Buffalo City Local	iKhwezi local	Inkwanca Local	Sakhisizwe Local	OR Thambo District
Great Kei Local	Kouga Local	Intsika yethu Local	Nelson Mandela Bay	Ukhahlamba District
Mbhashe Local	Kou Kamma Local	Sakhisizwe Local	Makana Local	Alfred Nzo District
			Nelson Mandela Bay	Cacadu District

Free State				
Mantsopa	Mafube	Moqhaka	Masilonyana	Matjhabeng
Mohokare	Metsimaholo	Ngwathe	Thabo Mofutsanyane	Tokologo
Setsoto	Nketoana	Phumelela	Thabo Mofutsanyane (District)	Manguang
Lejweleputswa (district)	Xhariep (local)	Naledi	Letsemeng	Dihlabeng
Fezile(district)	Motheo(district)	Xhariep (district)		Kopanong

Gauteng				
Kungwini Local	Emfuleni	Westonaria (Local)		
Nokeng Tsa Taemane (Local)	Lesedi	Randfontein		
Ekhuruleni Metro	West Rand District			
City of Tshwane Metro				

Graph 3: Local Government Compliance



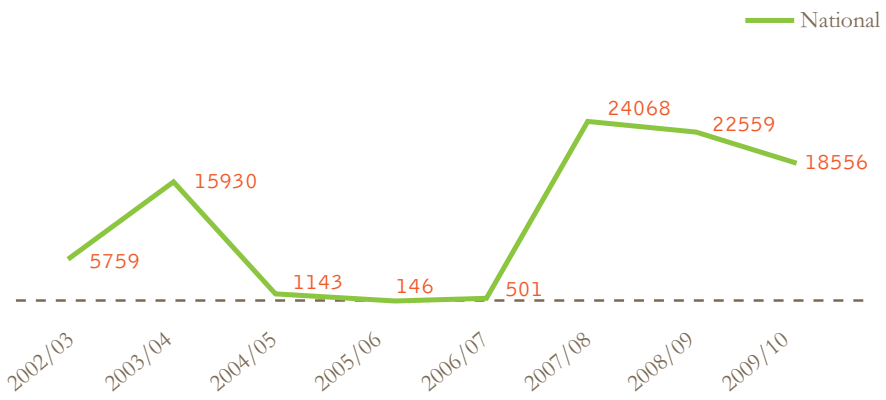


Chapter 9 Institutions

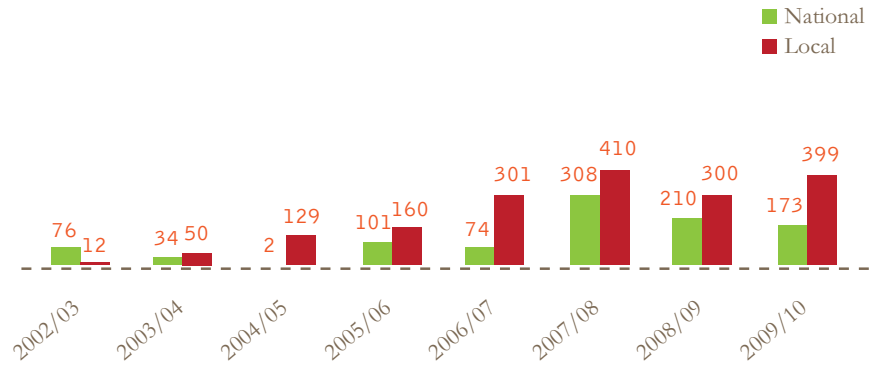
Table 4

Commission for Gender Equality
Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities
Independent Electoral Commission
Youth Commission

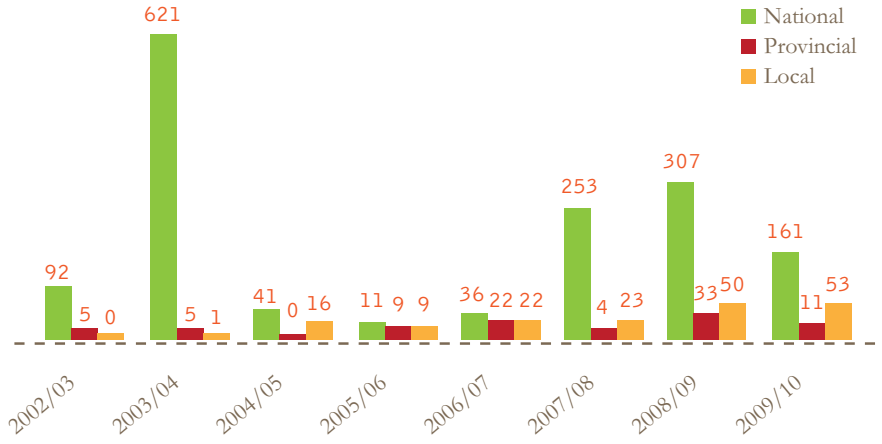
Graph 4: Total Requests Received at National Level



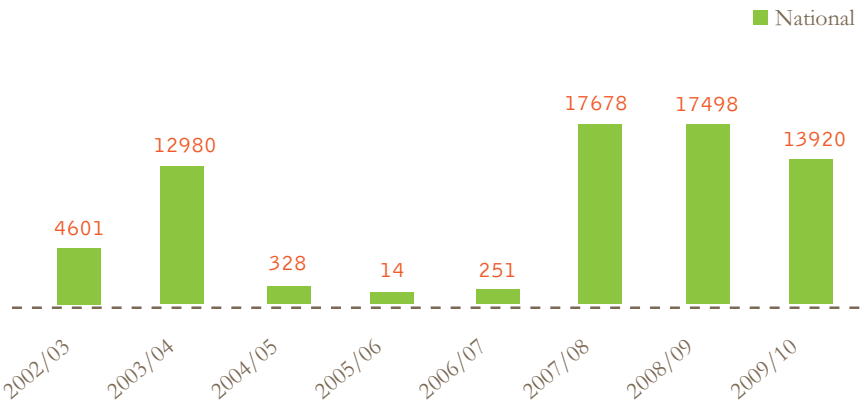
Graph 5: Provincial and Local Government requests received



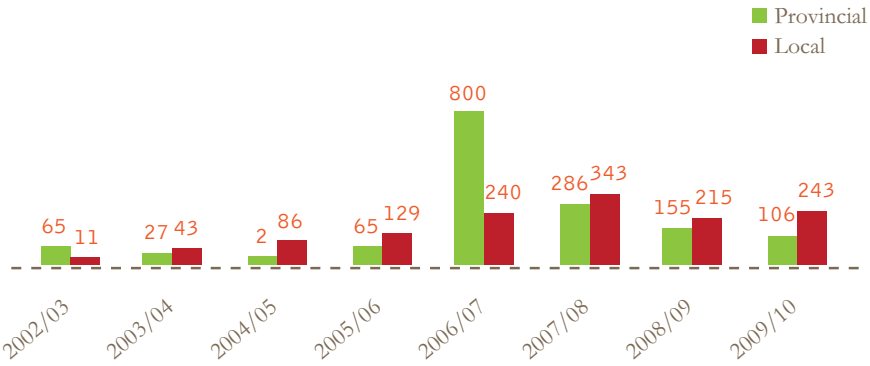
Graph 6: Requests Refused in Full

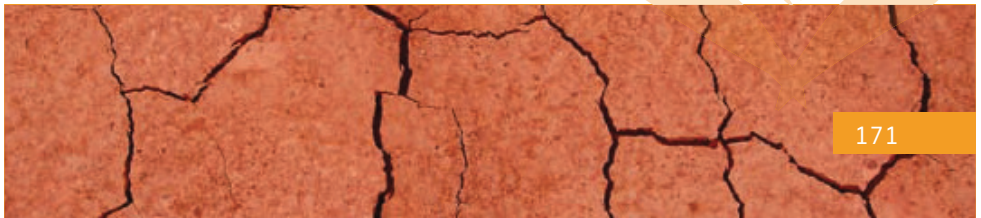


Graph 7: National requests granted in Full



Graph 8: Provincial and Local Government Requests Granted in full





Local Government Complying with Section 32

Reports by Public Bodies

All reports submitted to the Commission up to and including the 20th of May 2010 are reflected in this report. Later reports are not reflected. Three unknown reports were also submitted but have been excluded from the report statistics.

	Number of request for access received s32(a)	Number of request for access granted in full s32(b)	Number of request for access granted in terms of s46	Number of requests for access: (a) refusal in full (b) refused partially (c) number of times each provision of the act was relied on to refuse access in full or partially S32(d)			Number of cases in which the period stipulated in s25(1) were extended in terms of s26 (1) S32(e)	Number of internal appeals (a) lodged with the relevant authority	(b) number of cases in which as a result of an internal appeal access was given s32(f)	Number of internal appeals which were lodged on the ground that a request for access was regarded has having been refused in terms of s27 section 32 (g)	Number of applications to a court which were lodged on the ground that internal appeal was regarded has having been dismissed in terms of section 77 (7) s32 (h)	Other information
				A	B	C						
Eastern Cape												
Local												
Camdeboo	0	0	0	0	0	0	0	0	0	0	0	
District												
Chris Hani	0	0	0	0	0	0	0	0	0	0	0	
Free State												
Local												
Tswelopele *	0	0	0	0	0	0	0	0	0	0	0	
Gauteng												
District												
Metsweding *	0	0	0	0	0	0	0	0	0	0	0	
Mogale City (Loc) check	1	0	0	0	0	0	0	0	0	0	0	
Metro												
City of Johannesburg*	53	43	0	0	1	0	3	0	0	0	0	6 requests pending

	Number of request for access received s32(a)	Number of request for access granted in full s32(b)	Number of request for access granted in terms of s46	Number of requests for access: (a) refusal in full (b) refused partially (c) number of times each provision of the act was relied on to refuse access in full or partially S32(d)			Number of cases in which the period stipulated in s25(1) were extended in terms of s26 (1) S32(e)	Number of internal appeals (a) lodged with the relevant authority	(b) number of cases in which as a result of an internal appeal access was given s32(f)	Number of internal appeals which were lodged on the ground that a request for access was regarded has having been refused in terms of s27 section 32 (g)	Number of applications to a court which were lodged on the ground that internal appeal was regarded has having been dismissed in terms of section 77 (7) s32 (h)	Other information
				A	B	C						
KwaZulu-Natal												
Local												
Impendle	0	0	0	0	0	0	0	0	0	0	0	
KwaSani	0	0	0	0	0	0	0	0	0	0	0	
City of uMhlathuze*	4	3	0	1	0	0	0	0	0	0	0	
District												
Uthungulu District *Municipality	2	1	1	1	0	0	0	0	0	0	0	
Metro												
Ethekwini	81	60	0	9	2	11	19	2	0	2	0	
Mpumalanga												
Local												
District												
North West												
Local												
District												
Northern Cape												
Local												
District												
Pixley ka Seme	0	0	0	0	0	0	0	0	0	0	0	0
Siyanda*	0	0	0	0	0	0	0	0	0	0	0	
John Taolo Gaetsewe District Municipality*	2	1	0	1	0	0	0	0	0	0	0	

	Number of request for access received s32(a)	Number of request for access granted in full s32(b)	Number of request for access granted in terms of s46	Number of requests for access: (a) refusal in full (b) refused partially (c) number of times each provision of the act was relied on to refuse access in full or partially S32(d)			Number of cases in which the period stipulated in s25(1) were extended in terms of s26 (1) S32(e)	Number of internal appeals (a) lodged with the relevant authority	(b) number of cases in which as a result of an internal appeal access was given s32(f)	Number of internal appeals which were lodged on the ground that a request for access was regarded has having been refused in terms of s27 section 32 (g)	Number of applications to a court which were lodged on the ground that internal appeal was regarded has having been dismissed in terms of section 77 (7) s32 (h)	Other information
				A	B	C						
Frances Baard *	6	6	0	0	0	0	1	1	0	0	0	
Western Cape												
Local												
Theewaterskloof *	6	6	0	0	0	0	2	0		0	0	3
Drakenstein	4	4	0	0	0	0	0	0	0	0	0	
Overstrand*	38	24	3	14	14	0	0	0	0	0	0	
Mossel Bay*	1	1	0	0	0	0	0	0	0	0	0	
Hessequa	0	0	0	0	0	0	0	0	0	0	0	
District												
Central Karoo District Municipality *	4	4	0	0	0	0	1	0	0	0	0	
Cape Winelands *District Municipality	0	0	0	0	0	0	0	0	0	0	0	
Metro												
City of Cape Town*	197	94	0	27	19	46	3	3	1	1	0	

Other Public Bodies

	Number of request for access received s32(a)	Number of request for access granted in full s32(b)	Number of request for access granted in terms of s46 s32(b)	Number of requests for access: (a) refusal in full (b) refused partially (c) number of times each provision of the act was relied on to refuse access in full or partially S32(d)			Number of cases in which the period stipulated in s25(1) were extended in terms of s26 (1) S32e)	Number of internal appeals (a) lodged with the relevant authority	(b) number of cases in which as a result of an internal appeal access was given s32(f)	Number of internal appeals which were lodged on the ground that a request for access was regarded has having been refused in terms of s27 section 32 (g)	Number of applications to a court which were lodged on the ground that internal appeal was regarded has having been dismissed in terms of section 77 (7) s32 (h)	Other information
				A	B	C						
Airports Company South Africa*	4	4	0	0	0	0	0	0	0	0	0	0
Central University of Technology, Free State*	8	7	0	0	1	0	0	0	0	0	0	0
Media, Advertising, Publishing, Printing and Packaging SETA	0	0	0	0	0	0	o	0	0	0	0	0
Eskom Holdings Limited*	48	21	No entry	10	4	0	16	2	0	0	0	6 requests are still pending
FoodBev SETA *	0	0	0	0	0	0	0	0	0	0	0	0
Magistrates Commission*	14	11	0	0	0	1	1	1	0	0	0	0
South African Reserve Bank *	4	0	0	1	0	0	0	0	0	0	0	0
Special Investigating Unit*	1	0	0	1	0	0	0	0	0	0	0	
University of Johannesburg*	217	139	47	31	0	0	0	0	0	0	0	
University of Pretoria*	1	0	0	0	1	1	0	0	0	0	0	0

	Number of request for access received s32(a)	Number of request for access granted in full s32(b)	Number of request for access granted in terms of s46 s32(b)	Number of requests for access: (a) refusal in full (b) refused partially (c) number of times each provision of the act was relied on to refuse access in full or partially S32(d)			Number of cases in which the period stipulated in s25(1) were extended in terms of s26 (1) S32e)	Number of internal appeals (a) lodged with the relevant authority	(b) number of cases in which as a result of an internal appeal access was given s32(f)	Number of internal appeals which were lodged on the ground that a request for access was regarded has having been refused in terms of s27 section 32 (g)	Number of applications to a court which were lodged on the ground that internal appeal was regarded has having been dismissed in terms of section 77 (7) s32 (h)	Other information
				A	B	C						
South African Veterinary Council*	3	3	0	0	0	0	0	0	0	0	0	0
Agricultural Research Council	1	0	0	1	0	1	0	0	0	0	0	
Limpopo Economic Development Enterprise	0	0	0	0	0	0	0	0	0	0	0	
City Power Johannesburg	1	Request pending, intending to grant in full	0	0	0	0	0	0	0	0	0	
South African Qualifications Authority	0	0	0	0	0	0	0	0	0	0	0	0
CSIR	0	0	0	0	0	0	0	0	0	0	0	0
Financial Services Board	3	2	0	1	0	1	0	0	0	0	0	0
National Research Foundation*	1	1	0	0	0	0	1	0	0	0	0	
Transport, Education and Training Authority	1	0	0	1	0	1	0	0	0	0	0	
FASSET	0	0	0	0	0	0	0	0	0	0	0	

	Number of request for access received s32(a)	Number of request for access granted in full s32(b)	Number of request for access granted in terms of s46 s32(b)	Number of requests for access: (a) refusal in full (b) refused partially (c) number of times each provision of the act was relied on to refuse access in full or partially S32(d)			Number of cases in which the period stipulated in s25(1) were extended in terms of s26 (1) S32e)	Number of internal appeals (a) lodged with the relevant authority	(b) number of cases in which as a result of an internal appeal access was given s32(f)	Number of internal appeals which were lodged on the ground that a request for access was regarded has having been refused in terms of s27 section 32 (g)	Number of applications to a court which were lodged on the ground that internal appeal was regarded has having been dismissed in terms of section 77 (7) s32 (h)	Other information
				A	B	C						
Housing Development Agency	1	1	0	0	0	0	0	0	0	0	0	
Agri Seta	0	0	0	0	0	0	0	0	0	0	0	
Seta for Finance, Accounting, Management Consulting and Other Financial Services	0	0	0	0	0	0	0	0	0	0	0	
Bank Seta	0	0	0	0	0	0	0	0	0	0	0	
Transnet Limited	11	10	0	1	0	0	0	0	0	0	0	
Khula Enterprise Finance Limited	0	0	0	0	0	0	0	0	0	0	0	
State Information Technology Agency	4	3	0	1	0	0	0	0	0	0	0	
Clothing, Textiles, Footwear and Leather Seta	0	0	0	0	0	0	0	0	0	0	0	
SARS	9	5	0	4	9	4	1	1	0	0	0	
Wholesale and Retail Seta	0	0	0	0	0	0	0	0	0	0	0	
Forest Industries Education and Training Authority	0	0	0	0	0	0	0	0	0	0	0	

Chapter 9 Institutions

	Number of request for access received s32(a)	Number of request for access granted in full s32(b)	Number of request for access granted in terms of s46 s32(b)	Number of requests for access: (a) refusal in full (b) refused partially (c) number of times each provision of the act was relied on to refuse access in full or partially S32(d)			Number of cases in which the period stipulated in s25(1) were extended in terms of s26 (1) S32e)	Number of internal appeals (a) lodged with the relevant authority	(b) number of cases in which as a result of an internal appeal access was given s32(f)	Number of internal appeals which were lodged on the ground that a request for access was regarded has having been refused in terms of s27 section 32 (g)	Number of applications to a court which were lodged on the ground that internal appeal was regarded has having been dismissed in terms of section 77 (7) s32 (h)	Other information
				A	B	C						
Auditor General South Africa*	1	1	0	0	0	0	0	0	0	0	0	
Office of the Public Protector*	7	5	0	0	2	0	1	0	0	1	0	
South African Human Rights Commission	1	1	0	0	0	0	0	0	0	0	0	
Public Service Commission	2	1	1	0	0	0	0	0	0	0	0	

Provincial Government

	Number of request for access received s32(a)	Number of request for access granted in full s32(b)	Number of request for access granted in terms of s46 s32(b)	Number of requests for access:(a) refusal in full (b) refused partially (c) number of times each provision of the act was relied on to refuse access in full or partially S32(d)			Number of cases in which the period stipulated in s25(1) were extended in terms of s26 (1) S32(e)	Number of internal appeals (a) lodged with the relevant authority (b) number of cases in which as a result of an internal appeal access was given s32(f)	Number of internal appeals which were lodged on the ground that a request for access was regarded has having been refused in terms of s27 section 32 (g)	Number of applications to a court which were lodged on the ground that internal appeal was regarded has having been dismissed in terms of section 77 (7) s32 (h)	Other information
				A	B	C					
Limpopo											
Economic Development, Environment and Tourism *	5	4	0	1	0	0	2	0	0	0	

Education *	1	0	0	0	0	1	0	0	0	0	
Agriculture *	4	2	0	2	0	2	2	1	1	0	
Roads and Transport*	13	1	0	0	0	0	0	0	0	0	9 of the requests were received during March 2010
Treasury*	0	0	0	0	0	0	0	0	0	0	
Health and Social Development *	27	21	0	0	0	0	1	0	0	0	
Public Works*	4	1	0	0	3	3	0	0	0	0	
Local Government and Housing*	6	4	0	2	0	0	0	0	0	0	
Safety, Security and Liaison*	0	0	0	0	0	0	0	0	0	0	
Office of the Premier*	9	5	0	0	0		1	0	0	0	
Sport, Arts and Culture*	0	0	0	0	0	0	0	0	0	0	
Kaw Zulu Natal											
Agriculture and Environmental Affairs and Rural Development*	5	3	0	1	0	1	0	1(appeal is pending)	0	0	1 request is pending, the request was received on 15 March 2010
Arts, Culture and Sports and Recreation *	0	0	0	0	0	0	0	0	0	0	

	Number of request for access received s32(a)	Number of request for access granted in full s32(b)	Number of request for access granted in terms of s46 s32(b)	Number of requests for access:(a) refusal in full (b) refused partially (c) number of times each provision of the act was relied on to refuse access in full or partially S32(d)			Number of cases in which the period stipulated in s25(1) were extended in terms of s26 (1) S32(e)	Number of internal appeals (a) lodged with the relevant authority (b) number of cases in which as a result of an internal appeal access was given s32(f)	Number of internal appeals which were lodged on the ground that a request for access was regarded has having been refused in terms of s27 section 32 (g)	Number of applications to a court which were lodged on the ground that internal appeal was regarded has having been dismissed in terms of section 77 (7) s32 (h)	Other information
				A	B	C					
Western Cape											
Housing*	9	7	0	0	1	1	0	0	0	0	
Community Safety	3	1	0	1	1	1	1	0	0	0	
Health	17	7	0	0	2	2	1	0	0	0	
Free State											
Premier *	24	10	0	0	0	0	0	0	0	0	13 transfers, 1 withdrawn
Gauteng											
Health and Social Development	0	0	0	0	0	0	0	0	0	0	0
Agriculture and Rural Development *	31	22	1	7	2	3	3	4	1	4	
Education*	14	13	0	1	0	0	11	0	0	0	0
Office of the Premier*	5	1	0	1	1	0	0	0	0	0	0
Finance*	6	6	0	0	0	0	0	0	0	0	

National

	Number of request for access received s32(a)	Number of request for access granted in full s32(b)	Number of request for access granted in terms of s46 s32(b)	Number of requests for access:(a) refusal in full (b) refused partially (c) number of times each provision of the act was relied on to refuse access in full or partially S32(d)			Number of cases in which the period stipulated in s25(1) were extended in terms of s26 (1) S32(e)	Number of internal appeals (a) lodged with the relevant authority (b) number of cases in which as a result of an internal appeal access was given s32(f)	Number of internal appeals which were lodged on the ground that a request for access was regarded has having been refused in terms of s27 section 32 (g)	Number of applications to a court which were lodged on the ground that internal appeal was regarded has having been dismissed in terms of section 77 (7) s32 (h)	Other information
				A	B	C					
Agriculture, Forestry and Fisheries	20	13	0	1	5	6	2	1	1 pending	0	0
Science and Technology	1	1	0	0	0	1	0	0	0	0	0
Justice and Constitutional Development	215	133	0	11	6	65	8	1	0	No response	
Government Communications	2	1	0	1	0	0	0	0	0	0	
Trade and Industry	6	2	0	2	1	1*	0	0	0	0	
The Presidency	11	0	0			6	5	2	2	0	
Human Settlements	3	2	0	0	0	0	0	0	0	0	1 transferred
Environmental Affairs and Tourism*	109	66	0	7	3	1	1	4	0	0	
Labour	1	1	0	0	0	0	0	0	0	0	
PALAMA	0	0	0	0	0	0	0	0	0	0	
South African Police Services	18 145	13679	573	133	27	160	2178	4	0	1 (requester did not lodge an internal appeal	

	Number of request for access received s32(a)	Number of request for access granted in full s32(b)	Number of request for access granted in terms of s46 s32(b)	Number of requests for access:(a) refusal in full (b) refused partially (c) number of times each provision of the act was relied on to refuse access in full or partially S32(d)			Number of cases in which the period stipulated in s25(1) were extended in terms of s26 (1) S32(e)	Number of internal appeals (a) lodged with the relevant authority (b) number of cases in which as a result of an internal appeal access was given s32(f)	Number of internal appeals which were lodged on the ground that a request for access was regarded has having been refused in terms of s27 section 32 (g)	Number of applications to a court which were lodged on the ground that internal appeal was regarded has having been dismissed in terms of section 77 (7) s32 (h)	Other information
				A	B	C					
Public Service Administration*	4	1	0	0	0	0	0	0	0	0	3 requests transferred in terms of s20(1)(b)
International Relations and Cooperation	3	2	0	0	0	0	1	0	0	0	
Sport and Recreation	0	0	0	0	0	0	0	0	0	0	0
Health	13	6	0	3	3	0	0	0	0	0	0
Correctional Services	23	13	0	3	0	2	5	0	0	0	7 requests withdrawn

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ODAC

Ten Years of Access to Information in South Africa:

Some challenges to the effective implementation of PAIA

Chantal Kisoon

2/1/2010

Ten Years of Access to Information in South Africa:
Some challenges to the effective implementation of PAIA

INTRODUCTION

On the crest of the euphoric victory against apartheid, the new democracy of South Africa fortified its success by negotiating a formidable bill of rights, located within its Constitution. The Promotion of Access to Information Act (PAIA) therefore finds its genesis in Constitutional injunctions and international norms[1], enjoying equal status with other fundamental rights in the bill of rights. PAIA aspires to objectives that are directed at the good governance constants of transparency, accountability and informed public participation, the mainstay of any sound democracy. The current utility of access rights directed towards safeguarding people from the secrecy upon which the apartheid state thrived by proscribing information flows, as well as entrenching information sharing by government as the formula underpinning a contemporary pluralist democracy. Commitment to the access to information objectives therefore extends beyond the impetus lent for its adoption by supra entities at the global level but was fed by the popular ruling party's vision for a democracy informed during its struggle against Apartheid. This provides the landscape for a thought-provoking consideration of how this commitment has manifested itself in the ten years since the implementation of PAIA.

This 10 year reflection on the challenges in implementing PAIA would however be remiss if it did not attempt to unravel the complex and multi-dimensional nature of the impediments to realising PAIA objectives beyond an examination of the executive's commitment. In attempting to do so, reliance is placed on the statistical data generated by the South African Human Rights Commission (the Commission), the constitutional body charged with monitoring the implementation of PAIA. Empirical data generated by the Commission has proven useful in determining the levels of internal readiness of public bodies to realise the objectives of PAIA and in identifying factors that impede delivery in the sector. Monitoring by the Commission reveals an unhealthy stasis on the right to access information in South Africa. It has also identified a number of challenges which thwart the realisation of the right to access information and impact on user experiences and perception. Some of these challenges can be attributed directly to the regulatory framework and others relate to the orientation of the state apparatus to fully deliver on PAIA; and others to the socio-economic and cultural landscape in South Africa. Although reform to the legislative framework has been wrought incrementally on a few issues such as the lowering of request fee thresholds, the current dispute resolution mechanism in the legislation continues to present a critical barrier to the assertion of rights and its overhaul is warranted[2].

Levels of awareness remain a common thread in the matrix of barriers to implementation. Awareness remains a key barrier impacting both implementers and users. These conclusions are supported to some extent by research undertaken in the first seven years of the legislation coming into force. The

[1] The Constitution of the Republic of South Africa Act 108 of 1996 (the final constitution) also section 195 of the Interim Constitution Act 200 of 1993, Article 19 of the Universal Declaration of Human Rights, the African Union Declaration of Principles on Freedom of Expression in Africa, and the African Charter of Human and People's Rights and the AU Convention on Prevention and Combating Corruption

[2] Submissions by the SAHRC to parliament on the Protection of Personal Information Bill [B9-2009] and to the ad hoc Committee on the Review of Chapter 9 and Associated Institutions

comments drawing a nexus between culture, attitude, and its impact on the realisation of access to information rights are, however, untested by conclusive research.
Despite early policy commitments by government, the slew of barriers referred to, have become formidable over time and are particularly difficult to expeditiously resolve in the face of the political and socio-economic realities in South Africa. Given the inordinate resource pressures and socio economic landscape common to developing states, these challenges will perhaps apply with equal force to the region. While it is true that formal changes will herald reform, it must also be accepted that the optimal realisation of access to information rights does not rest on formal change alone. The executive's early commitment almost suggests a moral onus for it to support a strong freedom of information regime in the country, given its past. A consideration of government's orientation and commitment to creating an enabling environment for promoting access to information is therefore a necessary starting point in the assessment process.

In highlighting some of the consequences resulting from the three key barriers of administrative readiness, legislative reform and levels of awareness, cogniscence must be taken of the fact that these barriers do not operate in isolation of each other but often combine and present with multidimensional, complex and nuanced barriers to realizing access rights in South Africa.

LEVELS OF INTERNAL READINESS

While still in its draft form, a small handful of politicians voiced the view that the passage of the PAIA legislation would impose added strain on the public service, diverting its much needed resources from key areas on the transformation and delivery agenda[3]. This view was perhaps a death knell for PAIA, for it appears to have pervasively replicated itself and influenced government's commitment to the legislation since that time.

The lack of government commitment and its lack of recognition of the importance of PAIA are perhaps most clearly demonstrated in the levels of internal readiness within public bodies to deliver on PAIA. Reports and research have shown that key factors impacting on levels of readiness stem from the fact that the majority of public bodies do not budget for PAIA delivery, have weak or nonexistent internal PAIA policies, do not integrate information sharing into their activities and do not plan for PAIA delivery[4]. One of the implications of these shortcomings is that personnel are not dedicated exclusively to administering PAIA, and are usually tasked with its administration as an ad hoc function over and above their dedicated portfolios. These implementers view PAIA as burdensome, confusing and complex, and they often defer decisions to grant access to their legally qualified peers or senior management, thereby running foul of the 30 day timeframe within which to give access to records. Implementers also often prefer blanket refusals to requests than to risk the ire of senior management by redacting records or granting partial access in most instances. The reluctance of implementers to grant access appears to be largely motivated by a keen sense of self-preservation and a prevailing culture of secrecy in public bodies. In most instances implementers tend to refuse access in the knowledge that a resulting appeal will safely escalate the decision to grant access to the head of the public body in question.

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[3] Calland R and Tilton D. In Pursuit of n Open Democracy, A South African Campaign Case Study, IDASA

[4] At least 43% the public service departments of the sample in the survey conducted by the Public Service Commission (PSC) had not any kind of systems to manage requests. The study was conducted in 2007 and is titled: Implementation of the Promotion of Access to Information Act (Act 2 of 2000) in the public service, August 2007, published by the Public Service Commission; Compliance Audit Reports. South African Human Rights Commission, 2008/9 available on http://www. sahrc.org.za, Golden Key Award research 2007, 2008, and 2009 also available at http://www. sahrc.org.za

Poor records management is also endemic within the multiple levels of government. The lack of sound records management policies and poor records practices has adversely affected the capacity of personnel to locate and produce requested records. Compliance audits have also shown that the majority of information holders in the sector are unable to harness Information and Communication Technology advantageously. These inefficiencies in records management have been further exacerbated with the inheritance of the Apartheid regime's records, and the merging and changes within existing public bodies following elections.

While a plethora of additional factors like high staff mobility in the sector and poor levels of awareness of the legislation, particularly by frontline officials, also impact on implementation and delivery, it is perhaps the absence of any articulated intent for PAIA to be integrated into existing government participatory platforms which raises great concern. In keeping with its objectives, PAIA enjoins public bodies to share information proactively, an approach which would presumably reduce the need for formal requests. An assessment of the various platforms which have been created for information sharing and the absence of tangible PAIA integration plans reveal that PAIA has not been sufficiently brought into the mainstream work of government and is not being actively advanced through existing platforms for public participation. Poor integration of PAIA in the ongoing work of the public service and the absence of political champions have contributed to the misplaced perception that access to information is an elitist right by the public and the perception that it is a right of some lesser consequence by implementers. Although these perceptions are being whittled away bit by bit, the shift is occurring too slowly in South Africa.

Blanket refusals relying heavily on the exemption clauses of PAIA and mute refusals are typical responses frustrating access to information requestors[5]. Other common complaints from users centre on the quality, comprehensiveness and speed with which simple requests are responded to. Delayed responses to requests are commonplace, and generally impact on the currency of information. The compounded effect of poor administrative capacities and usage of ICT, low levels of awareness and commitment, and lack of operational resources have combined to shape responses by the sector. Poor user experiences have as a result informed the perception that PAIA is ineffective, reducing both, the prospect of repeat usage and new requestors.

Commitment and Intent

The celebrated Batho Pele[6] principles which aim to transform the South African public service are formulated on injunctions directed at consultancy, access to information, openness, and transparency. These principles precede PAIA but are in perfect synergy with articulated service delivery priorities identified within PAIA itself. The latter is but one example of a range of admirable policies and frameworks which aim to facilitate enhanced service delivery, openness, transparency, and information sharing. An assessment of the delivery environment however suggests that these frameworks have yet to be fully imbibed and internalised.

It is unfortunate that both the expansive and facilitative nature of access to information rights appear have not been fully appreciated. In this context it remains largely a missed opportunity for South African policy makers who view it as a competing priority, thereby isolating it as a deliverable from the broader context of social delivery. Its potential to facilitate the realisation of a plethora of interrelated rights in its operation merits closer consideration by all sectors of South African society. This relevance in

[5] Ibid note 3 on the Golden Key Award research statistics

[6] Articulated in the white paper on Transforming Service Delivery in the Public Service, 1997

application beyond political design and economic status speaks to the universality of the necessity for information. Significantly it is this fuller appreciation of its substantive and expansive nature which makes it a critical tool for the realisation of a broader spectrum of rights within the developmental context and so should be accorded a priority on the development agenda of South Africa and the region.

Despite its regional commitments to eradicate corruption, advance public participation and give credence to the Declaration of Principles of Freedom of Expression and Access to Information in Africa, the state agency has done little to honour these obligations from the perspective of access to information. It has also failed to respond to recommendations for improved implementation of PAIA from the panel of the African Peer Review Mechanism. Whilst an open democracy charter will not be a panacea for all of the implementation barriers on access to information, it could give new impetus to the state and provide the framework through which firmer commitment may be exhorted to address barriers.

While the South African government has both at regional and national policy level committed itself to accountability, transparency and public participation through the enactment of PAIA and regional agreements[7], the litmus test for delivery by political representatives of the promises made in their election manifestos[8] and regionally will rest on the enabling environment they champion for optimal openness and responsiveness of the state machinery in the country and beyond. Indicators testing orientation of the state apparatus to these principles are to some extent evident in a consideration of formal compliance levels of the sector and the levels of implementation of these principles within public entities.

Formal compliance

The creation of constitutional bodies like the Commission and the Office of the Public Protector is yet another testament of governments early commitment to good governance and human rights. The mandate of the Commission to monitor, promote, and protect human rights in South Africa coalesces with its legislative mandate in terms of PAIA. Given the environment within which PAIA operates, there is an expectation that national human rights institutions also play a central role in championing and advancing access rights, particularly within communities and vulnerable groups. Although the South

[7] The country report on South Africa, released by the African Peer Review Mechanism (APRM) states *"It is imperative that the nation should facilitate and even compel local units to behave and perform as governmental bodies vested with constitutional responsibilities."* This comment in the report captures the essence of the commitment that must be exacted from policy makers for any progress to be made with regard to achieving efficacy in PAIA based delivery in the country. The country report also clearly identifies PAIA implementation as weak. The review panel made several recommendations regarding capacity, monitoring, and commitment by government and further specific recommendations for service delivery at local government level. Government's response to the report has been accepting of the recommendations to prioritise local government service delivery outputs, but submitted no tangible response in its budgetary evidence indicating resources to be deployed for the implementation of PAIA specifically.
The lack, however, of any PAIA specific plan of action, budgetary allocation or specific timeframes for delivery shown by the responses to the APRM panel is cause for grave concern when addressing progress in implementation at this level, and raises questions about the success and capacity such processes can bring in pressurizing governments to act on recommendations.

[8] The ANC (majority party) manifesto is available at http://www.anc.org.za/show.php?doc=elections/2009/manifesto/manifesto.html and the Democratic Alliance (the official opposition party) is available at http://www.da.org.za/docs/6674/21941%20DA%20Manifesto%20Eng.pdf

African Human Rights Commission's is mandated by the legislation to promote, monitor and protect the access to information right, it has been provided meagre resources with which to execute this mandate, effectively undermining the extent to which it can fulfil its mandate.[9]
A consideration of compliance levels within the public sector through reporting imperatives imposed by PAIA although an insightful tool, must be seen in the context of the Commission's inability to actively enforce compliance with PAIA provisions, and perhaps best reflect its faltering success in championing PAIA.

a) Section 32

The reports referred to above are largely statistical in content and provide a snapshot of the numbers of requests submitted to public bodies, projecting the responses of the entities to these requests statistically. Since the inception of monitoring compliance with reporting obligations, the Commission has persistently reported systemic non compliance with the PAIA provisions to parliament, but these reports have been to no avail. Unfortunately, compliance rates themselves have been so low that the Commission has consequently shifted its focus to securing higher submission rates as opposed to dedicating resources for substantive monitoring and evaluation of report content. The legislation does not give the Commission direct powers to test the veracity of reports, but these powers are easy enough to infer as a necessary attribute of monitoring. Despite the focus on raising compliance rates however, only marginal increases in rates have been noted from a total of 42 public bodies submitting reports in 2002 (when the legislation was fully operationalised), to 88 in 2009.[10] These increases do not boost the overall compliance rate beyond 30% for the multiple levels of government.[11]

The reasons most commonly tendered by public officials for non-compliance include the overwhelming depth of compliance obligations with various pieces of emerging legislation, an absence of adequate monitoring and tracking systems and consequently the inability to collate regional statistics and a lack of awareness. High levels of persistent non-compliance with basic compliance provisions clearly reveal the premium placed by public bodies on the access to information legislation. The absence of provisions penalising non-compliance with reporting obligations have also permitted a number of repeat offenders to treat mandatory reporting with impunity.

In South Africa the local government tier of public bodies is the primary interface between government and communities. Unfortunately, monitoring of public bodies at this level also shows that local government has consistently ranked as the most non-compliant with PAIA provisions. In a concerted bid to accelerate training and awareness raising at this level, a number of civil society organisations have banded together to drive community interventions on access to information through its network. Compliance audits by the Commission testing implementation have identified implementation challenges at local government level which mirror those at provincial and national level to a large extent. Some of the key areas for accelerating compliance and implementation of PAIA at local government which merit urgent attention include the following[12]:

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[9] Erasmus Y Critically Reflecting on an Institutional Journey, 2002-2009, SAHRC, September 2009

[10] SAHRC Annual Report 2008/9 available on http://www.sahrc.org.za

[11] The hosting of a National Information Officers Forum (NIOF) by the Commission and the Open Democracy Advice Centre is a strategic intervention directed at heightening awareness and enhancing implementation in the public sector. This strategy has attracted the interest of growing numbers of implementers and has gained steady momentum in recent years. The growth in compliance rates correlate with and maybe attributable to levels of participation at the (NIOF)

[12] Ibid note3 and Kisoon C, Human Rights Development Report, Access Restricted, pg 70, 2008

- measures to sustain fully capacitated personnel, including frontline staff, and staff at customer care service centres;
- improved records and document management systems;
- adequate budgetary allocations;
- reporting and accountability on PAIA delivery;
- improved systems and processes to administer requests and, monitoring and evaluation of specific requirements to address impediments to delivery;
- increased commitment from senior management contextualising PAIA within service delivery priorities and standards;
- the integration of PAIA into the IDP process and community structures within each geographical area.

These changes address both operational and orientational needs to enhance PAIA compliance and implementation but need to be implemented urgently to overcome entrenched patterns of behaviour within local government structures.

b) **Information Directories: S14**

The PAIA framework also imposes a mandatory obligation on public bodies to produce information directories meant to increase access to their services and records. These information directories have a pivotal role to play in the South African context, demystifying government services and permitting ordinary people to consider the kind of record they seek, whether it is automatically available, and how they should set about requesting the record. The legislation also directs the various means through which public bodies must create access to this directory in terms of the languages in which they should be made available and physical repositories where they should be kept. In the first four years of the operation of PAIA a significant number of public bodies attempted to comply with this obligation, but this number has inexplicably plummeted to below 5% of the total number of public bodies complying. Despite key changes in the details of information staff and records, a significant number of directories have not been amended, translated into official languages, or offered in Braille. The result has been that the work of government agencies and the records they generate remain an unfathomable mystery to members of the public, further frustrating their ability to exercise their access rights.

Formal compliance with PAIA aims at increasing transparency, accessibility and responsiveness in the sector. Increased compliance with Section 14 provides an important gateway for ordinary individuals to begin the request process and is therefore critical for any level of public participation to occur. Efficient records management is vital for compliance with Section 14 to be achieved. Public bodies therefore need to demonstrate increased commitment to developing these manuals and to sharing information proactively as a mechanism to increase their accessibility to all groups within society.

Compliance rates with PAIA provisions generally remain unacceptably low, with reports being of poor quality. Monitoring and other accountability systems need urgent implementation in the sector to address these shortcomings. Systemic non-compliance by public bodies provides added impetus for more stringent enforcement mechanisms or formal compliance will continue to be neglected.

Awareness

Perhaps one of the most acute barriers to the exercise of access of access rights is the lack of awareness of the right in all areas of South African society. Inasmuch as the initial open democracy lobbyists and subsequent cache of experts shaping the debate on the bill hailed from diverse civil society structures,

the bill, and finally the legislation, had not been taken to the grassroots.[13] Early popularising strategies also did not speak adequately to this need and it remains arguably one of the key reasons for some of the perceptions about the legislation discussed above.

Low levels of general awareness have resulted in consistently low requestor volumes. Public bodies have also revealed that requestors typically represent a particular demographic of society, tending to require information to assert other rights and interests, or the media or political parties. This characteristic has prevailed since the inception of the legislation and has been slow to change, although a few diverse interests groups have begun engaging with the legislation of late. Requests by individuals premised purely on the right to know have, however, been thin on the ground. This paucity of requests has allegedly not created sufficient pressure on public bodies to justify the allocation of resources for PAIA delivery.

The usage of PAIA by communities to some extent has also been influenced by the perception that to question 'a people's government' is antagonistic, a show of no confidence, or in some way disloyal. These perceptions have perhaps been further fuelled by public usage of PAIA by opposition parties to obtain government records. Such traditions and perception-based impediments to information rights assertion are further exacerbated by the general reluctance of people to challenge power.

Another barrier to the effective realisation of PAIA objectives rests in the inherent tensions between some aspects of African traditional customary law and practices. The use of PAIA by rural communities who actively adhere to traditional frameworks and custom will be a challenge to initiate and will require focused awareness raising directed at traditional leadership structures within the various communities in each region. Based on geo-political factors, these communities are stakeholders who are perhaps most in need of information to effectively engage and shape policies for reforms.

Research has further shown that perceptions of complexity and a lack of awareness of access to information legislation have resulted in PAIA being used only by specialist organisations. Indeed, in many instances key NGOs indicated that accessing government records and information took too long, was inclined to be refused, and, even if provided, could not be trusted for its accuracy. Only a handful of non PAIA specialist NGOs have used PAIA in the course of their work or in litigation and even in these

[13] The trends in rights assertion and activism are not symptomatically exclusive to the South African dynamic. Andrew Puddephatt's comments on the monopolisation of access to information issues in Bulgaria, Mexico, South Africa, India and the United Kingdom mirror those highlighted in this report. His study commissioned by the World Bank Institute reflects similar trends in three other jurisdictions. According to him, "it is interesting to highlight that in all the countries analyzed, with the notable exception of India, the debate on access to information, appears to have been monopolised by an elite of experts – media, NGOs, and academics on different measures – rather than surging from grassroots movements of individuals. See Puddephatt A, "Explaining the Role of Civil Society in the Formulation and Adoption of Access to Information Laws: the Cases of Bulgaria, India, Mexico ,South Africa and the United Kingdom" commissioned by the World Bank Institute, available online at http://www.freedominfo.org/documents/WBI-Puddephatt.pdf

instances engaged with the legislation through representation and support of the specialist NGOs[14]. PAIA awareness and capacity building is therefore critical for the full spectrum of stakeholders in the civil society sector to be able to access their rights.

The role of a socially engaged media has also not been adequately harnessed in advancing awareness. One of the modes of governance of the apartheid regime was its reliance on misinformation and secrecy. This meant that its public image was kept pristine. Under the new dispensation of government, a welcome shift has seen leadership become very vocal about corruption within its ranks. The media has consistently and actively covered these matters. It is perhaps unfortunate, however, that the media has over the years not been as active a user of PAIA nor has it drawn attention to the incidence of corruption and use of PAIA to overcome corruption with any frequency. It is fair to concede however, that the reluctance of the media to use PAIA for pressing investigative purposes may be the result of the need for real-time information as opposed to information released only 30 days after a request. The media remains, however, an important partner in heightening awareness of access to information benefits.

Legislative framework

In terms of its legislative framework, PAIA closely mirrors freedom of information regimes globally. It does, however, contain two significant differences from most regimes. One of these rests on the right of requesters to access information from private bodies. This expansion of access characterises PAIA's unique distinction from access to information frameworks globally.

The second telling difference between PAIA and comparative international information regimes rests with the mechanisms for enforcement. In most comparative jurisdictions, dispute resolution and enforcement mechanisms are located in the offices of an information Commissioner or an information ombuds[15]. By contrast, in terms of PAIA, ultimate enforcement powers in South Africa are accorded exclusively to the courts.

This framework for rights assertion through the courts has presented a formidable barrier to rights assertion for the majority of people in the country, again reinforcing the perception that information rights are elitist or luxury rights of no ready value to ordinary people. The complex, expensive and lengthy[16] nature of litigation therefore remains a serious disincentive to ordinary individuals and grassroots movements to approaching the courts to enforce their right to access information. The challenge to rights assertion posed by the PAIA framework has been further compounded by a general resistance to litigation characteristic of most South Africans. Although the media and specialist NGOs have actively and successfully litigated, this form of enforcement is strategic and is generally stymied by a lack of resources[17].

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[14] Freedom of Information and Women's Rights in Africa: A Collection of Case Studies from Cameroon, Ghana, Kenya, South Africa, and Zambia, African Women's Development and Communication Network (FEMNET), 2009

[15] The Canadian, Irish, Norwegian, English and Australian models with Information Ombudsman and Information Commissioner's differ significantly from the South African model in this respect.

[16] Reported PAIA matters have taken an average of between one to two years to resolve.

[17] ***Brümmer v Minister of Social Development and Others,*** (10013/07) [2009] ZAWCHC 22 (16 March 2009), CCII Systems(Pty) Ltd v Fakie and Others NNO 2003 (2) SA 325 T, ***Trustees for of the Biowatch Trust v Registrar of Genetic Resources and others,*** Unreported case number CCT80/08, ***Treatment Action Campaign v the Minister of Correctional Services and the Office of the Inspecting Judge of Prisons'*** (18379/2008) [2009] ZAGPHC 10 (30 January 2009)

Albeit that the jurisprudence on PAIA has not been prolific, emerging jurisprudence indicates the courts have in the majority of instances ruled in favour of requestors. The executive may not be sufficiently persuaded by the trends in litigation to heighten openness and information sharing, but when actual costs in time and resources already expended by public entities defending denials to access information before courts are added to the equation, a cogent case on numbers alone is easily made for public sector compliance and timely delivery of information.

The momentum gained in recent years for reform of the dispute resolution framework within PAIA has grown in intensity driven largely by specialist NGO's and the Commission. At present, parliament has a number of comparative models and options available to it for positive reform which, once implemented, will remove a monumental barrier to access to justice in PAIA matters.

The Parliament also has to be mindful of the need to facilitate the shift from paternalistic governance frameworks which do not favour openness, transparency and information sharing. If vigilance is not exercised in this regard, emerging legislation will remain out of sync with access to information objectives. Particular heed therefore needs to be paid to the formulation of provisions which favour state secrecy and discretion, undermining or diluting the objectives of transparency, openness and general information sharing. Frameworks should as a rule favour a coherent synergy with the PAIA legislation to ensure that the right to access information is not unjustifiably impacted.

Conclusion

Tangible delivery by the newly elected government of South Africa will be informed by the commitment demonstrated to good governance. Central to this commitment will be the role leadership and senior management in the public sector accord to championing legislation like PAIA. Commitment in this sense translates to the allocation of resources sufficient to realise the PAIA objectives of openness, transparency and public participation, and leadership driving and shaping organisational culture within public institutions and its stakeholders within the region and beyond.

Immediate responses to low levels of general awareness however and community awareness levels in particular must be strategically driven to increase public confidence and reliance on access to information rights. Institutions like the Commission, civil society structures, the media, public bodies and interest groups have a pivotal role in increasing awareness of the right to access information at community level. Expert NGO's and specific interest groups have played and continue to play a central role in advancing the progress of open democracy in the country, but the right to know campaign has to be embraced more fully by community based organisations as well. Access to information should therefore be widely integrated into general human rights interventions undertaken by all stakeholders for access rights to become a lived reality and for negative perceptions to be reversed before they are embedded.

Change must also be evident in the orientation of state institutions to the side of openness and transparency as opposed to fearful secrecy driven by perceptions of vulnerability. This orientation can be supported by a fuller appreciation that PAIA expands beyond corruption. Seen in the context of informed public participation and service delivery, it is instrumental in informing wider platforms for engagement and shaping policies which are relevant to the communities the state has pledged to serve. In this sense it has a very real and significant role to play in sustaining a robust democracy and advancing agreed goals for the region. Changing attitudinal barriers and orientation will be achieved only over a

period of time, but at a minimum government can begin by auditing its levels of readiness and commit to improving the internal environment for delivery.

The good governance frameworks should be aligned to and integrated with planned agendas for the coming decade at the domestic, regional and global level. Success in implementation will therefore be rooted in political commitment, and in equal priority for resources on the reform agenda. The new South African parliament can lead this process by lending its support and acting on the reports of monitoring agencies like the Commission, honouring its commitment to related regional agreements and supporting regional efforts to create a framework for open democracy. Authentic embracing of the PAIA objectives, an awareness of its role in the development agenda, and supporting institutions committed to advancing democracy is critical for access to information to flourish, and to gain credibility and legitimacy before the public and public officials. These are feasible and necessary steps for leadership to take, shaping and informing the undoing of entrenched patterns of behaviour and to advance reform. The range of barriers to implementation have yielded findings which in some instances are at present unique to the country, but will provide useful flags to states with similar intent as they progress toward adoption. To this end the envisaged Open Democracy Charter could embody a firm regional commitment and a framework of best practise through which to influence this commitment.

In plotting the journey of implementation of access to information over the years, it is necessary to acknowledge and be mindful of the gains and victories in strengthening the right. These gains have been driven by experts and activists who vigilantly monitor its growth and development. It is vigilance, the passage of time and usage that have dictated the most pressing barriers to implementation in the course of this decade and the latter will continue to reveal new challenges and shape our responses to a more mature right to know underpinning the countries open democracy aspirations in the future.