

Report on the Right to Access Sufficient Water and Decent Sanitation in South Africa: 2014



*Water is Life. Sanitation is Dignity:
Accountability to People who are Poor*





Dedication

This report is dedicated to the following people:

- *6 year old Michael Komape from Chebeng Village in Limpopo, who fell into a pit toilet at his school and died tragically in February 2014.*
- *All those who have been injured or killed while protesting for their rights to water and sanitation.*
- *The many South African citizens who struggle to live a dignified life and whose lives are threatened by the lack of access to the rights to water and sanitation.*

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Acronyms

ANC	African National Congress
CBOs	Community-Based Organisations
CDW	Community Development Worker
CEDAW	Committee on the Elimination of Discrimination against Women
CGE	Commission for Gender Equality
CoGTA	Department of Cooperative Governance and Traditional Affairs
Commission	South African Human Rights Commission (SAHRC)
Constitution	Constitution of the Republic of South Africa Act, 108 of 1996
CRC	Convention on the Rights of the Child
CSIR	Centre for Scientific and Industrial Research
CSO	Civil Society Organisations
DA	Democratic Alliance
DAFF	Department of Agriculture, Forestry and Fisheries
DoBE	Department of Basic Education
DEA	Department of Environmental Affairs
DoHS	Department of Human Settlements
DoL	Department of Labour
DPME	Department of Performance Monitoring and Evaluation
DWA	Department of Water Affairs
ESR	Economic and Social Rights
FBS	Free Basic Services
FBSan	Free Basic Sanitation
FBW	Free Basic Water
GDLH	Gauteng Department of Local Housing
GHS	General Household Survey
ICESCR	International Convention on Economic, Social and Cultural Rights
IDP	Integrated Development Plan
ILO	International Labour Organisation
LHR	Lawyers for Human Rights
LGBTI	Lesbian, gay, bisexual, transgender and intersex

LRC	Legal Resources Centre
MDG	Millennium Development Goal
MIG	Municipal Infrastructure Grant
MIS	Municipal Infrastructure Services
MSTT	Ministerial Sanitation Task Team
NDP	National Development Plan
NGO	Non-Governmental Organisation
NPC	National Planning Commission
NUMSA	National Union of Metalworkers of South Africa
NWA	National Water Act
ODA	Official Development Assistance
OECD	Organisation for Economic Cooperation and Development
PAIA	Promotion of Access to Information Act
RDP	Reconstruction and Development Programme
SAICE	South African Institute for Civil Engineers
SAHRC	South African Human Rights Commission
SALGA	South African Local Government Association
SCC	Silobela Concerned Community
SJC	Social Justice Coalition
StatsSA	Statistics South Africa
UN	United Nations
UNDP	United Nations Development Programme
UNICEF	United Nations Children's Fund
UVIP	Unventilated Pit Latrine
VIP	Ventilated Improved Pit Latrine
WHO	World Health Organisation
WSA	Water Services Act
WSNIS	Water Services National Information System
WSP	Water Service Provider
WSRF	Water Services Reference Framework

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Foreword

Dignity is the recognition of the inherent worth and value of every human being. Humanity's birthright was silenced by apartheid's capitalist and patriarchal paradigm, which devalued, fragmented and destroyed human beings. The earth, air and water that sustain life became commodities to exploit for profit.

South Africa's democratic constitution reinstated dignity as its first founding value and as a substantive right in the Bill of Rights. The Constitution's revolutionary commitment to dignity, equality and social justice has the potential to transform old fault-lines of political, economic and social power. For centuries those who colonized the wealth of the world were seen as valued citizens. Their trade and profit, even through weapons of war or the pollution of the world's water, is counted as economic contribution. Those who were poor were depicted as scroungers and scavengers, lazy wastrels, who contribute nothing to society. Contributions to social reproduction, through for example, subsistence farming or caring for those who are old, sick or disabled are not recognised as economic contributions.

In South Africa this paradigm's dominance is reflected in an enduring apartheid spatial geography. Disaggregated statistics reveal that those who lack most rights, including water and sanitation in informal settlements or schools are those who were historically deprived of their rights. They remain those who are black and poor. Unequal power relations relegate women and girls to being the 'bearers of water'. They cook, clean and care for children, the elderly, those with disabilities and those who fall ill. Their jobs in the formal economy are the first to be cut and they have little protection in the 'informal economy'. The lack of safe transport, streetlights, water and sanitation, make them even more vulnerable to misogynistic violence.

A global economy driven by greed for massive profit searches for low wages, poor working conditions and subsidised water undermines human dignity. In South Africa, while a small Black elite has developed, whites who were wealthy have become wealthier. The result is ownership patterns that make South Africa one of the most unequal societies in the world.

Who is valued and who is not is reflected in decisions by both DA and ANC led municipalities to build unenclosed toilets in open public spaces. It is reflected in the rape of children and women who have to use open fields as toilets. It is reflected in the pit in the ground in which six-year old Michael Komape died, being described as a 'VIP' (ventilated pit latrine).

The choices those in power make about people's lives, including those reflected in budgets, trade agreements and contracts with companies who are unregulated 'service providers' reflect government's priorities. The tragic death of four people, killed by police, while protesting the lack of access to clean drinking water in Madibeng ('place of water') Municipality demands an interrogation of those priorities.

Madibeng is in the platinum-rich North West province, where mining companies, agribusiness and tourist industries surrounding the four dams, including wealthy Hartebeespoort, pay less per kilolitre than poor households. Yet they use and pollute most of the water, with little or no Government regulation. The poorest communities in the area, are located in what was a former apartheid homeland, Bophuthatswana. As with all homelands, apartheid's rulers nurtured those who were compliant and easily corruptible. It is no surprise that these former homeland areas are often the most corrupt. After 1994, government needed to develop a massive and systematic capacity building program that instilled a culture of service to the poorest that was free of corruption. This has not happened. Instead, National Treasury (in the Commission's roundtable discussion) indicated that they will be embarking on developing financial capacity, only in the big metros and municipalities, not in the poorest municipalities who most need this capacity.

To address the rights to water and sanitation, in a manner that goes beyond the resolution of the numerous complaints it receives, the Commission ruled (in its 2011 Moqhaka finding) that the Presidency's DPME must provide a report to the Commission on the right to sanitation across the country. The DPME provided its report in two phases in 2012 and 2013 and addressed both water and sanitation. The Commission's assessment that the problems of water and sanitation are systemic have been affirmed by the DPME report's finding that, 'key water services sector weaknesses and challenges has been attributed to a lack of adequate funding and poor revenue collection leading to financial instability; a lack of technical, management and business skills... political interference and corruption... unclear municipal powers and functions...'

The Commission tables and publicly launches this report entitled '**Water and Sanitation, Life and Dignity: Accountability to People who are Poor**' shortly after the 2014 budget speech. The budget needs to address the Presidency's own analysis of the problem. National treasury needs to specify that funds it allocates to Local Government must be used to improve the lives of the poorest communities; while building the capacity to manage these funds. For years the Commission has dutifully tabled its reports to Parliament, including socio-economic rights reports and PAIA reports that show non-compliance of over 80% at local government level. Non-action by Parliament and government on the reports of a constitutionally mandated institution is a waste of South Africa's money.

Parliament needs to move beyond a formal tabling of this report – it needs to ensure that it uses its oversight mandate to hold to account relevant Ministers and departments who received the report's draft recommendations in 2013 from the Commission. Despite their daily experience of the institutionalised violence of poverty, those who came to the Commission's hearings still believe in our constitutional democracy. They laid complaints. They made submissions. They used the Commission's PAIA training to access information on their rights. Their experience and insights are captured in this report and cannot be filed away on forgotten shelves.

it is possible to use power effectively where there is political will. After Michael's tragic death, the Commission met with the family, community and staff, before meeting education officials. It asked them to install decent toilets linked to proper infrastructure, which they did. After the tragic killings in the North-West province, the Commission met with community representatives before meeting local government representatives, proposing immediate access to clean water linked to sustainable long term solutions. The National Water Affairs Minister secured army trucks to ensure access to water. The Premier redirected water that was going to a mine to the community. Yet, the proactive plan that the Commission has been asking Government to develop would have prevented these tragedies.

This report is dedicated to Michael and to those who live with the daily humiliation of the lack of basic human rights. Government has a constitutional obligation to co-operate across all spheres and departments. It must use its power to protect and advance human rights, recognising that rights are universal, indivisible and interdependent. Poverty and inequality deepen vulnerability to human rights violations. Government's response thus needs to engage both human rights principles and structural problems to advance all rights. The Universal Declaration recognises that to realise human rights '[e]veryone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised... the foundation of freedom, justice and peace in the world' is the 'recognition of the inherent dignity and the equal and inalienable rights of all members of the human family.' There can be freedom from fear and freedom from want.



Pregs Govender
SAHRC Deputy Chairperson
Lead Commissioner on Water and Sanitation, PAIA and CEDAW

Structure of Report



Deputy Chair of the Provincial Government being guided by Khayelitsha Community members during a site inspection.

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1. Structure of Report

Section One: The South African Human Rights Commission (Commission) has a mandate to monitor the realisation of socio-economic rights (ESRs). Reporting realisation of ESRs by government is an important aspect of holding government to account. The Commission's constitutional mandate and monitoring methods applied in this regard are under discussion in the first section.

Section Two: This contains an overview of the international, regional and national legislation and soft law governing the right to water and sanitation. It provides a background to the responsibilities of different spheres of government, with particular attention on local government, which is responsible for service delivery at a local level. Finally, it includes an assessment of the Millennium Development Goals (MDGs), their effectiveness and progress made in achieving goal 7 of the MDGs.

Section Three: This provides an overview of the state of access to water and sanitation in South Africa. It provides the framework for the Commission's work on water and sanitation by looking at the *status quo*. It gives an overview of the impact that a lack of access to water and sanitation can have on one's life and dignity and one's ability to access other human rights. The section ends with an analysis of the state of national and provincial access to water and sanitation in the country.

Section Four: This examines the work undertaken by the Commission over the last four years in monitoring and investigating the right to water and sanitation. The section also includes an analysis of:

- Investigations and hearings into two complaints about unenclosed toilets. This included the Commission's recommendation that the Presidency's DPME provide a report to the Commission on the status and quality of water and sanitation across South Africa;
- The report to the Commission by the Department of Performance Monitoring and Evaluation (DPME);
- An overview of the Ministerial Sanitation Task Team (MSTT) report;
- Expert inputs received from Section Five Committee meetings;
- Two national hearings conducted by the Commission (in 2012 and 2013) and expert inputs received from hearings conducted in every province between August 2012 and December 2012;
- A report and presentations (made at the provincial hearings) by the Commission for Gender Equality (CGE) on the lack of gender mainstreaming in service delivery processes at a local level;
- The Commission's Promotion of Access to Information Act (PAIA) Unit's work on water and sanitation; and
- A report from a roundtable discussion initiated by the Commission and hosted by the DPME, where the Commission directly engaged with government departments about their plans to implement the Commission's draft recommendations (contained in this report).

Executive Summary



Community members at the Commission's Mpumalanga Province hearing, who came to share their experience of the lack of water and sanitation.

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2. Executive Summary

The Commission is a constitutional body governed by Section 184 of the South African Constitution. Section 184 (1) and (2) clearly underline the mandate, functions and powers of the Commission, and are unequivocal with respect to the Commission's requirement to monitor and assess economic and social rights (ESR).

Since its inception, the Commission has regularly tabled its reports in Parliament. These reports include reports on the state of socio-economic rights, as mandated by Section 184(3) of the Constitution. Parliament has been regularly alerted to the problems that people experience in realising and enjoying their rights, yet it has not used its powers to ensure government's responsiveness and accountability to the recommendations of various Commission reports. As the body of elected representatives of the people of South Africa, Parliament is entrusted by the Constitution with oversight responsibility over the executive. The Commission trusts that on this occasion, Parliament (through the National Assembly and the National Council of Provinces), will use its powers to ensure responsiveness and accountability to people who are poor ensuring their plight is addressed, and that they are able to enjoy their constitutional rights.

This report on **Water and Sanitation: Accountability to People Who are Poor**, is based on the Commission's systematic and extensive work undertaken in fulfilment of its mandate on these rights since 2010. It begins with a systemic approach to the legal investigation and resolution of the two complaints on unenclosed toilets that has informed the Commission's ongoing investigation and resolution of water and sanitation complaints across the country. This report is thus based on the work the Commission undertook through its legal, education and advocacy programs and in fulfilling its mandates under both CEDAW and PAIA.

In the run up to the 2011 local government elections, the Commission received two complaints about municipalities that built toilets without enclosures in their local communities. The first complaint at the end of 2009, was from the Western Cape (Makhaza, Khayelitsha). The complaint was against the City of Cape Town Metropolitan Municipality led by the official opposition, the Democratic Alliance. The second complaint concerned Rammulotsi in the Free State against the Moqhaka Local Municipality, led by the ruling party, the African National Congress.

Following the Commission's investigations into these matters, the Commission ruled that both municipalities had violated the residents' right to dignity, privacy and clean environment. The Commission ruled that both local municipalities had to immediately enclose these toilets in a manner that upheld human rights. The Commission monitored this process until the toilets were enclosed. In addition, the Commission ruled that the DPME must provide a report on the right to sanitation in every municipality across the country to the Commission within three months.¹ The DPME requested an extension to which the Commission acceded. The DPME submitted its reports, which analysed the extent of the problem, its causes and solutions in two phases, and presented these to the Commission in Human Rights Month in 2012 and 2013.

The Commission held its first national hearing on water and sanitation in March 2012. At the hearings, the Commission facilitated accountability of local government officials from the Western Cape and the Free State to community representatives in the first two complaints. Submissions were made by civil society organisations including NGOs and social movements and the DPME presented its first-phase report. In its report to the Commission, the DPME made the following key findings in relation to the rights to water and sanitation:

¹ African National Congress Youth League Dullah Omar Region (on behalf of Ward 95 Makhaza residents) v City of Cape Town, File Ref No. WC/2010/0029, South African Human Rights Commission report, 11 June 2010 and Van Onselen (on behalf of the Democratic Alliance) v Moqhaka Local Municipality (Free State), File Ref No: FS/2010/0231, South African Human Rights Commission Report, 16 May 2011.

- Approximately 11% (1.4 million) of households (formal and informal) still have to be provided with sanitation services (these households have never had a government supported sanitation intervention);
- At least 26% (3.8 million) of households within formal areas have sanitation services which do not meet the required standards due to the deterioration of infrastructure caused by lack of technical capacity to ensure effective operation, timeous maintenance, refurbishment and/or upgrading, pit emptying services and/or insufficient water resources.
- Although the un-served population is 11% of the national total, their predominance is in the widely dispersed rural settlements of KwaZulu-Natal, North West and the Eastern Cape. The areas with high levels of infrastructure maintenance needs are located within Limpopo, KwaZulu-Natal, Free State, Mpumalanga, Northern Cape and the Eastern Cape.
- Based on an assessment of the provision of water services, 23 municipalities (9% of the total) were in a crisis state, with an acute risk of disease outbreak; and
- A further 38% were at high risk, with the potential to deteriorate into a state of crisis.²

The DPME also made the following findings in terms of funding requirements to address sanitation needs:

- It is estimated that based on the 2011 pricing structure, an amount of R44.75 billion is required to provide basic services to the un-served (R13.5 billion) and to refurbish and upgrade existing infrastructure (R31.25 billion). This excludes financing for bulk infrastructure requirements for the provision of new services, as well as to address the upgrading of households in informal settlements; and
- These financial needs should be seen in the light of the total grants to municipalities of R41 billion in 2011/12 of which the conditional MIG (Municipal Infrastructure Grant) allocations for sanitation amounts to approximately R3.2 billion per annum.

The Commission's findings in the two complaints on unenclosed toilets reflected the lack of access to adequate water and sanitation and a lack of a rights-based approach to service delivery facing millions of people who are poor. After receiving these complaints, the Commission made a strategic decision to link these two local-level complaints to the constitutionally recognised right to water and sanitation across South Africa by calling for accountability from all spheres of government. To this end, the Commission held provincial hearings on the right to access water and sanitation, between August and December 2012. To undo the stigma and disrespect that people who are poor are subject to on a daily basis, the Commission consciously undertook to uphold dignity through the way in which the hearings were organised and conducted. Accountability was facilitated by inviting local, provincial and national government representatives, including the DPME, to listen and respond to people who are poor. Hassan Mohamed and Jackie Nel represented the DPME at each of the hearings. The hearings were held in poor areas to ensure that the voices of those worst affected were heard. Women formed the majority in the hearings and presented the gendered impact on their time, health and safety.

The hearings culminated in a draft Commission report on the state of access to water and sanitation in South Africa that was subsequently incorporated into this report. In March 2013, the Commission held its national human rights month event at the Pan African Parliament in Midrand, Gauteng. Government representatives were invited to attend and receive the draft findings and recommendations of the report. These were also formally delivered to all relevant government departments for their response within a specified timeframe. Those departments which did not comply were summoned to a legal hearing at the Commission in June 2013, where they responded to the findings and recommendations. Some departments requested further engagement on the Commission's findings and recommendations, which resulted in a roundtable discussion with over ten departments convened by the DPME and hosted at the Union Buildings in Pretoria.

² Department of Performance Monitoring and Evaluation. (2013). *Quality of Sanitation in South Africa: Final Report on the Status of Sanitation Services*, The Presidency, Republic of South Africa.

The key findings from all these Commission's engagements are as follows:

- Those areas which lack water and sanitation mirror apartheid spatial geography. Former homelands, townships and informal settlements are the areas in which communities and schools, who are black and poor, predominantly do not enjoy these rights and many others. The lack of access to sanitation has an impact on other rights including rights to dignity, education, health, safety and the environment. For instance, the Commission was presented with cases where raw sewage was pouring into the streets. This has severe health implications for the affected communities. Such communities often have limited, if any, access to health care;
- While national averages seem to indicate progress, when these statistics are disaggregated in historically poor areas, they reflect limited access to these services. National statistics show that, eighty five percent (85%) of households have access to RDP acceptable levels of water. However, in Kwazulu-Natal, 14.1% of households have never had access to water. National statistics reflect that over 70% of all households in South Africa have access to RDP acceptable sanitation. However, 12.5% of households in the Eastern Cape do not have access to any sanitation;
- There is a lack of a human rights-based approach to the delivery of water and sanitation services. This relates to the principles of transparency and public participation, in the delivery of basic services and access to information;
- There is a disproportionate impact on vulnerable groups, including women, children and people with disabilities. For instance, the Commission found that women were impacted as the main caregivers and people with disabilities had to use services that did not cater for their needs;
- Farm workers are unable to access water and sanitation mainly because they live on privately owned land. People in farming communities raised the concern that they were reliant on the landowner for the provision of basic services;
- The above problems indicate that water is viewed mainly as an 'economic good' or commodity by government departments and the private sector. The result is that most of South Africa's water is used by business, especially agribusiness, mining and other industries, at a relatively lower cost per kilolitre than poor households. By not holding businesses that pollute and waste water to account, government is not protecting water as a basic human right. At the same time, people who cannot afford to pay for water are denied access and their bodies bear the cost through illness linked to serious chemical pollution;
- The report highlights systemic failures in governance and budgeting, particularly in the implementation of and spending on projects. These failures point to the need for government to evaluate the current models of governance and funding;
- A key issue with access to water is the poor quality of infrastructure. In some cases, the infrastructure that is provided was broken or dysfunctional. In other cases, those businesses contracted to provide infrastructure, did not deliver on their contracts or delivered in a manner which did not uphold human rights. Participants at the hearings complained of an apparent lack of monitoring and evaluation by government, particularly of external contractors. They also highlighted cases of corruption and maladministration; and
- In all nine provincial hearings, people complained of the poor condition of waste and water treatment plants. Many municipalities testified that water treatment plants were collapsing, mainly due to the heavy loads of treatment required.

In the Commission's Makhaza ruling against the City of Cape Town, the Commission also ruled that the Departments of Human Settlements and Water Affairs needed to report on progress on the eradication of the bucket system. The Commission thus considered the MSTT report. The MSTT notes that there is no dedicated budget for sanitation at a municipal level. As a result, municipalities do not prioritise sanitation. Often, when a budget is allocated to water and sanitation, the entire budget is spent on water and none on sanitation.

However, many municipalities blamed problems at a local level on the lack of funding for the provision of services and for the repair and maintenance of water and waste water treatment plants. For many of the treatment plants, it will cost millions of rand to upgrade and maintain. A representative of the Masilonyana municipality, Free State explained that the municipality “*depends on conditional grants from infrastructure development and sometimes uses equitable share. The [MIG] is one of the major funding sources but it is not sufficient.*”³

On unequal access, use and wastage of water by agribusiness, the Western Cape hearing heard that:

*The richer white farmers have access [to rivers and dams] but the local poorer farmers do not. [The poorer farmers] bring in contractors to assess the availability of water and these contractors charge them a fortune to tell them that there is no water, but the neighbouring farms have access to water. Currently, the water boards are “white boards” and reform is needed. The level of wastage of water in commercial agriculture is shocking, watering during the day for example. We have reported these matters, but nothing has been done.*⁴

In addition, corruption plays a big role in the delivery of services, often leading to a situation where the rights of those most vulnerable are denied. For instance, a complainant from the North West stated:

*We have had three phases that were promised to give us the water but we have nothing. And the reason we are not getting the water because councillors are giving people tenders for water and they are not delivering. So there are people who have sub-contracts but they are officials so the service is very slow because their favourite people are getting favours.*⁵

At the Commission hearings the Office of the Public Protector was present to accept complaints related to corruption.

After the Commission’s water and sanitation hearings were held, the Commission decided to conduct feedback sessions at the nine communities that hosted the hearings. The purpose of these feedback sessions was to engage with community leaders on outstanding information to be requested from government officials which could be obtained through PAIA. At these sessions, participants engaged in consultative exercises where they drew relationships between challenges in their own communities and how they could utilise PAIA to address the challenges. Various complaints were received particularly in the Gauteng, Northern Cape and Mpumalanga provinces and the Commission has subsequently assisted the complainants to obtain the information and records required.⁶

Finally, during the Commission’s subpoena hearing, the DoBE indicated that a sector plan with timelines for the provision of water and sanitation facilities at schools is in place. They promised that by the end of the 2014/2015 year, all schools should have access to potable water and adequate sanitation.

3 Submission by the Masilonyana municipality, Free State hearing, 18 October 2012.

4 Submission from resident, Western Cape hearing, 26 November 2012.

5 Submission from resident, North West hearing, 27 September 2012.

6 One of the participants in Gauteng, a Councillor, raised a problem relating to a purification plant in their area (Hammanskraal) that was yet to be established. In her observation, a PAIA request was needed to obtain planning records and timelines for the development of the plant, including obtaining information about the geographical feasibility of the plant in conveying water to communities located on sloppy areas. Another complaint related to a ward, Kekana Gardens, which has been experiencing water crises over a period of time. Participants raised concerns about the installation of taps, accessibility to water tankers, time of delivery, costs of procuring boreholes and tanks.

2.1. Recommendations

2.1.1. Governance from a Human Rights-Based Approach

- 2.1.1.1. The Presidency, through the DPME, will engage with existing government multi-department structures that deal with water and sanitation to ensure the necessary coordination and oversight in relation to the provision of water and sanitation. Government needs to engage in meaningful consultation with communities. Officials need to understand and be responsive to differential impacts of Government policy and practice. This will entail addressing vulnerability to violations arising from discrimination and prejudice based on race, sex, gender, class, disability, age, sexual orientation and other factors. Solutions to these problems must be communicated to the Commission and progress reports submitted. (DPME).
- 2.1.1.2. A national human rights campaign must take place that addresses budgets and Integrated Development Plans (IDPs). This campaign will communicate budgets and IDPs in plain and accessible language so the choices and priorities can be monitored. Human rights such as water and sanitation must be addressed without trade-offs on other socio-economic rights. The campaign will ensure communities must be enabled to scrutinise budgets and hold government and the businesses they contract to account. This campaign should be rolled out in all provinces for at least two years and needs to be funded and conducted by national government. Government will provide a report to the Commission on progress. (National Treasury, CoGTA).
- 2.1.1.3. It is evident that some service delivery policies that are implemented at a local level do not have a human-rights focus or are not implemented from a human rights-based approach. It is necessary for CoGTA to conduct an audit of relevant policies and liaise with the Commission to reformulate those policies that are not in line with the Constitutional principles of human rights. (CoGTA).
- 2.1.1.4. It is necessary to develop a test of reasonableness or a minimum standard that can be used at a local level for economic and social rights, to ensure that services adhere to basic human rights principles and meet the basic needs of communities. (CoGTA, DWA, DoHS).
- 2.1.1.5. The competency of sanitation provision should be moved from the Department of Human Settlements to the Department of Water Affairs to ensure an efficient and streamlined provision of water and sanitation services. (DoHS, DWA, Presidency).
- 2.1.1.6. A lack of access to information and the lack of responsiveness of government departments remains a huge problem for communities. The Presidency must provide solutions to this problem or alternatives so that communities and individuals can engage effectively with government in the short and long term. (Presidency).
- 2.1.1.7. Some information should be made automatically accessible to communities and civil society organisations as opposed to being available only through PAIA applications (All).
- 2.1.1.8. The training of staff and municipal managers on gender mainstreaming is required as is the implementation of the gender policy framework (CoGTA).

2.1.2. Local Government

- 2.1.2.1. Government needs to evaluate and address the systemic reasons for the failures at local government level.
- 2.1.2.2. While water and sanitation service delivery is the competency of local government, many municipalities, particularly in poor or rural areas, do not have the skills and capacity to implement their mandate. Provincial and national government needs to use their legislated oversight and accountability mandates to monitor progressive realisation of rights. This can also ensure local government performs its responsibilities and functions effectively and without corruption. CoGTA and Treasury needs to evaluate how Government can strengthen

- the impact of existing mechanisms and programs on the poorer and outlying municipalities. This includes the Municipal Infrastructure Support Agent (MISA), (which deploys technical capacity into districts to render support through planning, design, implementation, skills development, reporting, and monitoring and evaluation functions to municipalities), as well as government’s capacitation grants, capital grants and technical assistance grants aimed at assisting municipalities with the execution of their powers and functions. Further, if vacancies remain unfilled or there is a lack of capacity and skill at a local level, redeployment from other municipalities or national and provincial departments will be necessary. The Commission will continue to monitor these. (CoGTA, Treasury, All).
- 2.1.2.3. A common definition of the terms and understanding of “access to services” is required across all government departments. For example, a common definition of the right to water is required. Furthermore, particularly at local government, all municipalities and districts should be educated on the meaning of and commitments associated with “progressive realisation.” Although common definitions are set as national norms and standards by the lead sector departments responsible for a particular competency and mandate, it is necessary for these definitions to uphold dignity and other human rights principles in service delivery. (CoGTA).
- 2.1.2.4. CoGTA and the DSD must review the national indigent policy to ensure that the poor in the country are accessing free basic services. At present, the indigent policy is not applied in a national, uniform fashion that upholds human rights. CoGTA must work with local government departments to ensure that there is consensus and uniformity in the application of the indigent policy across all municipalities. This must address the current limitations of the indigent register together with policies that refer to “indigent” persons without a clear definition. (CoGTA, DSD).
- 2.1.2.5. Internships with local universities and schools are needed to train local learners for work at a local government level, particularly in rural and outlying areas. The scholarship or bursary provided should stipulate that the recipient works at local government for a minimum period after completing their training. (DoHE).
- 2.1.2.6. The cross-subsidisation of poorer districts by well-resourced municipalities will ensure that poorer districts are not disadvantaged by their inability to pay for services. Officials and representatives of these municipalities need to recognise their obligation to serve the poorest communities. In addition, skills and training should be transferred between local government departments in different areas, to assist with on-going education and training. (CoGTA).
- 2.1.2.7. Provincial and national government departments must monitor the implementation of contracts with the private sector to ensure that the contracted company provides all services stipulated in the agreement and that service delivery is prompt and of a high quality. In addition, all infrastructure projects must include human rights based norms and standards. While there is some level of monitoring, particularly via the MISA, it is clear that additional monitoring is required to ensure service delivery and to eradicate corruption. (National Treasury, CoGTA, All).
- 2.1.2.8. The Commission understands that the DoHS plans to devolve its housing delivery function to accredited municipalities. The Commission requires information on how the DoHS expects local government to undertake such a significant mandate given the current lack of capacity, skill and service delivery backlogs at local government. (CoGTA, DoHS).

2.1.3. Community Partnerships and Monitoring

- 2.1.3.1. Immediate and meaningful community consultation on existing and new IDPs is required to ensure that planning is responsive and community-specific. Contracts must be developed to ensure that community sign-off on IDPs is required. While IDP processes are supposed to be fully consultative, this does not occur in reality. (CoGTA).

- 2.1.3.2. Budgets must be more transparent and accessible to the public to allow community monitoring of budget allocations and spending. While budgets are currently available, National Treasury must ensure that these budgets are accessible, easy for communities to understand, and available at the relevant time and in all official languages. (National Treasury)
- 2.1.3.3. Communities visited during the hearings were adamant that they have solutions to many of the problems facing local government, if only they were engaged at a more meaningful level. Therefore, the incorporation of the participation of communities will not only enhance financial management, but produce viable solutions to local level problems. (CoGTA, All).
- 2.1.3.4. National Treasury should liaise with community-based civil society organisations (CBOs) on proposals on the provision of water and sanitation to potentially provide CBOs with funding to implement appropriate projects, with monitoring from the relevant government departments and other CBOs. (National Treasury, CoGTA).

2.1.4. Intersecting Rights

- 2.1.4.1. When engaging with communities, local government, with appropriate oversight from national and provincial government, must ensure that the voices of women, children, people with disabilities and LGBTI (Lesbian, gay, bisexual, transgender and intersex) persons are heard. It is clear that engagement with these groups has been limited and is dependent on the training and capacity of the municipality. Guidelines should be developed to assist municipalities make their work responsive to differential impacts due to gender, disability, age, sexual orientation and other factors. (DPME, DoSD, DWCPD).
- 2.1.4.2. Government departments must make all communities aware of policies relating to women, children, persons with disabilities, LGBTI persons and other marginalised groups in society, such as policies to provide special facilities for people with disabilities. (DWCPD in collaboration with CoGTA).
- 2.1.4.3. The national DoBE has put in place a plan to address water and sanitation backlogs in schools within a specified timeframe. The DoBE must make the details of this plan widely available to schools, the public and civil society organisations and the DoBE must work with the departments of Human Settlements and Water Affairs ensure all deadlines are met and plans adhered to. These service delivery projects must ensure that the special needs of girls are addressed to eradicate drop-outs due to poor water and sanitation facilities. (DoHS, DoBE).
- 2.1.4.4. The DoBE must ensure that its new norms and standards for school infrastructure makes the provision of clean drinking water and dignified sanitation to schools compulsory and must not be in competition for funding with other resources (i.e. no tradeoffs). (DoBE).
- 2.1.4.5. The DWCPD must monitor the cases of violence against women and girls due to a lack of access to water and sanitation in their home, local communities and schools, and provide the Commission with this information along with plans to eradicate sexual violence in this context. (DWCPD, DoHS, DPME).

2.1.5. Access

- 2.1.5.1. Water should be viewed first as a right rather than a commodity. Private companies contracted to provide access to water should understand this basic principle to ensure that basic access is provided to all households, regardless of the availability of finances. (DWA).
- 2.1.5.2. The DWA should begin a process to upgrade water and waste water treatment plants that are dysfunctional or in disrepair, including budget allocation, project management, and monitoring and evaluation from national government, with appropriate timelines allotted to this process. Information on the implementation of such programmes must be communicated to the affected municipalities, communities and the Commission. (DWA).

- 2.1.5.3. Contact details of the rapid response unit that deals with water and waste water treatment plant emergencies should be provided to the Commission and publicised with communities and municipalities. (DWA).
- 2.1.5.4. National government must use recent census data to identify the poorest districts in the country and target these districts for development by way of dignified access to basic services and the repair of infrastructure. (DWA, CoGTA, DoHS).
- 2.1.5.5. Information on contracts with the private sector should be readily available to all public bodies, civil society organisations and communities and publicised on relevant government websites. (CoGTA).
- 2.1.5.6. Private companies and contractors that contravene agreements must be penalised by the relevant government departments. All lists of defaulting companies must be dealt with in an integrated and holistic manner to ensure all departments have access to these lists and are able to utilise them. (National Treasury).
- 2.1.5.7. The bucket system should be eradicated as soon as possible in all provinces. The relevant government departments should agree on plans with timelines for the eradication of buckets in all existing settlements. This plan must be communicated to affected communities and the Commission once finalised (DoHS, DWA).
- 2.1.5.8. Municipalities must conduct an audit of the number of households in existing informal settlements and new informal settlements to ensure that the relevant government departments have correct and up-to-date information on housing and basic services backlogs. (CoGTA, DoHS, DWA).

2.1.6. Hygiene

- 2.1.6.1. The Departments of Health and Basic Education must strengthen existing hygiene education in communities and schools. Collaboration of hygiene education initiatives and programmes must be strengthened between various government departments (DoH, DoBE, DWA, DoHS).
- 2.1.6.2. These departments must partner with civil society organisations such as the South African Water and Sanitation Academy to train people in communities on proper hygiene practices. (DoH).
- 2.1.6.3. In addition, influential people such as educators, priests, community and traditional leaders should be trained to train others on hygiene. Such programmes do exist at municipal levels, and must be implemented broadly and consistently with assistance from provincial and national departments. (DoH, DoBE).

2.1.7. Mining

- 2.1.7.1. All mines operating without water use licences should be instructed to suspend operations immediately. (DWA, DEA).
- 2.1.7.2. The DWA must put in place a system whereby mines are responsible for cleaning up water sources that they have polluted within a specific time. The relevant departments must seek compensation and action from courts in the event that a mining company fails to comply. (DWA, DMR).
- 2.1.7.3. Regional offices of mineral resources must ensure regular site visits are made to mining sites and to surrounding communities. This will assist with the monitoring and implementation of environmental management plans and social labour plans. (DMR, DEA).
- 2.1.7.4. An amendment of the current Mineral and Petroleum Resources Development Act and National Environmental Management Act is needed to move the decision-making powers regarding mining and prospecting licences from the Department of Mineral Resources to the Department of Environmental Affairs. (DMR, DEA, Parliament).

2.1.8. Farm Workers

- 2.1.8.1. An amendment of legislation governing farm labourers is required to ensure that they do not fall in a legislative gap that leads to the lack of service delivery for labourers on private land (i.e. legislation must ensure access to services). (DoL, DAFF).
- 2.1.8.2. Regulation is required around the use of pesticides and the working conditions of farms workers (i.e. appropriate attire, access to medical care). (DoL, DAFF).
- 2.1.8.3. Education campaigns on farms are essential to make farm workers aware of their rights. (DoL, DAFF).

Monitoring the Realisation of Socio-Economic Rights



***Water is Life. Sanitation is Dignity:
Accountability to People who are Poor***



3. Monitoring the Realisation of Socio-Economic Rights

3.1. Mandate of the South African Human Rights Commission

The Commission is a constitutional body governed by Section 184 of the Constitution. Section 184 (1) and (2) clearly underline the mandate, functions and powers of the Commission, and are unequivocal with respect to the Commission's requirement to monitor and assess economic and social rights (ESR). In particular, section 184 (3) requires that:

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

However, such monitoring and assessment is not only for the purposes of constitutional compliance, but also to ensure the advancement of social and economic rights so that the poor and marginalised groups of society may enjoy the full benefits of democracy. This will include the specific objectives of:

- a) Determining the extent to which the organs of the state have respected, protected, promoted and fulfilled human rights;
- b) Determining the reasonableness of measures including legislation, by-laws, policies and programmes adopted by organs of the state to ensure the realisation of human rights in the country; and
- c) Making recommendations that will ensure the protection, development and attainment of human rights.

While all Commissioners are collectively responsible for advancing this mandate, strategic leadership responsibility for basic services, including water and sanitation as well as PAIA and CEDAW were allocated to the Deputy Chair. The work undertaken in this regard, since 2009, laid the basis for this report. The Constitution compels Parliament to ensure that when the Commission presents reports to it, Parliament interrogates such findings and recommendations and holds government accountable. This ensures government is responsive to poor people who are yet to enjoy many of their rights 20 years into our constitutional democracy.

3.2. The Strategic Focus Area Report

During the Commission's strategic planning for the 2011/12 financial year, the challenges attached to the then current ESR methodology, were discussed. The methodology comprised of collecting information on the realisation of ESR every three years, via public hearings. It was determined that this strategy did not sufficiently address the Commission's critical monitoring mandate. In addition, the Commission felt that it was important to have not only a real understanding of the lived experience of the most vulnerable, but also of the various policymakers in terms of implementing ESR. Consequently, the following resolutions were adopted:

1. There will be two reports produced by the Commission annually - a Section 184(3) report as well as a strategic focus area report.
2. The primary methodology for obtaining information for the purpose of compiling the Section 184(3) report will be based on the submission of protocols, or questionnaires, for requesting information to relevant organs of state.
3. The methodology for collecting information for the strategic focus area report on the other hand, will be based on conducting primary research with regard to the realisation of a particular right(s).

Reliance solely on information provided by the very state organs being monitored raises questions regarding the credibility of the information for the monitoring of rights. Relying further on such information obtained, raises questions about the Commission's ability to determine with any level of confidence the extent to which interventions based on such information address the needs of marginalised groups and poor communities in South Africa. To avoid this, the Commission chose to implement its own process of independent assessment and monitoring.

As such, it was resolved that the Commission would produce one report in line with its constitutional mandate (i.e. *the S184 (3) report*) and an additional research report emanating from research carried out in terms of the strategic focus area. The former would rely primarily on data from government departments, while the latter, would emanate from independent primary research. In pursuit of the Commission's mandate and with particular reference to the strategic focus area report, the degree of success in terms of fulfilling the Commission's monitoring role is directly dependent on the reliability of various source(s) of information available and utilised.

The continuous assessment and monitoring of the achievement of rights throughout the country is required in the process of striving towards the progressive realisation of rights. Having such a monitoring system in place will enable the Commission to provide Parliament and the public at large with a comprehensive picture in terms of observance of human rights. Further, such an approach assures the Commission is pro-active in terms of making recommendations to government and securing appropriate redress where human rights are being violated.

3.3. Monitoring Methods

The Commission uses multi-pronged research techniques to collect information nationally and internationally on the realisation of human rights. Quantitative data is also collected and supplemented by information obtained *via* interviews and other secondary sources such as legal complaints received by the Commission. In terms of this report, the primary methodology used as the basis for compiling information were the nine public hearings on the right to water and sanitation, held between August 2012 and December 2012 in each of South Africa's respective provinces plus a national conference held in March 2013. The Commission also engaged with various government departments on the findings and recommendations that emanated from the provincial hearings.

International and National Obligations: The Rights to Water and Sanitation

This wheelchair belongs to a young disabled woman. She crosses a busy road to the communal toilet which cannot accommodate her wheelchair. She has to crawl to get in and out of the toilet.



**Water is Life. Sanitation is Dignity:
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4. International and National Obligations: The Rights to Water and Sanitation

I am convinced that the biggest barrier to the enjoyment of these rights is lack of political will. Without political will to recognise and prioritise these rights, it is highly unlikely that they will be realised. National plans of action, when undertaken in a comprehensive and serious manner, can be an important manifestation of political commitment.⁷

4.1. International Obligations on Water and Sanitation

State parties to the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognise in Article 11 “the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing and to the continuous improvement of living conditions.” The fact that the provision uses the word “including” indicates that this list was not intended to be exhaustive. This right has long been interpreted as including water, an interpretation recently confirmed by the United Nations (UN) body responsible for monitoring compliance with this treaty, the Committee on Economic, Social and Cultural Rights.⁸ The right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival. Moreover, the Committee has previously recognised that water is a human right contained in Article 11(1).⁹ The right to water is also inextricably related to the right to the highest attainable standard of health¹⁰ and the rights to adequate housing and adequate food.

The right to water is specifically entrenched in two international human rights treaties. Article 14 (2) of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) obliges states to eliminate discrimination against women in rural areas and ensure to such women the “right to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communication.”¹¹ It recognises the particular needs of women, to have access to water. Access to socio-economic rights take on special significance in light of traditional gender roles that make women and girls responsible for social reproduction, in addition to improving the quality of their lived experiences.

Under Article 24 (2) of the Convention on the Rights of the Child (CRC), states are obliged to take steps to ensure the realisation of a child’s right to health and in particular to take appropriate measures:

c) to combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution.¹²

Other regional treaties that enshrine the right to water and sanitation include:

- The African Charter on Human and People’s Rights (1981);
- The African Charter on the Rights and Welfare of the Child (1990);

⁷ de Albuquerque, C. (2012). *On the Right Track: Good Practices in Realising the Rights to Water and Sanitation*, United Nations Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, United Nations.

⁸ WaterAid and Rights and Humanity. *The Right to Water: a Legal Obligation*, <http://www.righttowater.info/ways-to-influence/legal-approaches/>.

⁹ See General Comment No. 15.

¹⁰ Article 12(1).

¹¹ Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). 1980.

¹² Convention on the Rights of the Child (CRC). 1989.

- The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ('Protocol of San Salvador') (1988); and
- The Arab Charter on Human Rights (2008).

On 30 September 2010, the UN Human Rights Council, responsible for mainstreaming human rights within the UN system, adopted by consensus a resolution affirming that the right to water and sanitation are human rights. The resolution adopted by the Human Rights Council took an important further step in affirming that:

The human right to safe drinking water and sanitation is derived from the right to an adequate standard of living and inextricably related to the right to the highest attainable standard of physical and mental health, as well as the right to life and human dignity. This means that for the UN, the right to water and sanitation is contained in existing human rights treaties and is therefore legally binding. The right to water and sanitation is a human right, equal to all other human rights, which implies that it is justiciable and enforceable.¹³

4.2. Governments Need to Prioritise and Protect Water as a Human Right

That the intrinsic value of the Earth's fresh water precedes its utility and commercial value, and therefore must be respected and safeguarded by all political, commercial and social institutions, That the Earth's fresh water belongs to the earth and all species and therefore, must not be treated as a private commodity to be bought, sold and traded for profit.¹⁴

In the Commission's hearings communities complained that while they live next to large dams, which supply mining companies, agribusiness and tourist companies, they have no access to water. This year, in Madibeng Municipality, local communities protested that while they were expected to go for long periods without any water, wealthy companies did not experience any water-cuts. The question is whether water is a right to which everyone is entitled, at least minimum access, or a commodity to which you will only have access if you can afford it?

The former generally involves state management of water as a resource, to which they allot a minimum amount to citizens of a country, often free of charge, and citizens pay for additional water used above that minimum amount. It also involves the management of water as a precious resource, ensuring that it is used sustainably and not irrevocably damaged through overuse and pollution. The latter generally involves the privatisation of the management of water, where the allotted entity provides water to users and collects payment in return for the service, including infrastructure development and supply. Sometimes models are a combination of the two.

The problem with treating water as a commodity is that a private entity has control over a resource that is essential to life and dignity. No living being can survive without access to potable water. According to the WHO, each citizen should be entitled to at least 20 litres per person per day.¹⁵ Privatisation means that availability is only ensured for those who can afford fees associated with connection, infrastructure and for the actual use of water. This has a global impact on poverty and inequality and on access to other human rights such as health, education, food and environment. Furthermore, a private entity is under no obligation to consult with consumers, ensure meaningful engagement on decision-making, transparency in operations and access to information. It is also under no obligation to ensure that people who are historically disadvantaged or marginalised are receiving access to service that is sufficient to meet their needs.

¹³ de Albuquerque (note 7 above).

¹⁴ http://www.blueplanetproject.net/cms_publications/treaty_eng.pdf.

¹⁵ http://www.who.int/water_sanitation_health/emergencies/qa/emergencies_qa5/en/index.html.

The simple fact is that this model of privatisation doesn't work. You cannot marry the profit motive to something like water or air which people need to survive. We have to take this notion of fresh water out of the market place and say that it belongs to the earth, it belongs to all species, it belongs to future generations, and no one has the right to commodify it for personal gain.¹⁶

While it is unclear whether the South African government views water more as a commodity or as a human right, there are many problems associated with the current model of service delivery, where the poorest people in the country remain without basic infrastructure and marginalised people remain without access. While the government has undertaken to provide a basic minimum amount to all citizens, the private entity decides on the cost of water, provides the infrastructure and makes decisions on allocation between household consumers and industry. The aim of the company is to profit from the venture and it is the poorest that pay the price. As Patrick Bond has argued,

[r]ural areas are underserved due to lack of operating subsidies which mean that a large percentage of taps installed in the post-apartheid era are now dry. And for those lucky to be on municipal water grids, mass disconnections due to un-affordability affect more than 1.5 million South Africans each year, even the government admits.¹⁷

4.3. National Obligations on Water and Sanitation

Section 27(1) (b) of the Constitution provides that “everyone has the right to have access to sufficient food and water.” This obligation is extended in section 27 (2), according to which “the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights.” The right to sufficient water intersects with environmental rights and is an enabling right for the enjoyment of other rights such as health, education and safety.

The right to water is a shared competency of national, provincial, and local government. The national government, through the Department of Water Affairs (DWA) is responsible for setting national policy frameworks and standards for the delivery of water services. The National Water Act 36 of 1998 (NWA) creates a comprehensive legal framework for the management of water resources in South Africa, which remains the responsibility of national government. The preamble of the NWA states that “acknowledging the National Government’s overall responsibility for and authority over the nation’s water resources and their use, including the equitable allocation of water for beneficial use, the redistribution of water, and international water matters.”¹⁸ Provincial government must monitor and support local government, which is responsible for the delivery of water and sanitation services.

CoGTA derives its mandate from Chapters 3 and 7 of the Constitution¹⁹. It is responsible for the development of policy and legislation regarding provinces and to monitor, among others, the implementation of the Local Government Municipal Systems Act, 2000 (Act No. 32 of 2000) and the White Paper on Local Government (1998), critical legislation guiding the delivery of services, including water and sanitation by local government. Furthermore, Cooperative Governance and Traditional Affairs (CoGTA) plays an oversight role in terms of municipal service delivery performance, including municipal planning, budgeting and monitoring. Finally, it provides support to local government in the form of municipal capacity-building programmes and aims to rationalize and provide greater cohesion in programmes geared towards improved service delivery.

16 <http://www.cbc.ca/fifth/deadinthewater/barlow.pdf>.

17 Bond, P. (2006). *When Commodification Annuls the Human Right to Water*, Centre for Civil Society, University of KwaZulu-Natal, <http://www2.ohchr.org/english/issues/water/contributions/universities/UniversityofKwaZulu-Natal.pdf>.

18 National Water Act, 36 of 1998.

19 The Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996).

The South African Local Government Association (SALGA) is an organisation mandated by the Constitution to act as the “voice and sole representative of local government.”²⁰ Its functions include providing advice and support to local government. The role of SALGA’s Municipal Infrastructure Services (MIS) is to find solutions to service delivery challenges common with municipal infrastructure services, such as water and sanitation. SALGA also partners with other government departments, including the DWA and CoGTA to give support to municipalities in terms of water services.

Other key role-players are the Water Research Commission, the Water Institute of South Africa and non-governmental organisations (NGOs) like the Mvula Trust. Many municipalities are now moving to involve the private sector in various aspects of service delivery. The Development Bank of South Africa is an important financier of infrastructure development for water and sanitation service delivery. Water boards operate dams, bulk water supply infrastructure and wastewater treatment plants, hence they too play an important role in water management in South Africa. Some water boards also provide technical assistance to municipalities.

South Africa has one of the most progressive legislative and policy frameworks for basic services in the world, including a constitutional right of access to sufficient water, a right to basic sanitation, and a Free Basic Water (FBW) policy and Free Basic Sanitation (FBSan) policy at the national level. The Free Basic Services (FBS) policy commits to,

- Free services to indigent²¹ households, providing a minimum of 6 kilolitres of water per household²² per month within a 200 meter radius of the household;
- At least a ventilated improved pit (VIP) sanitation facility;
- Solid waste management; and
- 50 kWh of electricity per household per month.²³

While progress has been made to eradicate service delivery backlogs in the country, at municipal levels and in the poorest areas of South Africa, service delivery remains a major challenge.

4.4. Provincial Oversight of Service Delivery

As mentioned, provincial government has the responsibility to support municipalities in fulfilling their functions. Section 139 of the Constitution confers on them the responsibility to intervene where municipalities fail to deliver on services, as mandated by their Constitutional and legal obligations. In particular, the White Paper on Basic Household Sanitation 2001²⁴ states that Provinces have an important role to play in supporting the municipalities in achieving their objectives and in ensuring that local municipalities perform effectively through “finance, human resources and technical support”. Additionally, in terms of the National Environmental Management Act (NEMA) 107 of 1998, provincial governments are obliged to ensure that municipalities exercise their functions in line with national and provincial environmental implementation and management plans.

Given these obligations, provincial governments clearly have a critical role to play in overseeing implementation of service delivery at the local level. Monitoring of delivery at a local government level is vital to ensure that municipalities deliver services that promote the realisation of the rights to water and

20 <http://www.salga.org.za/pages/About-SALGA/Welcome-to-SALGA>.

21 Poor households are defined as “indigent” in the Free Basic Services Policy, however, there are a number of concerns related to the indigent policy and its application, which are explored in more detail later in the chapter (2.2.1.).

22 A household is defined by Statistics South Africa as “a group of persons who live together and provide themselves jointly with food and/or other essentials for living, or a single person who lives alone”.

23 The term indigent means ‘lacking in the necessities of life.’ In interpreting this for the purpose of government policies, a position has to be taken on the ‘necessities of life’ in a South African context. The Constitution provides a guide in this regard, leading to the view that the following goods and services are considered as necessities for an individual to survive: sufficient water, basic sanitation, refuse removal in denser settlements, environmental health, basic energy, health care, housing and food and clothing. Anyone who does not have access to these goods and services is considered indigent.

24 White Paper on Basic Household Sanitation, 2001.

sanitation and ensures a dignified life. Past reports and information contained in this report refer to the lack of consistent and regular monitoring of the work of municipalities and a lack of adequate skills and capacity to spend public funds, at a local government level. The extent to which provincial government efficiently fulfills this function is questionable. This further necessitates consideration of an improved system of governance including monitoring and early warning systems that promote immediate response and adequate provision of support in crisis situations.

4.5. Service Delivery at a Local Level

The Water Services Act 108 of 1997 is the primary legal instrument relating to the accessibility and provision of water services. This includes drinking water and sanitation services, to households and other municipal water users by local government.²⁵

Although the responsibility for the management of water resources falls within the jurisdiction of the DWA, provision to households at a local level is the responsibility of the respective local government or municipality. The Water Services Act defines a water service authority (WSA) as “any municipality, including a district or rural council as defined in the Local Government Transition Act, 1993 (Act No. 209 of 1993) responsible for ensuring access to water services.”²⁶ A WSA has a “duty to all consumers or potential consumers in its area of jurisdiction to progressively ensure efficient affordable, economical and sustainable access to water services,”²⁷ and must draft a Municipal Water Services Development Plan for implementation within its boundaries.

However, the responsibility for the delivery of services remains with the municipality at a local government level, which will be the first port of call for public users that are not receiving or are having problems with their service. Ultimately, the municipality is responsible to “all consumers or potential consumers in its area of jurisdiction to progressively ensure efficient affordable, economical and sustainable access to water services.”²⁸

Box 1: South Africa’s Indigent Policy

The 2005 South African Department of Local Government (DPLG)²⁹ Guidelines for the Implementation of the National Indigent Policy by Municipalities indicates that the term ‘indigent’ means ‘*lacking the necessities of life*’.³⁰ Anyone who does not have access to these goods and services is considered indigent. One cannot define an indigent too narrowly as this may exclude those individuals or households who truly require poverty alleviation.

The National Indigent Policy by Municipalities states that “*due to the level of unemployment and poverty within municipal areas, there are both households and citizens who are unable to access or pay for basic services; this grouping is referred to as the ‘indigent’*. A municipality therefore needs to develop and adopt an indigent policy to ensure that the indigent can have access to the package of services included in the FBS programme.”³¹

25 Tissington, Dettmann, Langford, Dugard and Conteh. 2008. *Water Services Faultiness: And assessment of SA’s water and sanitation provision across 15 municipalities*. Centre for Applied Legal Studies, Centre on Housing Rights and Evictions, and Norwegian Centre for Human Rights.

26 *Ibid.*

27 *Ibid.*

28 *Ibid.*

29 Now the Department of Cooperative Governance and Traditional Affairs (COGTA).

30 DPLG, “Guidelines for the Implementation of the National Indigent Policy by Municipalities” Draft Document 1 (November 2005) (Guidelines).

31 *Ibid.*

An indigent policy is designed to allow municipalities to target the delivery of essential services to citizens who experience a lower quality of life. These services include, *inter alia*:

Free Basic Water: a minimum of 6 kilolitres of water per household per month;

Free Basic Energy: a minimum of 50 kilowatt hours or coal equivalent of ZAR55 per household per month;

Sanitation: ventilated improved pit latrine (VIP) or toilet connected to a septic tank or to water-borne sewerage;

Waste: collection and disposal of refuse;

Health: access to clinics and voluntary testing and counselling.

Studies by the Centre for Applied Legal Studies have shown that the indigent policy is only provided to those households that register as indigent households.³² This means that households that are not aware of the policy or fear discrimination due their financial and social status will not receive any free basic services. In addition, the policy is inconsistently applied by municipalities. Clearly, a more effective way of identifying indigent households must be formulated, one that does not require households to identify themselves.

4.6. Informal Settlement Upgrading

The provision of water and sanitation to households in informal settlements is particularly challenging to municipalities as these settlements do not have proper housing or water and reticulation infrastructure. Many of the complaints on a lack of services received by the Commission emanate from individuals and families living in informal settlements that have been on waiting lists for formal housing for a long period of time and continue to suffer from the impacts of a lack of access to basic services and the associated impacts on the other human rights.

The Department of Human Settlements (DoHS) is currently tasked with upgrading informal settlements. In accordance with the National Housing Programme, *in-situ* upgrading is the preferred development approach as opposed to complete resettlement. The latter is only considered when the location of the settlement is unsuitable for development. However, given that the majority of the informal settlement upgrading projects results in de-densification, the relocation of a portion of the community sometimes cannot be avoided. The DoHS also emphasised that participation in all aspects of development by the community is a principle of the National Housing Programme. This includes participation on *inter alia*, the township layout through to the services standards, the house typologies and details of the tenure rights to be awarded.

However, complaints made to the Commission over the last decade and investigations conducted by the Commission in respect of housing complaints show little adherence to this principle. Complaints around housing projects in Riverlea, Alexandra and Pennyville in Johannesburg, Makhaza informal settlement in Cape Town and Rammulotsi Township in the Free State were investigated by the Commission.³³ See attached an annexure listing the various complaints received by the Commission, their resolutions and proposed recommendations. The common factor in these complaints is the lack of public participation and access to information on the trajectory of the housing development.

Further, the upgrading of informal settlements and the provision of basic services are seen as separated unconnected services. Disparities in housing, water and sanitation policy initiatives in informal settlement upgrading contribute to the lack of transformation and improvement of informal settlements. To begin with, the impact of disparities manifests themselves in a continued inadequacy of access to basic water

³² Tissington et al (note 25 above).

³³ These complaints were lodged with the Commission between 2009 and 2011.

and sanitation services in informal settlements post upgrading.³⁴ In addition, implementation processes lacks collective objectives as project implementation is driven by individual departmental objectives.

4.7. The National Development Plan

The National Development Plan (NDP) developed by the National Planning Commission (NPC) is Government's strategy to deal with South Africa's development problems. The vision statement of the NPC is to eliminate poverty and reduce inequality by 2030, through increasing the capability of the state to provide on its given mandate and by increasing the capabilities of millions of economically disadvantaged people of South Africa through the provision of rights and services.³⁵ As stated in the NDP, “[the state has] to ensure that poor people have the environment, services and skills to improve their lives.”³⁶ The NDP has been criticised in numerous circles such as by Wits Vice Chancellor Adam Habib and National Union of Metalworkers of South Africa (NUMSA) for addressing poverty alleviation without paying the same attention to reducing inequality through as Habib as put it ‘wealth alleviation’. These critics observe that in the post-apartheid era those who are wealthy have become even wealthier, thus directly contributing to a situation of deepening inequality.

The NDP recognises that any poverty alleviation strategies have to include marginalised and vulnerable communities, and that this inclusion must go beyond passive citizenry to a system where all citizens are active champions of their own development. The NDP highlights education and employment as sectors that require particular attention, where it is anticipated that an improvement in education and growth in employment would stimulate economic growth and development. This stems from a finding on challenges that identifies *inter alia* the problem that too few people are employed and that the standard of education for most black learners is of poor quality. Further highlighted is the fact that South Africa's development path “has not sufficiently broadened opportunities for black South Africans, especially women and youth.”³⁷

One of the key targets of the NDP targets is to manage water resources including the development and maintenance of infrastructure, bulk water supply and waste water management between 2012 and 2017. Further, part of the vision is that by 2030 all South Africans will have affordable access to sufficient safe water and hygienic sanitation to live healthy and dignified lives.³⁸ However, the NDP speaks to a differentiation in service between rural and urban areas and do not specify the level of service that these areas will receive. Currently, there is a large discrepancy between the services received in urban areas compared with rural areas, a fact which has entrenched inequality and poverty in South Africa. It is therefore concerning that the NDP does not expressly focus on water and sanitation provision at a rural level.

It is important to note that the NDP states that “while local government will retain responsibility for ensuring adequate service provision in its areas, regional utilities will provide services where municipalities have inadequate technical and financial capabilities.”³⁹

The NDP is laudable and has the opportunity to effect change in South Africa, if all programmes are implemented from a rights-based approach, ensuring effective engagement and communication with the citizens of South Africa, and transparency. Importantly, it will be essential to deal with systemic issues of poverty and inequality to ensure that service delivery is sustainable and has a lasting impact on the lives of South Africans.

34 http://researchspace.ukzn.ac.za/xmlui/bitstream/handle/10413/401/Mbatha_S_2009.pdf?sequence=1.

35 National Development Plan, 2011.

36 *Ibid.*, 4.

37 *Ibid.*

38 *Ibid.*

39 *Ibid.*, 154.

4.8. Non-State Actors

Non-state actors must comply with the laws and regulations of the state in terms of general legal obligations. There are also global voluntary commitments such as the United Nations Global Compact and various multi-stakeholder initiatives in different sectors. These commitments are reinforced through soft law instruments such as the Guidelines for Multinational Enterprises of the Organisation for Economic Cooperation and Development (OECD), the Tripartite Declaration of Principles Concerning Multinational Enterprises of the International Labour Organisation (ILO) and the UN Guiding Principles on Business and Human Rights (also known as the *Ruggie Principles*).⁴⁰ While these do not create legally binding obligations, they “[derive their] normative force through recognition of social expectations by States and other key actors.”⁴¹ The Ruggie principles of “Protect, Respect and Remedy” framework have confirmed these commitments, and the Human Rights Council, in its resolution 8/7, has specifically emphasised that business enterprises have a responsibility to respect human rights. The human rights obligations of business are increasingly under scrutiny and there are significant critiques of the Ruggie principles themselves.

In South Africa, in relation to the right to water, WSAs are entitled to contract the services of a Water Service Provider (WSP) to provide services to end-users. Section 80 (2) of the Municipal Systems Act, 32 of 2000 stipulates that before a municipality enters into a service delivery agreement with an external service provider, it must establish a programme for community consultation and information dissemination regarding the appointment of the external service provider and the contents of the service delivery agreement. The contents of the service delivery agreement must be communicated to the local community through the media.

When a municipality enters into a service delivery agreement it must:

- Make copies of the agreement available at its offices for public inspection during office hours.
- Give notice in the media of:
 - Particulars of the service that will be provided under the agreement; and
 - The name of the selected service provider.

Unfortunately the reality is very different for many poor communities, as detailed in this report’s section on the Hearings

4.9. The Millennium Development Goals and Indicators

*Even if the MDG targets were to be achieved in full, it is important to note that there would still be more than 800 million people without safe drinking water and 1.8 billion people without basic sanitation in 2015.*⁴²

On 8 September 2000, following a three day Millennium Summit, the UN’s General Assembly adopted the Millennium Declaration. In the Millennium Declaration, 189 member states of the UN signed and reaffirmed the commitment of the international community to eradicate poverty. The Declaration is a consolidation of eight interconnected development goals, named the Millennium Development Goals

⁴⁰ John G. Ruggie is the UN United Nations Secretary-General’s Special Representative for Business and Human Rights. He was instrumental in the development of the UN Guiding Principles on Business and Human Rights, which were unanimously endorsed by the UN Human Rights Council on 16 June 2011. The principles provide three main guiding principles for states and business to implement the framework, including the state duty to protect human rights; the corporate responsibility to respect human rights; and access to remedy for victims of business-related abuses. For full text please see http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

⁴¹ A/HRC/4/35, para. 45.

⁴² <http://www.ohchr.org/Documents/Publications/FactSheet35en.pdf>.

or MDGs, which constitute a set of agreed and measurable targets and quantifiable indicators. While the MDGs address the symptoms of poverty, they do not address key causes such as economic policy that increases unemployment and poverty and does not sufficiently emphasise human rights. Table one below outlines the target and indicators for goal seven that pertains to access to water and sanitation.

Table 1: Targets and Indicators of Millennium Development Goal 7

Goal 7: Ensure Environmental Sustainability	
Target	Indicators
Target 10: Reduce by half the proportion of people without sustainable access to safe drinking water	<ul style="list-style-type: none"> • Proportion of the population with sustainable access to an improved water source, urban and rural • Proportion of the population with access to improved sanitation

Despite the fact that the MDGs are tools for measuring national progress on the realisation of specific rights, the MDGs do not incorporate foundational human rights principles of which any state must take cognizance. Specifically, while national targets, if achieved, should see a proportional increase in access to services, universal access remains unlikely. This means that the poorest people in a country will remain poor with little or no access to basic rights. Vulnerable people will continue to remain vulnerable under the implementation of programmes to achieve the MDGs as their rights will not be prioritised and the principles such as public participation, transparency and non-discrimination are not ensured. As such, in a country like South Africa, the MDG target might be achieved by 2014, but access to water and sanitation for many marginalised and impoverished communities across the country will remain low or non-existent.

4.10. A Human Rights-Based Approach

In addition to the relevant national and international law on ESR, the state’s obligations to respect human rights have been made more explicit over the last few decades *via* additional human rights treaties and national jurisprudence. All states have an obligation to respect, protect and fulfil human rights. The obligation to respect, for example, will mean that:

[S]tates may not prevent people already enjoying the rights from continuing to enjoy them, for example by selling land with a water source on it, and preventing users from continuing to access the source without an adequate alternative being provided. The obligation to protect the rights to water and sanitation suggests that States must prevent third parties from polluting a water source. The obligation to fulfil the rights to water and sanitation requires that States ensure that the conditions are in place for everyone to realise their rights.⁴³

ESR are subject to the principle of ‘progressive realisation,’ which means that the state must take appropriate and tangible steps towards the full realisation of these rights, by using ‘available resources’ to achieve these goals. The term ‘available resources’ acknowledges that states are limited by the available financial and other resources. As such, the state must take steps to acquire the resources needed over a period of time to ensure the progressive realisation of all ESR – including procuring assistance from private and international sources. It is important to note that the goal of ‘progressive realisation’ does not negate the need for states to act to provide services until resources are available,

⁴³ de Albuquerque (note 7 above).

On the contrary, the treaties impose an immediate obligation to take appropriate steps towards the full realisation of economic, social and cultural rights. A lack of resources cannot justify inaction or indefinite postponement of measures to implement these rights. States must demonstrate that they are making every effort to improve the enjoyment of economic, social and cultural rights, even when resources are scarce.⁴⁴

It is important to note here that the ICESCR states that state parties must use “maximum available resources with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”⁴⁵

*Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.*⁴⁶

In South Africa, for example, the Constitutional Court made a judgement in the case of the *Government of the Republic of South Africa and Others versus Grootboom and Others*,⁴⁷ where it defined the parameters of what constitutes ‘reasonable measures’, by questioning the reasonableness of a programme that excludes a significant segment of society. The Court stated that “[i]t may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right... if the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.”⁴⁸ Furthermore, Constitutional Court judgements demonstrate that ESR are justiciable, which means that it is subject to judicial enforcement.

Essential to a human rights-based approach to service delivery are the principles of engagement and transparency. As such, the following must be implemented or adhered to with service delivery projects:

- Effective and comprehensive public participation that constitutes ‘meaningful consultation’⁴⁹;
- Attention must be given to the views of women, children, LGBTI persons, persons with disabilities, and other marginalised groups such as migrant workers and their families;
- Decision making must be transparent with sufficient access to information;
- Accountability to ensure that there is continuous monitoring of the realisation of rights and appropriate complaints or grievance mechanisms in place in the instance of a violation of rights; and
- Non-discrimination is essential to ensure universal access and that there is no exclusion to access based on factors such as race, gender, sexual orientation, class and religion.

44 Office of the United Nations High Commissioner for Human Rights. Frequently Asked Questions on Economic, Social and Cultural Rights, Fact Sheet 33, <http://www.ohchr.org/Documents/Publications/FactSheet33en.pdf>.

45 ICESCR Article 2(1).

46 International Covenant on Economic, Social and Cultural Rights (art. 2 (1)).

47 *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC).

48 *Ibid* at paragraph 44.

49 *Beja and Others v Premier of the Western Cape and Others* (21332/10) [2011] ZAWCHC 97; [2011] 3 All SA 401 (WCC); 2011 (10) BCLR 1077 (WCC) (29 April 2011) found that “Before a Municipality enters into a service delivery agreement with an external service provider, it must establish a program for community consultation and information dissemination regarding the appointment of external service provider and the contents of service delivery agreement must be communicated to the local community. Secondly, the Housing Code requires the City to consult with the community on every aspect. If the City cannot, as a matter of law, act on an agreement with the community, then there is no purpose to such consultation.”

Contextualising Access to Water and Sanitation



Everyone is entitled to equality and dignity.

**Water is Life. Sanitation is Dignity:
Accountability to People who are Poor**



5. Contextualising Access to Water and Sanitation

Information in this section is based on a literature review conducted by the Commission, during the period under review. The purpose of the literature review was to ascertain the *status quo* in terms of access to water and sanitation in the country and to inform the work that the Commission sought to undertake in relation to these rights.

5.1. Lack of Access to Water and Sanitation

Non-discriminatory access to water and sanitation is regarded as a pre-requisite for the realisation of several other human rights, such as the rights to life, dignity, health, food, and an adequate standard of living and education.⁵⁰

Access to safe drinking water and sanitation is fundamental to the enjoyment of other rights such as the rights to education, health, safety and an environment that is not harmful to human health or well-being. A lack of access to water and sanitation not only impedes access to other rights, but heightens the vulnerability of certain groups of people such as women, girls and people with disabilities. It also impacts on the right to practice one's culture or religion. The UN *Special Rapporteur* on the human right to safe drinking water and sanitation has shown that inadequate water and sanitation facilities impact on the realisation of other rights such as education, health, work and dignity, amongst others.⁵¹ Water and sanitation are fundamental to the health and well-being of all people.

According to the United Nations Development Programme (UNDP) approximately 443 million school days are lost each year due to illness caused by a lack of access to water or access to a poor water source.⁵² According to the World Health Organisation (WHO), “surveys from 45 developing countries show that women and children bear the primary responsibility for water collection in the majority of households. This is time not spent working at an income-generating job, caring for family members, or attending school.”⁵³ Furthermore, 115 people in Africa die every hour from diseases linked to poor sanitation, poor hygiene and contaminated water.⁵⁴ A lack of access to safe drinking water and sanitation still kills more children than malaria, measles and HIV/AIDS combined.⁵⁵

Although the WHO and the United Nations Children's Fund (UNICEF) estimate that 1.2 billion people worldwide gained access to improved sanitation between 1990 and 2004, an estimated 2.6 billion people, including 980 million children, had no toilets at home. If current trends continue, there will still be 2.4 billion people without basic sanitation in 2015, and the children among them will continue to pay the price in lost lives, missed schooling, in disease, malnutrition and poverty. Using proper toilets and hand washing, preferably with soap, prevents the transfer of bacteria, viruses and parasites found in human excreta, which would otherwise contaminate water resources, soil and food. This contamination is a major cause of diarrhoea, the second biggest killer of children in developing countries, and leads to other major diseases such as cholera. Improving access to sanitation is a critical step towards reducing the impact of these diseases. It also helps create physical environments that enhance safety, dignity and self-esteem. Safety issues are particularly important for women and children, who otherwise risk sexual harassment and assault when defecating at night and in secluded areas.

50 UNESCO's contribution to OHCHR's study on the scope and content of the human rights obligations related to equitable access to safe drinking water and sanitation. April, 2007. <http://www2.ohchr.org/english/issues/water/contributions/IntOrg/UNESCO.pdf>.

51 de Albuquerque, Report of the independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation, Human Right Council A/HRC/6/3 16 August 2007.

52 UNDP, <http://hdr.undp.org/en/media/HDR06-complete.pdf>.

53 WHO, http://www.who.int/whr/2002/en/whr02_en.pdf.

54 Cited by UNICEF “Water, sanitation & hygiene” 19 November 2010. www.unicef.org/madagascar/Final_Global_Latrine_Day.docx.

55 Wash United, <http://www.wash-united.org/the-club/why-wash.htm>.

Glass ceilings aside, millions of women are prohibited from accomplishing little more than survival. Not because of a lack of ambition, or ability, but because of a lack of safe water and adequate sanitation. Millions of women and children in the developing world spend untold hours daily, collecting water from distant, often polluted sources, then return to their villages carrying their filled 40 pound jerry cans on their backs.⁵⁶

In most societies around the world, particularly in Africa and Asia, women are the main care givers and are responsible for the management of a home. For them, the consumption of water is essential for survival and for other basic activities such as cooking, cleaning, and caring for children, the aged and the ill, food production, caring for livestock and so much more. Therefore, much of the time of a women or girl in an underdeveloped area, is spent collecting water for various purposes, least of which is personal hygiene. According to the WHO and UNICEF, “surveys from 45 developing countries show that women and children bear the primary responsibility for water collection in the vast majority (76%) of households.”⁵⁷

More girls than boys miss school because they have the responsibility for collecting water, which might be a long distance away. In addition, girls often miss school or drop out of school because of a lack of sanitation facilities to accommodate them, particularly during their menstrual cycle.

As such, a lack of access to water has a major impact on the rights and well-being of women and girls. It is therefore critical that states are aware of the disproportionate impact that a lack of access to water and sanitation has on women and girls. Nevertheless, women are most often systematically excluded from consultations and decision-making processes around the service delivery of water and sanitation and related projects.

A study by the World Bank and the IRC International Water and Sanitation Centre of community water and sanitation projects in 88 communities found that projects designed and run with the full participation of women are more sustainable and effective than those that do not.⁵⁸

Turning to the issue of disability, while international and national legislation exists to ensure that the rights of people with disabilities are protected, in reality, the provision of water and sanitation does not often consider their needs. For example, sanitation developments in communities are outdoors and inaccessible due to the small size and uneven landing. Standpipes in communities, for water collection, can be a long distance away from homes and taps are often at a low level making them inaccessible to persons with disabilities. The affordability of water is also an essential element of accessibility for persons with disabilities, as they are often more marginalised and poorer than those without disabilities.

The WHO burden-of-disease analysis suggests that a lack of access to safe water, sanitation and hygiene is the third most significant risk factor for poor health in developing countries. Furthermore, those without access to adequate sanitation are 1.6 times more likely to experience diarrheal disease.

In 2000, at least 1.1 billion of the world’s population did not have access to safe water. Of those without access to safe drinking water, 65% were from Asia and 28% were from Africa. The latter is a large proportion when one considers the total population of the African continent compared with Asia.⁵⁹ People in rural areas around the world suffer more due to a lack of access to water, as they rely greatly on land and water resources for their livelihoods.

⁵⁶ Water.Org. (1990-2013). Water Facts: Women, <http://water.org/water-crisis/water-facts/women/>.

⁵⁷ WHO/UNICEF Joint Monitoring Programme (JMP) for Water Supply and Sanitation. (2010). Progress on Sanitation and Drinking-Water, 2010 Update.

⁵⁸ Water and Sanitation Program (WSP). (2000). Linking Sustainability with Demand, Gender and Poverty: A study in community-managed water supply projects in 15 countries.

⁵⁹ Pillay, P. (2005). Access to Essential Services – Education, Health, Water and Sanitation: The Global Context, HSRC Press.

The relationship between water resources, sanitation and the natural environment is a complex one. On the one hand, a poor state of natural resources, such as pollution, impacts on the availability of the resource as a consumable and the health of those that might use that particular resource. At the same time, the treatment of water for consumption and the disposal of waste and waste water has an impact on the environment, which in turn impacts on the well-being of all living species. Furthermore, poorly planned or overloaded reticulation and housing developments also negatively burden the environment. This concern increases with a growing world population. In addition, climate change has and will continue to impact on water resources and their availability.

To combat negative environmental impacts and to safeguard the environment for future generations, integrated and holistic planning is essential, including catchment management. Proper impact assessments will mitigate environmental damage and maintain the integrity of ecosystems, especially wetlands, which are essential to the functioning of a healthy environment.

5.2. The State of Access to Water in South Africa

It is not acceptable that close to half of all people in developing countries are suffering from health problems caused by poor water and sanitation, or that slum dwellers pay five or even ten times as much for their water as wealthy residents of the same cities, or that more than one billion people in rural communities live without toilets and have to defecate in the open.⁶⁰

According to the Key Results from the 2011 Statistics South Africa (StatsSA) Census, 46.3% of households in South Africa have access to piped water and just over 85% have access to water that is of a RDP-acceptable level.⁶¹ This level of access, however, is not reflected across all provinces in the country. In Eastern Cape, 31.1% of household do not have access to water of a RDP-acceptable level while the same is true for 27.2% of households in Limpopo.

Table 2: Access to Water, by Province as at October 2011⁶²

Province	RDP-Acceptable			Not RDP-Acceptable	
	Piped Water within Dwelling	Piped Water within Stand	Piped Water within 200 Meters from Stand	Piped Water more than 200 Meters from Stand	No Access to Piped Water
Eastern Cape	32.8%	16.6%	18.6%	9.9%	22.2%
Free State	44.8%	44.3%	6.2%	2.6%	2.2%
Gauteng	62.1%	27.3%	6.0%	2.8%	1.8%
KwaZulu-Natal	40.0%	23.6%	14.8%	7.6%	14.1%
Limpopo	18.4%	33.9%	20.5%	13.2%	14.0%
Mpumalanga	35.7%	36.0%	9.2%	6.6%	12.6%
North West	29.3%	40.0%	14.3%	8.0%	8.4%

⁶⁰ Ban Ki Moon in de Albuquerque (note 7 above).

⁶¹ Acceptable level according to the 1994 RDP is currently still in use.

⁶² StatsSA Census 2011.

Province	RDP-Acceptable			Not RDP-Acceptable	
	Piped Water within Dwelling	Piped Water within Stand	Piped Water within 200 Meters from Stand	Piped Water more than 200 Meters from Stand	No Access to Piped Water
Northern Cape	45.8%	32.3%	12.8%	6.6%	2.6%
Western Cape	75.1%	13.3%	8.3%	2.4%	0.9%
South Africa	46.3%	27.1%	11.7%	6.2%	8.8%

Evidence provided later in the report from provincial hearings on the right to water shows that the same is true for particular districts in South Africa, which have very poor access and this level of access reflects apartheid planning of the past.

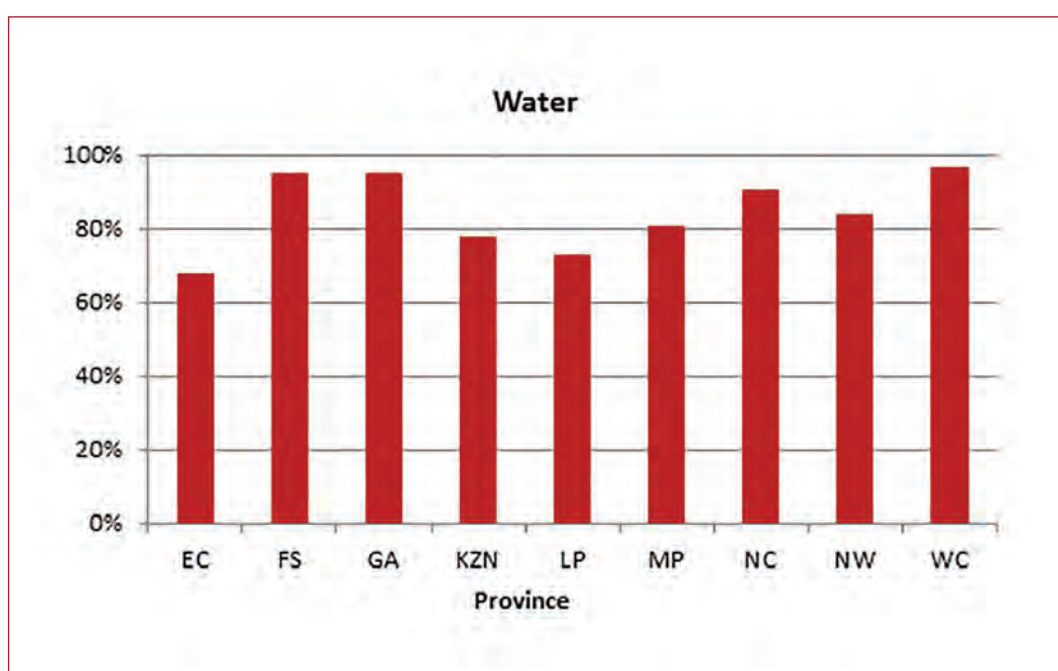


Figure 1: Level of Access to Water in South Africa, by Province (October 2011)

5.3. The State of Access to Sanitation in South Africa

Information from the most recent StatsSA census shows that just over 60% of households have access to sanitation via a flush toilet, while just over 70% of households have access to sanitation that is of an RDP-acceptable level. Again, this level of access is not enjoyed across the country. Almost two-thirds of Limpopo does not have access to sufficient sanitation, while just under half the population in the Mpumalanga and North West provinces do not have sufficient access. KwaZulu-Natal also has a below average level of access to sanitation. Of particular concern is the Eastern Cape, where 12.7% of households do not have access to any form of sanitation and the Free State, Northern Cape and Western Cape provinces, which have a large number of households still using a bucket for sanitation. It is important to note that the bucket system should have already been completely phased out by government.

Table 3: Access to Sanitation, by Province as at October 2011⁶³

Province	RDP-Acceptable			Not RDP-Acceptable		
	Flush Toilet	Chemical Toilet	Ventilated Pit Latrine	Unventilated Pit Latrine	Bucket Latrine	None
Eastern Cape	43.0%	3.0%	13.9%	20.2%	2.3%	12.7%
Free State	67.1%	0.6%	87.0%	13.5%	5.5%	3.1%
Gauteng	85.4%	1.1%	2.4%	7.4%	1.8%	1.1%
KwaZulu-Natal	45.0%	8.2%	14.4%	20.7%	1.7%	6.3%
Limpopo	21.9%	0.9%	15.1%	52.9%	0.6%	7.2%
Mpumalanga	43.8%	1.4%	12.1%	33.9%	0.9%	6.3%
North West	45.4%	0.8%	11.3%	34.2%	1.0%	5.8%
Northern Cape	66.0%	0.6%	9.1%	10.7%	4.0%	8.0%
Western Cape	89.6%	0.9%	0.6%	0.6%	3.7%	3.1%
South Africa	60.1%	2.5%	8.8%	19.3%	2.1%	5.2%

Like with access to water, evidence from provincial hearings on access to sanitation shows that there are highly impoverished communities in South Africa that were historically disadvantaged under apartheid that remain without access to basic services, including sanitation, in the post-democratic era.

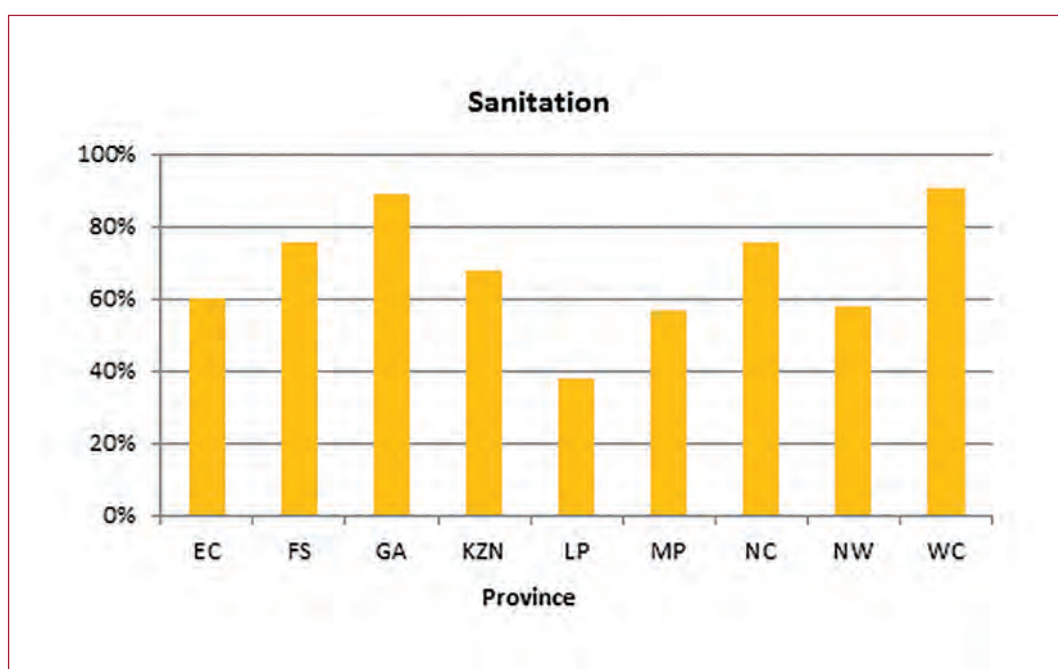


Figure 2: Level of Access to Sanitation in South Africa, by Province (October 2011)

There has been a steady decline in the level of satisfaction with the quality of water services received since 2005, when users that rated their service as good was at 76% compared with 72% in 2007. In 2010, only 64%

⁶³ Ibid.

of consumers rated the water quality as good.⁶⁴ In 2010, 28% percent of households in the Eastern Cape felt that their water was unsafe to drink, while the same was true for 22% of households in KwaZulu-Natal and 13% of households in Mpumalanga.⁶⁵

Of serious concern is the state of bulk water and waste water infrastructure in the country. In 2011, a report by the South African Institute for Civil Engineering (SAICE) and the Centre for Scientific and Industrial Research (CSIR) reported that “*much of South Africa’s bulk water infrastructure is reaching the end of its life and will require upgrade or replacement*” and that “*a serious problem regarding bulk infrastructure is uncontrolled, high levels of pollution, especially in dams. Mingling pollutants near urban areas makes identification and penalisation of the many offenders extremely difficult.*”⁶⁶

The national government has linked its sanitation rollout to its housing delivery programme through its Housing Subsidy Scheme. This has meant that the same delays experienced in housing delivery are experienced in sanitation. People are forced to wait to be allocated a subsidy and a house in a housing development before their access to sanitation is improved. According to Kathy Eales, “*South Africa’s household sanitation policy is grossly inadequate. It speaks primarily to dry systems, and does not clarify roles and responsibilities around what to do when pits are full. National government under-estimated the scale of technical support required.*”⁶⁷

According to SAICE and the CSIR, although statistics reveal improvements in sanitation access, users are often not receiving the full benefit because of high failure rates for two main reasons. Firstly, most sanitation facilities are not compliant with appropriate technical design standards. Hence they are built in a manner susceptible to quick failure and extreme maintenance difficulties. Secondly, there is a consistent lack of communication with users on why and how to use these facilities, compounding maintenance problems. Further “*while great strides have been made in basic sanitation provision in South Africa, the infrastructure is in bad condition (for avoidable reasons) without much hope for improvement in the near future. Given the role of sanitation in preventing disease transmission and providing dignity to all, this is a serious health risk and critical problem.*”⁶⁸

Of Johannesburg’s vast informal settlements which are home to nearly a third of the city’s 3.2 million residents, for sanitation, 52% have dug pit latrines themselves, 45% rely on chemical toilets, 2% have communal flush toilets, and 1% use other communal sanitation.⁶⁹ These conditions are particularly hostile to vulnerable people.⁷⁰ For inadequate sanitation breeds opportunistic infections at a time when Johannesburg’s HIV rate has soared above 25% and in the last decade, cholera and diarrhoea epidemics have killed many tens of thousands of people, especially children.⁷¹

There is currently some confusion on sanitation provision since the function was moved over to the national DoHS from the DWA. The non-enclosure of toilets is symptomatic of the fact that since the function has been moved over to the DoHS, there has been a drop off in systemic and effective monitoring. It is clear that a regulatory function over this basic service is required from the DoHS.

64 Stats SA “General Household Survey 2010”, Statistical Release P03185 (May 2011) 25-27.

65 Tissington, K. Submission to Section Five Committee meeting on Governance and Basic Services.

66 SAICE and CSIR (2011). SAICE Infrastructure Report Card for South Africa., http://www.csir.co.za/enews/2011_jun/download/infrastructure_report_card_sa_2011.pdf, 14.

67 Kathy Eales in Bond, P. *The Neoliberal Loo*, 19 February 2008.

68 SAICE (note 66 above), 16.

69 Bond, P. “South Africa’s ‘rights culture’ of water consumption: Breaking out of the liberal box and into the commons?” in Johnston, B.R., Hiwasaki, L., Klaver, I. and Strang, V. (Eds) (2010). *Water, Cultural Diversity & Global Environmental Change: Emerging Trends, Sustainable Futures?* UNESCO, p 5.

70 Vulnerable: No-income households, poor population, Low-income households -headed households, Pensioner-headed households, Abandoned children, Homeless persons (children and adults), including street children, Children with disabilities (physical and mental), Persons (excluding children) with disabilities (physical and mental), Persons living in rural areas, Persons living in informal settlements, Persons living with and/or affected by HIV/AIDS, AIDS orphans, Non-nationals (refugees, asylum-seekers, permanent residents and other groups), Unemployed persons, Women, Girl-children, Female-headed households, Children (younger than 18 years), Older persons (60 years and over), Historically disadvantaged racial groups (African, Coloured and Indian), Detainees and prisoners. Please note that vulnerability is increased by the intersection of class, gender, race, age, sexual orientation, geographic location and other demographic factors, e.g. poor women from rural areas.

71 Bond, P. (note 69 above).

The Work of the Commission on Water and Sanitation

Children are our future.



**Water is Life. Sanitation is Dignity:
Accountability to People who are Poor**

6. The Work of the Commission on Water and Sanitation

6.1. Investigations and Findings on Complaints Received

In the run up to the 2011 local government elections, the Commission received two complaints about municipalities that built toilets without enclosures in their local communities. The first complaint was from the African National Congress (ANC) Youth League Dullah Omar region, on behalf of Makhaza residents against the Democratic Alliance (DA) led City of Cape Town. The second was from Gareth Van Onselen, on behalf of the DA against an ANC-led municipality, Moqhaka, in the Free State. As a Chapter 9 Institution, the Constitution mandates the Commission to operate without fear, favour or prejudice. In line with this mandate, the Commission investigated the complaints and ruled that both municipalities had violated the right to dignity.⁷²

In both findings, the Commission addressed the responsibility of the local municipalities to immediately enclose the toilets.

Later in that year, residents of Makhaza approached the Western Cape High Court for relief as the toilets remained unenclosed.⁷³ The court noted that ‘the SAHRC investigated the complaint that led to considerable public interest and media reports’ and affirmed the SAHRC finding, which the City disputed. The court found in favour of the applicants, ruling that the unenclosed toilets violated the right to dignity and privacy and that no provision was made for the elderly, people with disabilities and women, leaving them vulnerable to further violations of their rights. The court noted that central to service delivery is meaningful participation:

We are dealing with a poor vulnerable community, who met with the City in order to reach agreement on important issues regarding their day to day existence. In the circumstances can it be said that the City has complied with the Code in concluding the agreement with the community? Poor people enclosed toilets which were open it seems, in desperation to salvage some basic element of human dignity. They did not do so as evidence of an agreement.⁷⁴

The Commission’s findings also recognised the fact that the unenclosed toilets reflected a bigger problem facing millions of people who are poor – a lack of access to decent sanitation and a lack of a right-based approach to service delivery. The Commission thus made a strategic decision to link these two local-level complaints to the generic right to sanitation across South Africa by calling for national responsibility and accountability. In the Commission’s complaint against the City of Cape Town, the Commission asked the National DoHS, in conjunction with the DWA to intervene more actively on ensuring the eradication of the bucket system throughout the country. The judgement stated that

The National Department of Human Settlements in conjunction with the Department of Water Affairs should intervene more actively in all provinces to ensure that its stated policy of ensuring the eradication of the bucket system is achieved more expeditiously throughout the country. This intervention should strive for the phasing out of the communal toilets and ensure that all toilets that are installed are adequately enclosed.⁷⁵

In the second complaint against the Municipality of Mokhaqa, the Commission asked the DPME in the Presidency to ‘report to the Commission within at least three months on the quality of sanitation services delivered by local government across the country’.

⁷² For the finding from Makhaza see: <http://www.sahrc.org.za/home/21/files/Makhaza%20Finding%202010.pdf> ; the finding from the Rammulotsi see <http://www.sahrc.org.za/home/21/files/FS%20Open%20Toilet%20Finding.pdf>. Both findings were signed off by Commissioner Govender, who had provided strategic leadership on these cases.

⁷³ *Beja and Others v Premier of the Western Cape and Others* (note 45 above).

⁷⁴ *Ibid* Section 94.

⁷⁵ *African National Congress Youth League Dullah Omar Region (on behalf of Ward 95 Makhaza residents) v City of Cape Town*, File Ref No. WC/2010/0029, South African Human Rights Commission report, 11 June 2010

The DPME asked for a significant extension to which the Commission agreed. The DPME thus delivered a comprehensive report in two phases in 2012 and 2013, which also dealt with an analysis of the state of water and sanitation as well as government's plans to address the backlogs. The Commission took the findings from the two individual cases in the Western Cape and the Free State, as well as DPME's report and embarked on public hearings in every province, on the rights to water and sanitation.

It is worth noting that the starting point for the Commission's water and sanitation campaign was to ensure that our own practises reflected respect for people's dignity. To this end, the Commission designed a process to ensure that those responsible for the range of activities to be implemented as part of the national water and sanitation campaign constantly practised the listening skills needed to recognise and uphold people's dignity.

6.2. Department of Performance Monitoring and Evaluation

The Commission plays a vital oversight role in ensuring accountability and transparency of government. Given the importance of this function, the Commission saw the need to ascertain the status of access to water and sanitation in South Africa and the quality of the services provided. The Commission's Moqhaka finding thus ruled that the DPME provide a comprehensive report on the right to sanitation in every municipality across the country.

To produce this report, the DPME had to assemble an inter-governmental task team, consisting of the departments of COGTA, Human Settlements, Water Affairs and National Treasury. It thus addressed two key problems identified by the Commission, namely, the lack of real co-operative governance and the lack of adequate monitoring aimed at timely, effective remedy for the lack of rights. The DPME committed itself to the following in phases:

6.2.1. Deliverables

Phase 1 Deliverables:

- A fully populated and geo-referenced country wide community level classification of quality (adequacy and functionality) of sanitation services experienced by citizens using the Strategic Framework for Water Services criteria.
- An assessment of the quality and condition of existing sanitation infrastructure (inclusive of waste water treatment works).
- Identification of the settlements where the quality of sanitation service levels does not meet the above criteria, while also quantifying the types of investments and costs to bring sanitation service levels to acceptable levels.
- Key challenges hampering the attainment of adequate sanitation service levels in identified hotspots.

Phase 2 Deliverables:

- An institutional assessment of municipal technical and financial capacity to expand and sustain access to adequate and functioning sanitation services following an asset management approach.
- Establish the conditions required for a national performance monitoring framework for sanitation service delivery and clarify the regulation and/or monitoring of sanitation service delivery at a municipal level.
- Establish the roles and responsibilities for the provision of both technical support and support for community consultation, communication and the conclusion of variation agreements regarding norms and standards as interim sanitation delivery arrangements.

- Establish the policy, programme and legislative review implications of the recent ruling made by the Cape High Court and Commission for the delivery of quality basic sanitation services.
- Propose sanitation master plans linked to Water Services Development Plans with actions, timeframes and allocated resources to implement quality sanitation services in areas where they are lacking.

6.2.2. Main Findings of the Report on the Status of Sanitation Services in South Africa

In March 2012, at the Commission’s National Hearing in Human Rights Month in Cape Town, the DPME presented to the Commission its report on the Status of Sanitation Services in South Africa. The DPME also provided a summary of this report to communities, at each of the Commission’s provincial public hearings.

The DPME indicated that sanitation is fundamentally a human rights issue. It is about people’s well being and dignity and is directly related to health and economic activity. Without access to safe water, the health of adults and children can be seriously affected. A lack of access can also affect the ability to participate in economic activities and access other rights such as education.

The DPME further indicated that South Africa had made good progress in terms of sanitation provision. By 2010, the proportion of people without access to sanitation had reduced to 21% from 52% in 1994. South Africa had also achieved the MDG in relation to sanitation. However since 2009, South Africa has begun to regress. The findings of the report illustrated the following:

- a) In formal areas, 9% of the population have no access to any form of service, about 36% of all households in the informal areas have never received any services – in total, 11% of all households have no access;
- b) About 3.2 million households have broken infrastructure;
- c) The highest backlogs are in rural settlements of KwaZulu-Natal, Eastern Cape and the North West.

In May 2013, the DPME submitted its phase two deliverables to the Commission, which aimed to assess the technical and financial capacity of local municipalities. The DPME report highlighted the following:

- Of all employment positions at a local level in South Africa, 72% were filled. Only 61.5% of such positions were filled in Limpopo;
- 42% of all municipalities did not have a registered engineer in their employ;
- Provision in 23 municipalities (9%) was in a crisis state, with an acute risk of disease outbreak;
- 99 municipalities, (38%), were at high risk, with the potential to deteriorate into a state of crisis;
- Chronic delivery weaknesses were tipping into outright service emergencies in a growing number of municipalities;
- 46% of all municipalities were considered to be in crises regarding technical and financial capacity.
- There was inadequate involvement of communities in the planning and implementation of service delivery projects;
- Due to the lack of affordability of households to pay for maintenance, there was poor cost recovery in many district and local municipalities;
- There was inadequate health awareness and user education.

6.2.3. Analysis of DPME Reports

While the DPME report offers a comprehensive account of the state of sanitation facilities in the country, there is still much that is lacking or requires additional explanation and analysis. This critique is based upon a core agreement with the DPME’s statement that “[p]oor planning across government from a strategic

level right down to the micro level as well as inadequate resources for both the capital costs as well as on-going maintenance costs are some of the root causes of failure in regards to sanitation service delivery.”⁷⁶

The importance of the DPME report as a potential planning document is undeniable. Therefore, it is crucial that the data presented is sound and reliable. This will provide the best foundation for strong strategic planning that can inform sanitation backlog eradication efforts, as well as allowing a realistic estimate of the costs involved. These elements combined can then lead to a reversal of the failed attempts of the past to provide adequate sanitation services delivery to all South Africans.

At the outset, it is difficult to determine the exact source of the data the report uses to ascertain sanitation provision. According to the DPME main report,

*The national findings in this report were informed by in-depth analysis of the state of sanitation within each of the 159 Water Services Authority (WSA)... Satellite spot imaging was used to map 68 000 settlements and calculate population and household information. The settlements were then evaluated and updated according to their current sanitation service needs. Field work at the municipal level (not household), was done to profile the settlements according to the classification developed for the study.*⁷⁷

The report goes on to describe the types of information sources that were available to the DPME in gathering data on which to base its report, namely, the Water Services National Information System (WSNIS) based on StatsSA census data with annual adjustments for calculated service delivery and population growth. Notably, this data does not estimate the refurbishment, upgrade or operations and maintenance backlogs. StatsSA data is based on census data and the General Household Survey (GHS) data from 2002 to 2010.

For the purposes of the report to the Commission and the description of the six areas of need, the DWA Water Services Reference Framework (WSRF) data has been used as a basis for the analysis of the current situation. Although the report appears to indicate that the sources mentioned other than the DWA WSRF work were not used in deriving the data given in the report, the presentation given by the DPME at the Western Cape hearing states that a combination of various sources was used.

If a combination of sources was in fact used, discrepancies that may exist between the different sources are not set out in the report, nor is a rationale provided for resolving discrepancies. For instance, a discrepancy is found when the DWA WSNIS reported numbers for households with sanitation provision in April 2012 are compared to the DPME numbers derived from the WSRF.

Table 4: Sanitation Figures from DWA and the WSRF

Province	No. of Households with Sanitation Provision Below RDP Level (April 2012) ⁷⁸	No. of Households with Sanitation Provision Below RDP Level (March 2012) ⁷⁹
Eastern Cape	279,142	782,931
Free State	241,819	401,748

⁷⁶ DPME Presentation, Western Cape hearing, Slide 19.

⁷⁷ DPME (note 2 above).

⁷⁸ Reported by DWA WSNIS.

⁷⁹ DPME (note 2 above).

Province	No. of Households with Sanitation Provision Below RDP Level (April 2012) ⁷⁸	No. of Households with Sanitation Provision Below RDP Level (March 2012) ⁷⁹
Gauteng	425,347	145,487
KwaZulu-Natal	317,595	911,515
Limpopo	442,026	1,016,648
Mpumalanga	294,623	469,619
North West	191,215	638,263
Northern Cape	36,429	69,670
Western Cape	80,962	22,717

The wide disparity in the numbers above could be explained by a simple difference in the definition of the dataset if it were not for the figures given for Gauteng and the Western Cape, where the DPME numbers are approximately 1.5 to 3 times higher than those of the DWA WSNIS.

Still with regard to Gauteng and the Western Cape, another unusual characteristic stands out from the data reported by DPME, namely that there is no reported need for improvement in operation and maintenance or upgrading or extension of sanitation infrastructure in either province save for 90 households within the Mossel Bay Local Municipality in the Western Cape.

The same lack of need for improvement in operation and maintenance or upgrading or extension of sanitation infrastructure is reported throughout the whole of the Nelson Mandela Bay Metropolitan Municipality. Given the size and population density of these areas and the overall DPME finding that operation and maintenance and infrastructure extension or upgrading are areas in critical need of attention throughout the country, these figures would benefit from a demonstration that their veracity has been tested to assure that going forward they can be relied upon.

In her capacity as Commissioner responsible for this province, the Deputy Chairperson led the provincial office in site visits in the Western Cape Province. The site visits to Bonteheuvel and Strand in the City of Cape Town Metropolitan Municipality and Zwelethemba in the Breede Valley Local Municipality revealed numerous formal households that should have been counted as being in need of improved operation and maintenance or upgrading or extension of sanitation infrastructure.

In addition to the information independently gathered by the Commission, the DPME report states that the Presidential hotline has received a number of complaints from throughout the Western Cape regarding problems with drainage and sewer blockages. Moreover, the report lists the City of Cape Town as having no household, formal or informal, without adequate sanitation provision. The Commission site visits within the City of Cape Town have directly contradicted these reported figures.

Additionally, some information appears to be missing from the DPME report. In the Western Cape, no costing or readiness information is provided for the following municipalities:

- Bergrivier Local.
- Breede Valley Local.
- Cederberg Local.
- City of Cape Town Metropolitan.
- Drakenstein Local.

Complaints on water and sanitation across South Africa to the legal unit of the Commission indicate that there are problems with a lack of service delivery in areas where the DPME reports that sanitation service delivery has been achieved.

The Phase II report from the DPME was supposed to provide an institutional assessment of municipal technical and financial capacity to expand and sustain access to adequate and functioning sanitation services. While there was much information provided on the capacity and level of skill at a local level, the report did not provide an adequate analysis of the ability of staff to undertake the jobs for which they were hired, as educational qualification is not an indication of ability. The assessment of the vulnerability of municipalities was difficult to read and not fully transparent on how particular scores were obtained. Also, the analysis of the findings was not sufficient as more information was needed on what high vulnerability would mean for the functioning of the municipality and what the impact on communities would be, particularly for vulnerable groups.

The analysis of financial capacity and budgets did not look at the ability of a municipality to spend the allotted budget and did not draw any parallels between poor spending and a lack of skills at a local level. The report was effective in highlighting the need for greater operational budgets and the lack of inter-departmental collaboration, but much of the report provided background information, which was unnecessary and repetitive and the report did not speak to the human rights implications of the findings. Overall, a plan of action or implementation, with allocated timelines, must be developed for the recommendations of the report.

6.3. The Report by the Ministerial Sanitation Task Team

In the Commission's Makhaza ruling against the City of Cape Town, the Commission also ruled that the Departments of Human Settlements and Water Affairs needed to report on progress on the eradication of the bucket system. The Commission thus also considered the Ministerial Sanitation Task Team (MSTT) report.

On the 6 September 2011, the then Minister of the DoHS, Mr. Tokyo Sexwale, appointed a MSTT headed by Mrs. N.W. Madikizela-Mandela. The main purpose of the task team was to engage with communities and relevant stakeholders on the state of sanitation services in the country. The MSTT had the following objectives:

- To review and evaluate sanitation programmes as a key deliverable / contributor towards the development of sustainable and integrated human settlements;
- To investigate irregularities and malpractices in the implementation and delivery of sanitation facilities;
- Assess in all nine provinces, the prevalence and severity of the lack of appropriate norms and standards and the application of such in the provision of sanitation and toilet facilities; and
- To make recommendations on appropriate steps and actions to be taken to improve the implementation and delivery of sanitation programmes.

Using various methods of data collection, the MSTT conducted its assessments and in July 2012, produced a report entitled "*Review, Investigation and Evaluation of the National Sanitation Programme - Towards Continuous Improvement.*"⁸⁰

⁸⁰ Department of Human Settlements. (2012). *Review, Investigation and Evaluation of the National Sanitation Programme - Towards Continuous Improvement*, Ministerial Sanitation Task Team Report.

The report by the MSTT made the following findings:

- There is no coordinated response to sanitation delivery and problems;
- There is a lack of coordination between departments and different spheres of government, and no one department takes responsibility for the rollout of sanitation services;
- Service delivery is plagued by poor public participation;
- Wards councillors do not undergo proper inductions;
- There is a lack of education and awareness on health and hygiene in communities;
- There is no dedicated budget for sanitation at a municipal level. As a result, municipalities do not prioritise sanitation. Often, when a budget is allocated to water and sanitation, the entire budget is spent on water and none on sanitation;
- Many municipalities use funding that they receive, such as the equitable share, on maintenance and correcting problems as opposed to eradicating backlogs;
- The operational debt of some municipalities is so severe that, even if no further infrastructure were acquired, it could still be impossible to catch up with existing maintenance backlogs;
- Many municipalities have to deal with customers that do not pay for services. The equitable share does not take this into account;
- There is poor maintenance, evaluation and monitoring of sanitation services;
- There is poor technical capacity at a local level;
- There is no official management of indigent registers;
- There is poor management of health issues due to poor water and sanitation access.

Since the release of the MSTT report, it has been tabled with the Minister of the DoHS and Parliament. The Minister had promised to put in place plans to deal with backlogs and identified problems. In his 2014 State of the Nation Address, President Jacob Zuma stated that “Government has begun an intensive programme to eliminate the bucket system as part of restoring the dignity of our people. Phase one of the programme will eradicate buckets in formalised townships of the Free State, Eastern Cape and Northern Cape. Phase Two will eradicate buckets in informal settlements in all provinces.”⁸¹

6.4. Partnerships: Section Five Committee Meetings

In terms of section five of the Human Rights Commission Act, 54 of 1994, the Commission has the power to create expert advisory committees that have a particular focal point. The Deputy Chairperson of the Commission convened several section five committee meetings relevant to water and sanitation to date. In May 2011, the Committee looked specifically at governance and basic services. There was a particular focus on the need for government and the private sector to be held accountable for the delivery of basic rights.

The second section five committee meeting took the form of a roundtable discussion, which focused on basic services and the CEDAW.” (Written as ‘roundtable’ everywhere else in report). It was held in Cape Town on International Women’s Day 2012. 14 participants from ten civil society organisations met to look at the campaign on water and sanitation to ensure that a gender analysis is central to the campaign. It was noted that there was a lack of proper budgeting and will to push for the implementation of women’s rights. The interest and concern over the lack of rights of people who are poor, was reflected in the participation by section five committee members from organisations such as the Women’s Legal Project, the Social Justice Coalition and Black Sash, amongst others. The organisations also made submissions on the intersection of rights at the Commission’s National Water and Sanitation Hearing held in March 2012.

On International Women’s Day on 8 March 2013 a section five committee meeting entitled “Patriarchy, macro-economic policy, Socio-economic Rights and Gender Based Violence: Connecting the Dots,” was

⁸¹ The Presidency, State of the Nation Address by His Excellency Jacob G Zuma, President of the Republic of South Africa on the occasion of the Joint Sitting of Parliament, Cape Town, 13 February 2014, <http://www.thepresidency.gov.za/pebble.asp?relid=16912>.

convened. The aim of the meeting was to present the findings and recommendations of the report in order to canvas the findings in relation to structural causes such as economic policies which deepen poverty and inequality and increase vulnerability to gender-based violence. There was consensus on the need for the findings of the report to reflect the differential impact of the lack of rights and the underlying causes of poverty and inequality. In this section five committee meeting, members commented extensively on the draft water and sanitation report and provide suggestions on how the report could be improved. The report was welcomed as it dealt with many of the problems that civil society organisations were dealing with in communities on a daily basis.

The most recent section five committee meeting was convened in February 2014. It focused on the tabling and public launch of this report. The meeting focused on how to ensure that the demands the Commission heard at its hearings are supported by civil society so Parliament and Government will respond to addressing the rights of people who are poor. There were concrete ideas on how to ensure that the Commission is able to take the report's recommendations back to the people of South Africa, as well as areas for potential litigation.

6.5. The 2012 National Water and Sanitation Hearing

On 14 March 2012, the DPME submitted a report to the Commission's National Hearing. In the same week of the National Hearing, the Commission held site inspections and meetings in the communities of Rammulotsi in the Free State and Makhaza, in the Western Cape, the two communities where unenclosed toilets were identified. The goal was to assess the progress made in implementing the Commission's findings in the Rammulotsi and Makhaza cases. It also enabled community participation, so that government officials were able to see and hear first-hand community concerns regarding the delivery of water and sanitation. The Commission facilitated the accountability of the municipality to community members to ensure that remaining problems related to the right to sanitation were addressed.

The inspections and meetings were attended by government representatives such as the mayor and local government officials as well as the complainants, members of the communities and local organisations. The site inspections revealed that while the two municipalities had made significant progress in attempting to comply with the Commission's ruling to enclose the toilets, there were still problems in how this had been done.

For example, there were facilities with no connections to water pipes or taps, no provision was made for persons with disabilities and no lighting was provided. In addition, in areas surrounding the now enclosed toilets, there was evidence of a lack of planning and prioritisation by local government authorities with regard to the provision of water and sanitation, as many portable toilets had not been cleaned and the waste not collected for weeks. On site, and at the meeting convened at the end of the inspections, the Commission was able to ensure that local government constructively responded to the concerns of the local communities. Local officials made significant commitments to addressing the problems identified.

At the Commission's National Hearing a few days later, both communities and municipalities were well represented. Representatives of the two communities presented their submissions followed by submissions from other CSOs, NGOs, academics and engineers from the private sector, who had been contracted by local government. The inter-sectionality of human rights was reinforced by participants who addressed the adverse and disproportionate affects of a lack of sanitation and water on women, school-going children as well as those who were elderly or had disabilities.

During the National Hearing, officials from local government responded to the community submissions, before the DPME presented its report to the Commission. The DPME reported that 16 million people do not enjoy the right to sanitation and R45 billion is needed to address the backlog and upgrade infrastructure.

In summarising the hearing, the Commission's Deputy Chairperson asserted the indivisibility and interdependence of ESR. In addressing the problems identified in the DPME report on sanitation, she argued that there should be no trade-off between ESR in national, provincial or local budgets. She maintained that it was crucial that both government and those it contracted to deliver and maintain services had to be monitored, and that these entities and government departments should be held to account for the lack of delivery of basic ESR. In addition to asking for government accountability, she pointed to the nexus of government and the private sector, as the private sector is notably a significant user of water and sanitation services.

The question remains therefore, how much do businesses use, and at what cost and to whom are they accountable? In addition, the private sector is often contracted to provide services and must be held accountable in circumstances of non-delivery. Municipalities sign service delivery agreements or contracts with private entities, which must be made available for public viewing on municipal websites as per the Municipal Service⁸² and Municipal Finance Management Acts⁸³. Currently, not one municipality has these contracts available on their website. In fact, the High Court noted in the Makhaza matter:

*Before a Municipality enters into a service delivery agreement with an external service provider, it must establish a program for community consultation and information dissemination regarding the appointment of external service provider and the contents of [the] service delivery agreement must be communicated to the local community through the media (section 80 (2) of the Act).*⁸⁴

6.6. Provincial Hearings

A series of provincial hearings were held from August to December 2012, through which the Commission sought to give effect to the constitutional commitment to public participation on the right to access to water and sanitation and the DPME would be given a platform to present the findings on the state of sanitation in the country. Communities facing water and sanitation problems were identified by provincial Commission offices and public hearings were hosted in these communities. Stakeholders from civil society, government, research institutions and the private sector were invited to attend and provide submissions on the right to water and sanitation.

In research, a public hearing can best be described as a focus group which is intended to stimulate discussion among participants and bring to the surface responses that otherwise may lay dormant. Focus groups offer unique insights for critical inquiry as a deliberative, dialogic and democratic practice. In the context of human rights, a focus group as a problem posing formation serves to identify and interrogate the lived experience of the poor and change specific lived contradictions through ensuring that the voice of the poor is heard.

The aim of the hearings was to enable local communities to:

- Interrogate the DPME report relating to their province and municipalities from their own lived experience.
- Share their analysis of delivery of these rights, the initiatives they have taken to access their rights and the solutions they have proposed.
- Reflect on the differentiated impact of the lack of rights, for example, on gender-based violence and gender equality.
- Engage with and hold accountable local provincial and national government to ensure the right to water and sanitation is realised.

82 Municipal Services Act, 32 of 2000.

83 Municipal Finance Management Act, 56 of 2003.

84 *Ibid* section 3.

- Enforce government accountability to regulate and monitor private entities contracted to deliver the services in a way that upholds human rights.
- Identify what businesses pay, in comparison to households, for their use as well as pollution of water.

Table 5: Schedule and Location of Provincial Hearings 2012

Date	Province	Location
29 August	Mpumalanga	Oakley Community Hall, Bushbuckridge
12 September	KwaZulu-Natal	Nxamalala Community Hall, KwaHaza, uMngeni Municipality
20 September	Limpopo	Jane Furse Comprehensive School Hall, Sekhukhune
27 September	North West	Bataung ba Hlalele Hall, Maboloka
9 October	Northern Cape	Keimoes Town Hall, Kai Garib Municipality
18 October	Free State	Selosesha Civic Centre, Selosesha, Thaba-Nchu
14 November	Eastern Cape	Happy Rest Hall, Alice, Nkonkobe Municipality
26 November	Western Cape	Zwelethemba Community Hall, Worcester, Breede Valley Municipality
10 December	Gauteng	Suurman Community Hall, Ward 8, Hammanskraal

The process and development of the public hearings entailed the production of a concept document. The purpose of the concept document was to stimulate thinking by respondents around water and sanitation as human rights and linked these to ESR. The written submissions together with the outcomes of the hearings formed the basis for the analysis. Although, the content of the submissions and the oral testimony of the hearings were invaluable, they were nonetheless limited in respect of content validity. To overcome this limitation, the research analysis was supplemented by extensive secondary research of government documents, academic texts and international literature.

6.6.1. Findings from the Provincial Hearings on the Right to Water and Sanitation

There is more than enough water in the world for domestic purposes, for agriculture and for industry. The problem is that some people—notably the poor—are systematically excluded from access by their poverty, by their limited legal rights or by public policies that limit access to the infrastructures that provide water for life and for livelihoods.⁸⁵

The findings presented in this section are based primarily on the Commission’s provincial hearings that were held between August 2012 and December 2012 across the country. They emerge from testimonies of residents and representatives from civil society organisations. The Deputy Chairperson and Commissioners co-chaired the hearings and facilitated accountability through securing responses from government departments. The findings are grouped into themes relating to access, the quality of the service, the quality of the water and infrastructure and the impact of a lack of access to water and sanitation. The results indicate that despite government’s belief that access to water and sanitation is substantial in South Africa, many residents, particularly in the poorer areas of South Africa, suffer from a complete lack of access or only have access to non-functional or broken infrastructure. The Commission also found that

⁸⁵ UNDP, Human Development Report 2006.

there is a disproportionate impact on marginalised groups of people such as women, children and people with disabilities.

6.6.1.1. Access to Water and Sanitation⁸⁶

Despite the flattering statistics recently presented by government on the realisation of the right to water, the Commission's provincial hearings illustrate a starkly different reality. Complaints were received in all provinces of a complete lack of access to water and sanitation. The lack of access can be attributed to one of the following:

- a) A lack of access to any infrastructure;
- b) Access to infrastructure that has never been operational; and
- c) Access to infrastructure that is no longer in working order.

In some provinces, residents complained of a complete lack of access to infrastructure or services, where water is accessed via reservoirs, open water sources such as rivers or via water tanks erratically supplied by the municipality. In the Eastern Cape, residents complained of a reliance on dams for water provision.

In Bushbuckridge in Mpumalanga, one resident spoke of water pipes passing through the stands in the community without bringing access to water to their homes and another spoke of accessing water via open water sources, where they were often threatened by crocodiles. A community from KwaZulu-Natal was only able to access water via water tanks delivered once a day, in the morning, and were often forced to buy water.

Many residents in Gauteng complained of a lack of access to water, but did not specify from where water was being obtained. A resident from Gauteng explained that *“there were water pipes installed but the projects were never completed. Now people are being asked to pay R15 per month for service of water. There was dam built in Temba but there was never water filled in that dam. Now, the community has become impatient and have begun defaulting on the R15 payment.”*⁸⁷ A representative from the Gauteng Department of Local Housing (GDLH) explained that the delivery of services in Gauteng is difficult because the province continues to grow with immigrants from other provinces.⁸⁸ However, many of the communities represented at the Gauteng hearings have been without access prior to 1994. Similarly, a resident in the North West indicated that water meters were installed in their community at a cost of R150, but no water had been delivered. World Vision South Africa indicated in a written submission that four villages in ThabaNchu did not have water connections despite the fact that there is existing bulk water infrastructure in the area.⁸⁹

The Social Justice Coalition (SJC) submitted that while government statistics might indicate a high level of access to water and sanitation, the norms and standards being used to ascertain access levels are incorrect. *“Many local and provincial governments have no real understanding of how many people live in settlements, particularly in informal settlements. Without having this information, it is impossible to provide services to all,”*⁹⁰ explained the SJC.

The level of access to sanitation in most communities remains dire. Communities in Rawsonville and Ceres in the Western Cape and the Moqhaka municipality in the Free State are using buckets for their sanitation needs, while in Rosemary (extension one) in Gauteng, residents have taken to digging holes to use as

86 This section looks at the level of access to water and sanitation services in the communities visited by the Commission. It assesses access to a basic service and functioning and maintained infrastructure.

87 Submission from resident, Gauteng hearing, 10 December 2012.

88 Presentation by Mr. Patrick Ngope (Gauteng Department of Local Housing), 10 December 2012, Gauteng Hearing.

89 Submission by World Vision South Africa, 25 October 2012.

90 Submission by Social Justice Coalition, Western Cape hearing, 26 November 2012.

toilets. Also common, is the use of unventilated pit latrines (UVIPs) in communities in the Eastern Cape and the North West.

Most common in most provinces, were complaints of non-functioning or defective infrastructure. The SJC stated at the Western Cape hearing that,

There is currently no maintenance or cleaning of toilets and standpipes. Many people are using one facility and because there is no maintenance, taps and toilets remain broken for long periods of time. There is a lack of monitoring by government to ensure that toilets and taps continue to work properly and are cleaned regularly. This also applies to outsourced services – even though those private companies are paid but not meeting their requirements and government is not checking to see that they are doing so.⁹¹

This view was reiterated by residents in the Western Cape and other provinces, who complain of poorly erected infrastructure, broken facilities or facilities in poor working order. Zwelethemba residents complained of blocked drains in their area, which are infested with mosquitoes and other insects. A resident from Mpumalanga complained “there are about 400 toilets built in our area but they are not working, persons can [not] go outside to help themselves while the toilets are there, and some of them are locked. The toilets are not well built and we are afraid people will get hurt, can we please get help.”

Community Development Workers (CDWs) testified that in communities in the Free State there is an overflow of sewerage in the streets and leaks from water pipes. “VIPs [Ventilated Improved Pit Latrines] are not cleaned and the water from the rain seeps in and they overflow and they become dirty and infected. The troughs become filled and the roads become un-navigable,”⁹² stated one CDW, while another complained that VIPs are not durable and easily sink. Another CDW stated that when vehicles drive over pipes, they break and are never repaired. Similarly, residents from Keimoes in the Northern Cape testified that the municipality does not maintain or clean the toilets that were erected in their community. As a result, community members broke down the toilets as they were deemed unhealthy and there was a stench from them.

A resident at the Gauteng hearing stated that “there are no sanitation facilities. There was a forum for water in the [North West] to ensure that there are water services in the community. Toilets were built within a 200 meter radius but they were not properly built and now the community has begun to build their own pits,”⁹³ while another resident from the North West stated that “the sewerage smells so bad that you cannot even eat.”⁹⁴

Mostly, communities complained of broken taps, pipes (reticulation systems) and toilets, which were never maintained or repaired by municipalities. Therefore, national statistics might indicate a higher level of access than is actually enjoyed in reality. If infrastructure for a service is provided, it seems to be considered by government that the right has been realised, despite the fact that there is no access due to non-functional infrastructure and systems. In addition, evidence shows that some communities are still being charged for services that they do not receive.

Equally concerning is the state of water and waste water treatment plants across the country. Municipalities and residents from all provinces complained of the poor state of treatment plants. Most common were complaints that the facilities were old with little or no maintenance and not designed to meet the needs of a growing population. In addition, there were some complaints about the over-use of dams’ and lack of storage space for water.

91 *Ibid.*

92 *Submission from Community Development Worker, Free State Hearing, 18 October 2012.*

93 *Submission from community member, Gauteng hearing, 10 December 2012.*

94 *Submission from community member, North West hearing, 27 September 2012.*

A municipal manager in the North West indicated that people in that municipality only get water in the mornings and not the evenings, a problem that would only be solved by the refurbishment of water treatment plants in Letlhabile and Madibeng. A representative from the GDLH also complained of the facilities in Gauteng, stating that *“the waste water treatment plants are running at either full capacity or over-flowing. There are only about three in the province that are designed to take their current load.”*⁹⁵ Representatives from Free State municipalities shared these views on the water treatment plants as well as the poor state of reticulation and water storage systems.

A representative from the National Taxpayers Union added that *“only 33 sewerage works are completely functional in the country. In the Free State there isn’t one that is working – and this is contaminating our water sources and is a problem, particularly for people downstream.”*⁹⁶ In Marquard in the Free State, the water purification plant was supposed to be upgraded but the contractor demolished the old plant and did not build the new one. A representative from the Amatole Water Board in the Eastern Cape stated that *“infrastructure is poorly located, inadequate and under-maintained.”*⁹⁷

6.6.1.2. Quality of Water and Infrastructure⁹⁸

When considering quality one must consider the quality of infrastructure and the service provided. The evidence above illustrates that the quality of treatment plants, bulk water supply, reticulation and water storage systems are poor and in disrepair across the country. Further testimonies from communities show that sanitation systems are in a very poor condition and this is impacting on their well being. In many areas, sewerage systems and VIPs are no longer functional and municipalities have not made an effort to repair them. For example, in an area in Gauteng, a community member confirmed that toilets were built in the area, but they were not properly built and the community has now begun to build their own pits. He also appealed for the installation of water pipes so that the community would have access to water.

Various community members across the country complained of poor workmanship by contractors that were never repaired and no action was taken by government to hold the contractors accountable. In Mpumalanga, a pipeline between Mzoka and Hoxani was not connected well by the contractor and currently remains in disrepair. Similarly in the Free State, a community member submitted that *“money was made available to erect toilets. The process was rushed and the toilets never functioned. They are still not functioning.”*⁹⁹ Two municipalities mentioned the need for assistance with water testing.

Residents also complained of the lack of blue¹⁰⁰ and green¹⁰¹ drop certification in their respective provinces. The North West Department of Environmental Affairs complained that only two municipalities have blue drop certification in that province and that there was a responsibility of the municipality to ensure that sewerage systems did not pollute water supplies. *“The reason many other municipalities do not have blue drop certification, the water is being polluted by sewerage. It is good to have blue drop certification as it will attract investors.”*¹⁰² A similar complaint was received in the Free State.

95 Submission from community member, Gauteng hearing, 10 December 2012.

96 Submission from National Taxpayers Union, Free State hearing, 18 October 2012.

97 Submission from Raymond Bukubukwana, Amathole Water Board, Eastern Cape hearing, 14 November 2012.

98 This section provides testimonies on the quality of the water and sanitation infrastructure installed by municipalities and the quality of the water provided.

99 Submission from Resident, Free State hearing, 18 October 2012.

100 Measures the quality of drinking water.

101 Measures the performance of waste water treatment works.

102 Submission from the North West Department of Environmental Affairs, North West hearing, 27 September 2012.

6.6.1.3. Governance¹⁰³

Funding for the delivery of basic services is provided to local municipalities by the respective national government departments. The Municipal Infrastructure Grant (MIG) is a conditional grant to municipalities designed to facilitate the eradication of basic services backlogs and cover the capital costs of infrastructure rollout to predominantly poor households, although beneficiaries of the grant may also be municipal services or institutions used extensively by the poor or businesses which are run by the poor.¹⁰⁴ The calculation of the MIG uses a formula which takes into account the number of water and sanitation backlogs in the municipality, the water and sanitation allocation amount and the total number of backlogs in South Africa.

It is important to note that often municipalities are not sufficiently capacitated to plan innovatively and effectively around the MIG process, and poor planning results in service delivery targets not being met, MIG funding not being spent efficiently or not being spent at all. Thus, often municipalities that most need the funds are least able to spend them.¹⁰⁵ In addition, if a municipality does not spend its allocated grant in a year, there is a great possibility that the funding will be reduced in the following year. In this way, less capacitated municipalities are at a great disadvantage.

There were complaints from all provinces on the lack of effective implementation of projects and monitoring by government departments. Not surprisingly, most criticism was directed at ward councillors and municipalities, as the nearest face of government, for a lack of monitoring and action to solve problems. Even with the lack of decent housing, which is a national competency, anger is directed at local government representatives. Community members complained of non-functioning water and sanitation systems that were ignored by ward councillors and municipalities. A North West resident stated at the hearing that “we are seeing the municipality for the first time today. When they have meeting the councillors don’t attend and then come here with just speeches. We have got water meters but no water.”¹⁰⁶ This view was continually reiterated by community members complaining of disinterested ward councillors.

In addition, there was a lack of monitoring by government of the work of contractors. As such, contractors often under-performed or violated the conditions of their contracts with no follow-up or recourse. There were also allegations of corruption levelled at government officials. A complainant from Mpumalanga stated the following:

*I hear you talking about sanitation, it’s true our households need toilets and we do not have them. Government has contractors to build the toilets but the contractors are not doing what government expected from them. For example, in 2006 the contractor was given a tender to build toilets but those toilets did not have proper foundation and they are falling so where is development which government is talking about in this situation? I would like to know from the responsible officials. I don’t see any supervision and monitoring from government and if it is there, it means those who are there are corrupt.*¹⁰⁷

A complainant from the North West similarly stated:

*We have had three phases that were promised to give us the water but we have nothing. And the reason we are not getting the water because councillors are giving people tenders for water and they are not delivering. So there are people who have sub-contracts but they are officials so the service is very slow because their favourite people are getting favours.*¹⁰⁸

¹⁰³ This section deals with the budget allocation for the provision of water and sanitation services, grants provided by national government and ability of municipalities to spend the allocated budget.

¹⁰⁴ DPLG, “Policy Framework for the Implementation of the Municipal Infrastructure Grant (MIG)” (5 February 2004) (Policy Framework), p. 3: <http://www.DPLG.gov.za/subwebsites/mig/docs/2.pdf>.

¹⁰⁵ Tissington (note 25 above).

¹⁰⁶ Submission from resident, North West hearing, 27 September 2012.

¹⁰⁷ Submission from resident, Mpumalanga hearing, 28 August 2012.

¹⁰⁸ Submission from resident, North West hearing, 27 September 2012.

The SJC also stated that “there is a lack of monitoring by government to ensure that toilets and taps continue to work properly and are cleaned regularly. This also applies to outsourced services – even though those private companies are paid but not meeting their requirements and government is not checking to see that they are doing so.”¹⁰⁹

Many municipalities blamed problems at a local level of the lack of funding for the provision of services and the repair and maintenance of water and waste water treatment plants. For many of the treatment plants, it will cost millions of rand to upgrade and maintain. A representative of the Masilonyana municipality explained that the municipality “depends on conditional grants from infrastructure development and sometimes uses equitable share. The [MIG] is one of the major funding sources but it is not sufficient.”¹¹⁰

A representative from the North West DWA reiterated that “most of the time the municipality does not have a budget because people don’t pay for their services. The National Treasury therefore must allocate sufficient money to local government.”¹¹¹ Several CSOs, however, argue that the availability of funding is not the problem, but rather the allocation of the budget to specific priorities.

6.6.1.4. The Impact on Intersecting Rights¹¹²

a) Education

A lack of access to adequate water and sanitation impacts on most peoples’ right to education, health and environment. A lack of access to water meant that communities have no means of ensuring personal hygiene or caring for ill family members and friends. There were numerous additional complaints about the quality of the water causing illnesses and cases where communities were sharing water with their livestock and other animals, causing illness.

In Mpumalanga, a resident complained that they “do not have water in our area at Nkomeni. And we are drinking the same water with cows. Elder persons are sick [as they are] using outdated and broken taps.”¹¹³ A resident from the Free State attested “when the water from the fields gets depleted household animals and livestock then go into townships and drink from where people drink. Then diseases are spread to people, especially children and this is spread through water and food.”¹¹⁴ In the Eastern Cape, “communities without access to clean drinking water are left to share unsafe drinking water with domestic animals.”¹¹⁵ Similar complaints were received from the North West, Mpumalanga and KwaZulu-Natal.

There was great concern articulated by most communities about the state of access to water and sanitation in schools, which was impacting on the right to education, particularly for girls. All provinces experienced cases of a lack of access to water in schools. Mr. Trevor Malaudzi of the South African Water and Sanitation Academy articulated many of the problems associated with water and sanitation and access to education:

- Many learners do not drink water at all during the day while at school and often become dehydrated and constipated.
- Learners also don’t have water and soap to wash their hands.
- Toilets in schools are so filthy that the children cannot sit down when they want to use the facilities.

¹⁰⁹ Social Justice Coalition (note 87 above).

¹¹⁰ Submission by the Masilonyana municipality, Free State hearing, 18 October 2012.

¹¹¹ Submission by the North West Department of Water Affairs, North West hearing, 27 September 2012.

¹¹² This section speaks to the impact of a lack of access to water and sanitation on other human rights, particularly economic and social rights.

¹¹³ Submission from resident, Mpumalanga hearing, 28 August 2012.

¹¹⁴ Submission from resident, Free State hearing, 18 October 2012.

¹¹⁵ Submission from resident, Eastern Cape hearing, 14 November 2012.

- Infrastructure is also inadequate: there are too few toilets for the number of learners.
- Girls do not have access to sanitary towels.

Equal Education had similar concerns, stating that “the lack of sanitation has a huge impact on school attendance, especially for girls,” and “diarrhoea is also a major problem that leads to deaths and high absenteeism.”¹¹⁶

Equal Education also referred to a study that they conducted on the state of water and sanitation in schools. One of the testimonies presented to them stated that,

The toilets at my school are very dirty and the situation is affecting the students. The students don't go to the toilets as a result because they get disgusted so we use [the] toilet when we are at home in the morning and again after school.”¹¹⁷

Furthermore this testimony continued,

There is no toilet paper in the toilets. Paper is bought, but it is kept in storage and then disappears. There are about 1200 to 1500 pupils per school in Khayelitsha. Of the 12 schools, only one had soap and toilet paper. Toilets are only cleaned on Wednesday and Fridays. Sometimes toilets are very dirty on Monday as school has been used during the weekend. There is no emergency access to sanitary towels.”¹¹⁸

b) Health

Also common was the impact of poor sanitation and associated infrastructure on the health of communities. A lack of adequate sanitation facilities means that people are often forced to defecate in fields and other open spaces. Facilities that are provided are often not functional and either do not flush or are overloaded. Sewerage systems are not maintained and raw sewerage spills onto streets, causing severe health problems, particularly with children and the elderly.

A presentation in KwaZulu-Natal by the Water Caucus explained that open defecation and poor sanitation facilities like leaky sewers impact on the quality of water in rivers, groundwater and the sea, which have high levels of cholera. It takes a long time to repair these and people are often infected by the poor water quality. A resident from the North West complained that “we have servitude pipes that are open and the stench is unbearable,”¹¹⁹ while another criticised the municipality, “before the municipality was established in Jericho we had water. Then the municipality came to give us water but they gave us dirty water and most of the people are sick. Water comes from a pit. Another project was supposed to give us better water but has been abandoned. We are also using disused pipes as toilets.”¹²⁰ A submission by the Free State Provincial Department of Health states that “as it stands, after the rainy season, we get lots of complaints of illnesses, mainly diarrhoea. Human waste will wash out of sanitation facilities and sometimes go into houses. At this time, medical facilities will be overstretched.”¹²¹

Access to adequate water and sanitation as well as other resources is also a problem for primary and tertiary health care facilities, particularly in rural areas. As such, when there is an influx of people with illnesses due to a lack of access to proper water or sanitation, the health care facilities often cannot cope. There were also numerous complaints at the lack of accessible 24-hour health facilities.

¹¹⁶ Submission by Equal Education, Western Cape hearing, 26 November 2012.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

¹¹⁹ Submission from resident, North West hearing, 27 September 2012.

¹²⁰ Ibid.

¹²¹ Submission by Free State Department of Health, Free State hearing, 18 October 2012.

c) Environment

A few communities complained of the environmental impacts of poor sanitation and the quality of water sources. Most communities complained of the pollution from raw sewerage or sewerage plants and the impact on natural water sources. This was particularly a problem in the North West and Free State.

The Free State Department of Environmental Affairs mentioned that its responsibility was to ensure that all developments were sustainable and in line with the ecological integrity of the area but that the provision of sanitation does not equate the creation of a healthy environment. There were many problems with poor management of human waste. The department suggested that the solution was to integrate the development water and sanitation provision and the environment. A representative from the National Taxpayers Union indicated that there is not a single river that is not polluted in this country from acid mine drainage.

Box 2: Lack of Access to Safe Drinking Water in Carolina, Mpumalanga¹²²

A submission received from the Lawyers for Human Rights (LHR) at the Commission's Mpumalanga hearing, illustrated the impact of mining activities on water quality and provision. The LHR represents the Silobela Concerned Community, a voluntary association comprising of some 150 members, and all of whom are residents in Carolina. Carolina residents became aware of a problem with their water around January 2012 due to reported fish deaths in the Boesmanspruit Dam, which services Carolina's water supply. The tributaries leading to the dam are surrounded by various mining operations that leaked high levels of manganese, aluminium, iron and sulphate into the town's main water source. A water quality survey conducted on 11 January 2012 by the local municipality showed that the water being supplied to the residents was unfit for human and animal consumption, exceeding both the South African standards for humans as well as those of the WHO.

In response to these findings, the local municipality created a water task team and a rapid response unit. Their response to the crisis however was wholly inadequate. To warn the residents that the water was contaminated, communication was done through loudhailers, radio announcements, posters, pamphlets and media briefings. No pamphlets were distributed amongst the poorer community in Silobela and as a result residents in Carolina continued to drink the tap water and some became very sick, seeking assistance from the local clinics and hospital.

To address the fact that the tap water was unfit for consumption, tanks (or "jojoes") with a temporary supply of water were placed in and around Carolina in February 2012. Approximately 10 tanks were haphazardly placed in Silobela with no access for those living in the furthest section of the township, including Silobela extension comprising of RDP housing specifically allocated to elderly and disabled people. Tanks that were supposed to supply replacement water were not filled regularly and residents were not provided with sufficient water (at the most 5 litres per person per day, which residents had to walk up to 3 km to access).

122 Submission by Lawyers for Human Rights, 4 September 2012

The situation led to mounting frustration and in May 2012 service delivery protests erupted in an already tense and fraught environment. These led to the damage of the water tanks with the result that some residents were arrested and charged with public violence and malicious damage to property. After these protests, the delivery of water in Silobela was almost non-existent leaving thousands of residents without access to water. LHR intervened by writing numerous letters to the Minister of Water Affairs as well as the local municipality asking for their urgent attention, engagement and a supply of water in line with minimum legal standards. Unfortunately no responses, positive or otherwise, were received.

With the residents facing dire infringements of their constitutional rights to water, dignity, and in light of the fact that no meaningful response was being received, LHR, in conjunction with the Legal Resources Centre (LRC), launched urgent court proceedings on the basis that the minimum legal standards for the supply of water had not been met. In July 2012 the North Gauteng High Court ordered the Gert Sibande District Municipality to provide temporary potable water to the residents of Silobela, Caropark and Carolina Town within 72 hours of the order. The court also ordered that meaningful engagement take place between the municipality and the residents of Carolina.

The municipalities brought an application for leave to appeal against the decision. At the same time LHR and LRC were successful in an application asking that the original order be executed pending the appeal process. The municipalities filed an application for leave to appeal against the order that the original order be executed pending any appeals. They were unsuccessful, and were again ordered to immediately implement the original order. The order required that the municipalities immediately provide temporary potable water in line with the minimum legal standards within 72 hours of the order. The order also required meaningful engagement between the municipalities and the applicants.

However, since the order was handed down, the municipalities have not engaged with the residents, nor have they responded to a letter by the resident's legal representatives. A few residents were made accidentally aware of the media briefing in which the MEC of CoGTA announced that the tap water was fit for human consumption. To date no public announcement has been made to the residents, no question and answer session has been held, no tests results have been made available, no spokesperson or official has been identified in order to direct questions to, no information has been made available on what methods were used to render the tap water fit for consumption and no information has been made available on what efforts have been made to upgrade the water treatment plant.

During the 2014 section five committee meeting of the Commission, after the lawyer working on this case presented the challenges of getting basic information, the Committee discussed the need for government to protect poor people against mining companies and agribusiness who pollute the water. Government also needs to ensure transparency and accountability.

6.6.1.5. A Human Rights-Based Approach¹²³

In addition to being non-responsive, communities and CSOs complained that government does not engage sufficiently with communities and that there is complete lack of communication and access to information. There was a lack of education and awareness on peoples' rights and on the correct usage of the facilities that were provided by local government. This lack of a rights-based approach to service delivery results in many inappropriate decisions by local government such as the location of sanitation

¹²³ This section looks at the level of participation of communities in service delivery projects and the transparency and level of access to information that these communities have regarding project-related plans.

facilities (along busy roads in the Western Cape) and unenclosed toilets (in the Western Cape and Free State).

Members of the community stressed how keen they were to be given greater opportunities to participate in municipal decision making processes in the water services sector.¹²⁴

Residents in the Free State indicated that many problems between local government and communities would be avoided if communication was improved. One Free State complainant stated that,

People are still being charged a basic amount by the municipality even though there is no water or maintenance. The biggest problem is the lack of communication. There was a High Court judgement a few weeks ago on communication. I would like to ask the Commission to speak on our behalf to the municipality because we have written and tried to communicate but to no avail.¹²⁵

Communities in the Eastern Cape also expressed unhappiness at the lack of access to information and participation of residents in development of policy and decision making on service delivery. One resident indicated that the municipality only consulted them during elections.

A resident in the Western Cape stated that “[d]epartments at different levels and spheres of government are not talking to each other to solve these problems. Government is also not talking to communities to assess the problems. Government is obliged to meaningfully engage with communities – it is important to access delivery and maintain services, but this is not being done.”¹²⁶ Another Western Cape resident explained the “participation is not just a dissemination of information, it is an engagement process. The language for water management is not must be made accessible and participation must be more meaningful.”¹²⁷

Importantly, many residents expressed disappointment at the lack of training on the use of water and sanitation facilities, particularly for children. A resident in the North West stated that “we don’t have tissue paper, we are using newspaper. Some people who have VIPs, they were not educated on how to use them and are still using newspaper instead of toilet roll.”¹²⁸ A resident in the Free State went further by stating that “public servants must be given a workshop in human relations and how to deal with people [and] on communication.”¹²⁹

6.6.1.6. Impacts on Marginalised Groups¹³⁰

A lack of access to basic services almost always has an ensuing impact on vulnerable and marginalised groups. Extensive research has shown that a lack of access to water and sanitation impacts greatly on women and children, particularly girls, people with disabilities and farm labourers.

Many of the reports of impacts on women and girls involve illness or violence. In some cases, women and children fall ill due to the lack of access to water or access to poor and unhealthy sanitation facilities. For example, a complainant in the Western Cape stated that “people have to go to bushes to relieve themselves and this exposes women and children to sexual violence, especially rape. Also, people are not reporting rapes

¹²⁴ Report from the Eastern Cape hearings.

¹²⁵ Submission from resident, Free State hearing, 18 October 2012.

¹²⁶ Submission from resident, Western Cape hearing, 26 November 2012.

¹²⁷ Ibid.

¹²⁸ Submission from resident, North West hearing, 27 September 2012.

¹²⁹ Submission from resident, Free State hearing, 18 October 2012.

¹³⁰ This section assesses the impact of a lack of services on vulnerable and marginalised groups or people that have historically been denied access to services and rights.

because police do not follow up on the cases. Most sanitation facilities provided use lots of chemicals and the community is not made aware of the impact of these chemicals on their bodies.”

A resident of the North West also highlighted this problem, stating that,

Squatter camps do not have toilets and ladies have to go to the fields and they are raped. I hope that the municipality will look at these problems but also hope that the SAHRC will assist. Information on rapes can be obtained from the police but we do have a case where a woman was raped and murdered. The problem in the shanties [is] we need toilets at every household because some of our elderly people, especially women are raped at night.¹³¹

A representative from a wealth training organisation in Gauteng did research on the experience of female learners and access to sanitation. She found that the toilets are small and do not provide adequate privacy. Girls are not sure how to dispose their sanitary towels at schools as there are no facilities to assist as they were taught. Absenteeism of girls increases in these circumstances.¹³²

Equal Education presented on the impact of a lack of sanitation facilities for girls in schools and found that *“the lack of sanitation has a huge impact on school attendance, especially for girls. Girls are not provided with sanitary towels and bins, so at least once a month girls do not go to school. Diarrhoea is also a major problem that leads to deaths and high absenteeism.”¹³³*

Persons with disabilities were fairly well represented at all the hearings and provided examples of service delivery that did not cater for them. Most complaints were about water facilities that are a distance from one’s home and sanitation facilities that are not disabled-friendly. This means that, amongst other factors, toilets are too narrow to allow for wheel chairs or people to assist, are on uneven surfaces and are poorly lit. Municipalities that presented at the hearings indicated that if a person required a home that is disabled-friendly, they should apply to the municipality and they would be catered for. However, very few people were aware of this provision.

Another issue mentioned was the needs of ill people. One presenter stated that,

When you experience water cut off, in most cases communities are not informed and by law, they should be informed. There is no provision made for immune-compromised individuals and facilities for children and older persons. This further impacts on health as people do not take their medication and health issues are exacerbated. We need to know HIV prevalence in areas so that we know the impacts of water cut-offs is exacerbated.¹³⁴

Many respondents at the hearings highlight the plight of farm workers and their access to land and basic services. The main problem highlighted was the fact that farm workers live on privately owned land, and it is at the discretion of the owner whether or not to provide adequate service and accommodation that is of an acceptable condition. There have been cases where farm owners cut off water supply to farm workers, despite the fact that access to water is a basic human right.

The Association for Rural Advancement (AFRA) submitted that,

We know that there are 17 million people living in rural areas in South Africa, and of those, many are farm dwellers. Where do farm dwellers get their water from? They have to rely on the farmer for access to water and sanitation in most cases. What happens if the farmers cuts off

¹³¹ Submission from resident, North West hearing, 27 September 2012.

¹³² Submission from resident, Gauteng hearing, 10 December 2012.

¹³³ Equal Education (note 116 above).

¹³⁴ Submission from resident, Free State hearing, 18 October 2012.

their water or supplies limited water? AFRA comes across this problem on a regular basis. When this happens, the only recourse we have is through the law. The law does provide assistance through legislation (via eviction legislation). In this legislation the definition of eviction includes the denial of access to water. The problem, however, is that it takes a long time to approach the courts to get assistance – it takes much longer than 3 days – the time a person can survive without water.¹³⁵

Many farm dwellers also rely on the keeping of livestock for their livelihood and in many instances, the farmer cuts water from the livestock so people have no access to water for their animals. If the municipality is approached, they often refuse to assist on private land. So farm dwellers find themselves in a legislative gap. Farmworkers in Rawsonville and Zwelethemba had similar complaints.

On the issue of water and land rights many farmers that are financially-unstable complained that they faced many challenges accessing land and water to grow their businesses. A community member from the Western Cape testified that there are a lot of farmers with livestock and crops but they are not getting any assistance from the local municipality. They are often told that viable agricultural land is earmarked for use by other farmers, but no information is accessible.

One Western Cape farmer complained that,

The richer white farmers have access [to rivers and dams] but the local poorer farmers do not. [The poorer farmers] bring in contractors to assess the availability of water and these contractors charge them a fortune to tell them that there is no water, but the neighbouring farms have access to water. Currently, the water boards are “white boards” and reform is needed. The level of wastage of water in commercial agriculture is shocking, watering during the day for example. We have reported these matters, but nothing has been done.¹³⁶

6.7. The Report by the Commission for Gender Equality

The Commission has a mandate to monitor South Africa’s implementation of international human rights conventions and treaties. This includes CEDAW, which government signed and ratified. Within the Commission, strategic leadership for CEDAW is the responsibility of the Deputy Chairperson who integrated CEDAW’s commitment to eliminate all forms of discrimination against women in the water and sanitation campaign. In South Africa’s patriarchal society, many still do not accept that women’s rights are human rights and the unequal, differential gendered impact of the lack of rights is often not addressed. The result is that the lack of sanitation and water on the lives of black women, in particular, who remain the majority of the poorest and who bear the brunt of gender based violence and HIV and AIDS is often devastating.

The Commission thus invited the Commission for Gender Equality (CGE), to present its report, ‘*Gender Mainstreaming in the Water Sector: Evaluating Progress by Municipalities and Provincial Water Boards.*’ to each of the Commission’s provincial hearings.

In 2011, the CGE undertook an investigation into how far the water services provisions of local government had progressed to realise the Constitutional commitment to gender equality and transformation. The study examined the policies, programmes and activities of water services authorities at provincial and municipal level that aimed at promoting gender equality, particularly by providing employment opportunities and promoting economic empowerment for women. The study focused on the water services sector and those services provided by the provincial water boards and municipalities designated as Water Services

¹³⁵ Submission by AFRA, KwaZulu-Natal, 12 September 2012.

¹³⁶ Submission from resident, Western Cape hearing, 26 November 2012.

Authorities by the DWA. Research was gathered through comprehensive interviews with officials from various provincial water boards and municipalities from across all nine provinces, and discussions in focus groups consisting of water users from local communities.

One of the major findings was the lack of awareness at municipal level of gender policies and legislation, leading to ineffective or non-existent implementation of such frameworks. Indeed, despite the 2007 Local Government Gender Policy Framework, the guides to gender-related activities for municipalities and provincial water boards take no heed of the framework and fail to comply with current policy provisions on gender equality. The CGE attributed this failure to a lack of effective political leadership at a national level, particularly from CoGTA. This resulted in an unwillingness to prioritise gender concerns at a local level.

Local municipalities and provincial water boards have not created their own internal policies on gender equality, and lack the necessary processes and structures which institutionalise gender mainstreaming. Where any policies have been formulated they had not been fully implemented due to lack of will, capacity and prioritisation.

When they were asked to produce gender disaggregated data which would ensure effective monitoring and oversight of the implementation of gender-related policies and frameworks, many municipalities and provincial water boards were unable to provide any data. The CGE therefore recommended that municipal capacity be strengthened.

The CGE noted that the water services sector failed to provide opportunities for female empowerment by supporting small scale projects run by women or allocating resources to assist building their capacity. They thus recommend that municipalities insert within their procurement policies a requisite percentage of tenders to be from women-owned companies, or that male-owned companies partner to a certain monetary value with a women-owned company. The CGE highlighted the inadequacy of transparency and accountability within provincial and local government, with many accounts of lack of consultation and poor relationships between communities and municipalities.

The results showed that municipalities and water boards are not aware of gender equality standards and legislation and are therefore not meeting requirements in the implementation of programmes. In addition to no implementation of gender policies there was a lack of staff and capacity to meet gender-specific requirements or mainstreaming. The CGE therefore concluded that South Africa is not meeting the needs of women in communities with regard to the provision of water and sanitation. Municipalities are not collecting the correct information (gender disaggregation) and there is no monitoring and evaluation to assess if women are benefiting from the implementation of programmes. It was additionally noted that there was also a need for a good governance committee.

Local municipalities have to use a system of integrated development planning (IDPs) to holistically chart the city's planning and management processes over the short, medium and long term. An essential element of IDPs is public participation in all stages of planning and implementation, including drafting, budgeting, monitoring and management.

The CGE reported that communities indicated that municipalities are not consulting them on projects. Communities were also not advised about water cut-offs, which has a huge impact on women and girls, as water is cut off during the day and switched back on at night (it is mostly women who are at home during the day). Overall, there is no accountability by the municipalities and no space for participation for communities.

The CGE recommended the following to CoGTA and local ward councillors:

- CoGTA: gender mainstreaming; training of staff and municipal managers and implementation of the gender policy framework;
- Councillors: there is need for clarity on how they monitor gender mainstreaming, and performance management systems must ensure implementation of gender legislation and the information provided to the CGE and government to monitor progress.

Recommendations from CGE's report include an inter-governmental alliance between the CoGTA, the South African Local Government Association (SALGA), and relevant Provincial Departments of Local Government who will develop an awareness raising campaign under the guidance of CGE. This will seek to educate municipalities and local government officials on gender equality policies and legislative frameworks. The aim is more effective implementation of such policies at municipal level, the establishment of a clear role for local councillors in terms of monitoring and oversight, and a clear commitment of resources from national, provincial and municipal government.

The CGE also calls for the DWA to institute an internal campaign on gender awareness and to ensure commitment of resources for compliance of national policies and frameworks guiding gender sensitivity in this sector.

6.8. The 2013 National Water and Sanitation Hearing

In March 2013, the Commission hosted its National Human Rights Day event on the Right to Water and Sanitation at the Pan African Parliament in Midrand, Johannesburg. In the lead up to the event, the Commission circulated the draft findings and recommendations of the report on the right to access to water and sanitation. It invited Ministers of relevant government departments to attend the national hearing. It requested government departments to attend the presentation of the report and to respond to findings and recommendations specific to each department.

The overall response to the invitation was poor, particularly by government departments. At the hearing, the Deputy Chairperson's introduction highlighted the complaints that the Commission had received on unenclosed toilets in two municipalities, and detailed the process of investigation on the right to water and sanitation in those municipalities as well as in impoverished communities in all provinces across South Africa. The introduction also reflected on the Commission's experiences in the communities that it had visited in the previous eight months, and the lack of dignity that people are expected to endure due to a lack of access to basic services. The Deputy Chairperson invited all SAHRC Commissioners to present the link between the right to water and sanitation and other human rights such as the rights to education, environment and housing, as well as on the rights of children, people with disabilities and the elderly that different Commissioners lead.

Finally, the findings and recommendations of the Commission's report on the state of access to water and sanitation were presented. It was essential that relevant government departments and organisations were not just made aware of the findings and recommendations, but would consider how the recommendations could be implemented to ensure that many of the issues highlighted in relation to the provision of water and sanitation could be addressed.

In addition to presenting the findings and recommendations at the national hearing, the Commission advised that they would be forwarded to all relevant government departments with stringent deadlines for the submission of responses. Government departments were expected to engage with the recommendations and detail steps that they would take to implement the recommendations and deal with the highlighted problems.

6.9. Responses from Government Departments

In the period March 2013 to June 2013, the Commission received responses from six ministers, some of which were substantive and others less so. The ministers provided general responses to cross-cutting issues while also offering responses to specific recommendations pertaining to the mandate of the relevant department.

Table 6: Responses from Government Departments to the Water and Sanitation Findings and Recommendations

Department	Date Received
Non-Substantive Responses	
Department of Health (DoH)	May 3, 2013
Department of Mineral Resources (DMR)	June 12, 2013
Substantive Responses	
Department of Human Settlements (DoHS)	April 23, 2013
Department of Agriculture, Forestry and Fisheries (DAFF)	April 25, 2013
Department of Performance Monitoring, Evaluation and Administration (DPME)	April 29, 2013
Minister of Finance	June 3, 2013

The Minister of Mineral Resources indicated that the department did not receive the Commission’s draft water and sanitation report and was therefore unable to comment on the recommendations, but would do so after it had time to peruse the report. The Minister of Health acknowledged that the department has a role to play in issues pertaining to ‘*health and hygiene of persons that involves water utilisation and sanitation practices*’. However, the Minister of Health advised the Commission to refer the report to the DWA and the DoHS for a more substantive response, noting that the constitutional mandate for ensuring water and sanitation services lies with these departments.

The Minister of the DAFF noted that she shares the concerns on issues pertaining to farm workers, as highlighted in the report, and confirmed that provision of services on private land is problematic, but noted that there is not much the department or government as a whole can do about this issue. The ministers of the DoHS, DPME, Finance and DAFF indicated their willingness to engage further with the Commission to address challenges related to water and sanitation services, in a more coordinated fashion.

The Minister of Finance indicated that during the period 2013/14, just over R30 billion was allocated to municipalities for delivery of water and sanitation services to poor households, notably, R7.1 billion of this from the MIG and R16.1 billion from the local government equitable share. However, the Minister also stated that “[n]ational government is concerned that the substantial resources allocated through the Division of Revenue [sic] are not being used optimally and that the pace of service delivery rollout suffers as a result”¹³⁷. This means that in essence, the lack of delivery in terms of water and sanitation services is largely due to the inefficient use of available financial resources. A critical consideration in this regard is whether there is sufficient monitoring of these substantial funds allocated to local government. According to the Minister,

¹³⁷ Letter from the Minister of Finance dated June 3, 2013.

National Treasury constantly monitors and engages with municipalities on their budgeting, in-year performance and community consultation processes; these include two formal annual institutionalised engagements with the 17 non-delegated municipalities (these are the eight metros and larger secondary cities that National Treasury is directly responsible for; remaining municipalities have been delegated to the respective provincial treasuries. National treasury is currently in the process of ensuring that all provincial treasuries replicate these leading practices with all delegated municipalities.

The challenge with this arrangement is that the rural district municipalities, which are in greater need of the support from National Treasury are not benefitting from its expertise. Additionally, given the sustained challenges faced by local government in this regard, Provincial Treasury, which has been responsible for monitoring and providing assistance to local municipalities for an extended period, is clearly not able to adequately monitor the use of funds and provide sufficient assistance to local municipalities when they face challenges. One of the section five committee members raised the importance of ring-fencing funds specifically for water and sanitation, so that the necessary funding is not redirected to other priorities.

A further challenge, based on the Minister of Human Settlements' response, may be that some "municipalities have not sufficiently prioritised sanitation delivery from grant funding such as the MIG and their own resource". In addition, a lack of capacity and adequate guidance in spending public funds serves as a further challenge to the delivery of these services. The Commission is also aware of various allegations of corruption and maladministration by municipalities when it comes to the spending of MIG funds.

The inability of municipalities to maintain infrastructure exacerbates these challenges and in order to address the challenges, monitoring, at project level and in the use of public funds, becomes vitally important. Monitoring was thus confirmed by both the Ministers of the DoHS and DPME as a challenge in the service delivery process and one that warrants constant improvement. Despite the fact that the country may be heralded as one of the most transparent in terms of how the budget is allocated, much more transparency and meticulous monitoring of how the budget is spent is required.

Whether provincial treasuries will be able to successfully replicate practices that support sound financial management of public funds, at local government level, remains to be seen. The Commission will monitor this situation, and request that National Treasury account for any failure in this regard.

Finally, the Minister in the Presidency cautioned that the lack of safe and reliable services is due to complex and multivariate problems, often particular to specific localities. Specific water and sanitation issues taken from the public hearings may therefore not be applicable to South Africa as whole.

6.10. Subpoena Hearing

Given that responses to the recommendations and findings were not received by all relevant government departments, the Commission began a process to compel departments to respond. A notice to appear before the Commission on Thursday, 13 June 2013 was sent to ten government departments. Although a substantive response was received from the DAFF, a notice to appear was sent to request additional information on the access of basic services for farm workers. In response to some of the Commission's concerns, government departments provided the following explanations:

- a) The DWA explained that through cabinet *legotlas*, a new programme dealing with areas that do not have access to safe water supply, 24 district municipalities requiring urgent attention, were identified for urgent attention; and
- b) In terms of breaking silos between the DWA and CoGTA, the Ministers established a task team to deal with collaboration between departments. Within this arrangement, departments look at

service delivery and identify hotspots. The DWA has established a rapid response unit to intervene in these areas and CoGTA has done the same. The Commission remains concerned at the lack of a proactive strategy by relevant government departments to address problems relating to service delivery prior to service delivery protests.

- c) The DWA stated that it is misplaced to assume that mines without water use licenses should not be operating. There are currently 39 mines operating that don't have licences and many of those water use licence applications are in process.
- d) When asked about water tariffs and the price that industry pays for water compared with household consumers, the DWA responded that it does not have a single regulatory regime that deals with tariffs from source to tap and back to source. The DWA deals with raw water elements and has a water pricing strategy that feeds into structures at municipalities and water boards. Most municipalities will have a stepped tariff arrangement.
- e) When asked if bulk water users end up paying less than poor households the DWA indicated they do monitor all the tariffs, but that the Commission's question was valid as the DWA was not regulating tariffs at the moment. The DWA subsequently provided information on average water tariffs over the last 5 years, but this was not in an understandable format.
- f) On the issue of poor areas that have never had access to water and sanitation and were in immediate need of services, the DWA indicated that it did have a toll free hotline that communities could call for assistance. The DWA promised to provide the number and details of the hotline, but this was not provided.
- g) The DAFF shares the concerns of the Commission on the issue of provision of basic services and working conditions of farm workers, DAFF supports the Commission's recommendations.
- h) The DAFF also agreed that on-going rights education and awareness on labour issues is needed.
- i) The Department of Basic Education (DoBE) explained that there are currently 626 water projects and 42 sanitation projects in schools in all provinces. In rural areas where there is no reticulation, the DoBE provides water tanks for rain harvesting, which is administered by the municipality.
- j) Timelines for the provision of water and sanitation facilities: the sector plan is very clear. The DoBE categorises schools in terms of basic functionality, minimum functionality and optimal functionality and by the end of the 2014/2015 year, all schools should have access to potable water and adequate sanitation.
- k) The Commission raised concerns over the amendments to mining and environmental legislation to ensure that environmental concerns are considered during mining applications. The DMR stated that amendments have not been operationalised due to unintended consequences but would shortly be repealed and amended.

6.11. The Report of the Commission's PAIA Unit on Water and Sanitation

Section 32 of the Constitution recognises the right of access to information. The Commission has a specific mandate set out by the Promotion of Access to Information Act (PAIA) 2 of 2000, to promote the right to access to information. The Commission is therefore committed to creating awareness, monitor compliance and provide assistance to members of the public to realise this right. Moreover, access to information is critical in realising ESR or seeking redress when these rights are violated. In the Commission, strategic leadership for PAIA is located with the Deputy Chairperson, who asserted the importance of using PAIA to further the rights to water and sanitation.

Through the exercise of the right of access to information, the public can, by accessing information, demand the respect, protection, and the fulfilment of their rights. The public can determine whether resources are available and acceptable in realising a right. The exercise of the right of access to information has the potential to assist the public to determine whether the implementation plan for the delivery of a particular socio-economic right by government will meet the needs of the public that requires it.

It is important for the implementation measures by the state to advance and realise ESR to be communicated to the public and in instances where the state fails to do so, the public can, through their right of access to information, obtain access to records about plans, policies, and processes that are being put in place by the government to effect the realisation of their rights. The right of access to information serves as a useful and important accountability tool to demand such responsiveness from government in complying with their obligations.

After the Commission's water and sanitation hearings were held, the Commission decided to conduct feedback sessions at the nine communities that hosted the hearings. The purpose of these feedback sessions was to engage with community leaders on outstanding information to be requested from government officials which could be obtained through PAIA. At these sessions, participants engaged in consultative exercises where they drew relationships between challenges in their own communities and how they could utilise PAIA to address the challenges. Various complaints were received particularly in the Gauteng, Northern Cape and Mpumalanga provinces and the Commission has subsequently assisted the complainants to obtain the information and records required.¹³⁸

The participants at these feedback sessions consisted of community development workers and ward committee members. These participants were drawn primarily on the basis of the leadership and supportive role they provide in their communities and their ability to spread awareness to other groups in the community.

Some of the other outcomes of these PAIA feedback sessions included:

- Further interrogation of the DPME reports relating to service delivery issues within the provinces;
- Sharing the experiences of residents on the quality of delivery of water and sanitation rights with the municipal and provincial authorities concerned;
- Identification of mechanisms and measures to ensure accountability of local and provincial authorities to the provision of clean, safe and accessible water;
- Identification of collaborative mechanisms and measures for civil society bodies to co-operate with local and provincial government in the delivery of water and sanitation services to affected communities.

Communities raised challenges with accessing services, including the inability of people living in rural areas to easily access information and the lack of awareness about their right of access to information; the disrespectful attitude of public servants in dealing with people who are poor; the lack of sufficient consultation with the public on the primary needs and the prioritisation of those needs; and the failure of public officials to establish committees where the community could communicate their concerns.

Finally, the Commission's PAIA unit is currently working with the Thohoyandou Community in Limpopo to obtain information relating to the contamination of the Nandoni dam by a sewerage facility under the control of the local municipality. The PAIA unit is video-documenting this process with the hope of documenting a case study where PAIA was used to effectively achieve a socio-economic right, in order to inspire other communities to embrace the usage of the right.

¹³⁸ One of the participants in Gauteng, a Councillor, raised a problem relating to a purification plant in their area (Hammanskraal) that was yet to be established. In her observation, a PAIA request was needed to obtain planning records and timelines for the development of the plant, including obtaining information about the geographical feasibility of the plant in conveying water to communities located on sloppy areas. Another complaint related to a ward, Kekana Gardens, which has been experiencing water crises over a period of time. Participants raised concerns about the installation of taps, accessibility to water tankers, time of delivery, costs of procuring boreholes and tanks.

6.12. Roundtable Discussion on Recommendations

The Commission's mandate of monitoring measures government has taken towards realising ESR implies that it has a responsibility to call government (departments) to account for measures taken or failure to do so, towards the realisation of ESR.

In previous years, the Commission submitted its monitoring reports to the National Assembly / Parliament with the view that Parliament would use the documents to further hold government accountable for the extent of delivery on ESR. However, the Commission observed that Parliament has not been particularly effective in this regard. Given the critical importance of this issue, the Commission decided that it will embark on a process where it directly engages with government departments to discuss their plans on implementing the Commission's recommendations and how challenges in this regard. The Commission therefore began liaising with the DPME to organise a platform where this engagement may take place, in the form of a roundtable discussion.

The aim of the discussion was to present the key recommendations to the government departments, to document plans to address highlighted problems, implement recommendations and identify associated challenges. The Commission sought to provide a human rights framework in relation to water and sanitation in which government departments could overcome some of the challenges they face. The objectives of the roundtable discussion were therefore to:

- a) Hear key challenges impacting on implementation of recommendations faced by government departments;
- b) Understand how government intended to coordinate its approach to address the Commission's recommendations for dealing with the access to the rights to water and sanitation; and
- c) Timeframes agreed upon for recommendations to allow for effective implementation and performance monitoring.

It was agreed at the meeting that following the roundtable, that the Commission would take into account the issues raised at the roundtable and that government would commit to implementing the redrafted recommendations to ensure the rights to water and sanitation were realised in communities that didn't enjoy access to these rights.

Conclusion



6 year old Michael Komape from Chebeng Village in Limpopo, fell into this pit toilet at his school and died tragically in February 2014.

**Water is Life. Sanitation is Dignity:
Accountability to People who are Poor**



7. Conclusion

In 2010, following the receipt of two complaints on access to sanitation, the Commission took a decision to strategically link these complaints to a broader investigation on the right to water and sanitation in South Africa. The Commission requested that the DPME provide a baseline assessment of the level of access to sanitation in all municipalities in the country along with details of backlogs and the financial and technical capacity needs to alleviate these backlogs.

The Commission also embarked on a series of provincial hearings on the right to water and sanitation. The Commission visited rural communities in all nine provinces in South Africa and asked these communities to highlight the problems, if any, that they were experiencing in accessing water and sanitation. Communities were very candid in their response, indicating that they faced appalling infrastructure failures and little or no access to water and sanitation. In addition, communities indicated that the failure to access these services impacted severely on the access of other human rights such as health, and education and that the impacts were felt more disproportionately on some groups of people such as women, girls and people with disabilities.

Following the provincial hearings the Commission developed a set of comprehensive recommendations to improve the state of access to water and sanitation in the country. The recommendations spoke to *inter alia* improving institutional arrangements, enhancing a human rights-based approach to service delivery and improving access to services in schools, particularly for girls. In an effort to hold government to account, the Commission engaged extensively with government departments on these recommendations (national hearing, written communication, subpoena hearing, roundtable discussion). These recommendations were also discussed with civil society organisations, especially through the Section Five Committee and their comments were incorporated.

It is important to note that the production of this report does not mark the end of the Commission's work on the rights to water and sanitation. The Commission intends to monitor parliament and government to ensure that this report's recommendations are implemented. The state of access to water and sanitation in South Africa, particularly for the poorest people in outlying areas, needs to improve. The Commission will hold government (across all spheres and departments), accountable for upholding human rights.

Annexure One

No.	Name & Year of Report	Place/ Province	Summary	SAHRC Findings	Recommendations	Nature & Date of Engagement ⁴³⁹
1.	SAHRC (On behalf of Sasolburg residents) / Metsimaholo Local Municipality	Free State	During the month that the SAHRC was hosting a campaign under the theme 'Water and Sanitation in South Africa – A Question of Accessibility', through news reports the Commission became aware that residents of Sasolburg had been using pit latrines (toilets that are dug into the ground without connection to any water system, treatment facility, septic treatment, or access to municipal services) as toilets.	<p>The Commission found that:</p> <ul style="list-style-type: none"> - The rights to health, dignity, water and a clean environment had been violated. - Governance, leadership and management competencies of the municipality were weak during the period under investigation - There was poor intergovernmental co-operation between the national, provincial and municipal governments resulting in an inability to provide water and sanitation to the residents - In failing to submit its section 14 report to the SAHRC and the inadequate information given to the community, the municipality was also found in contravention of section 32(1) (a) and (b) 	<p>The Respondent was directed to</p> <ul style="list-style-type: none"> - Realize rights by ensuring that priority was given to basic sanitation - ensure that each community member had access to a closed toilet facility - The Department of Co-operative government was to review the effectiveness of intergovernmental collaboration between national, provincial and municipal with regards to sanitation in Metsimaholo - Department of Human Settlements: assess current infrastructural and sanitation projects and the reasons for backlogs, develop plans and strategies to resolve the backlogs. Undertake an assessment of water and sanitation challenges, identify means to address them. - For the departments of Human Settlements, Co-Operative Governance and the Municipality to submit reports detailing the progress made with respect to each of the recommendations and furnishing the Commission with copies of the same within 3 and 6 months respectively. 	Report adopted by legal committee meeting held in September 2012

No.	Name & Year of Report	Place/ Province	Summary	SAHRC Findings	Recommendations	Nature & Date of Engagement ⁴³⁹
2.	Theunissen Forum / Dept of Water Affairs, Department of Co-operative Government and Traditional Affairs, Masilonyana Local Municipality	Free State	Forum lodged a complaint alleging a water crisis in the municipality and a violation of the right to adequate, safe water; a lack of communication regarding steps taken to address the issue	<p>Commission found that:</p> <ul style="list-style-type: none"> - For a limited time, the respondent violated the community's rights to adequate drinking water - Pursuant to lab analysis, the respondent did not violate the right to safe drinking water - Despite the safety of the water for consumption, it was nonetheless contaminated with micro-organisms - Respondent had fallen short of the 2011 and 2012 Blue Drop Reports' indicators for standards and quality assurance 	<p>Commission recommended the following:</p> <ul style="list-style-type: none"> - Reports detailing interim measures taken by the municipality to address water challenges particularly in relation to vulnerable groups; immediate measures to remove impurities, discolouration and micro-organisms (To be completed by the municipality within 3 months) - Report by the Dept of Water Affairs detailing measures put in place to ensure that the challenge is progressively resolved (To be completed within 6 months); a bi-annual report indicating progress made towards the progressive realisation of the right to adequate water, as well as continued monitoring of the water supply 	Report adopted by Commissioners in March 2013

No.	Name & Year of Report	Place/ Province	Summary	SAHRC Findings	Recommendations	Nature & Date of Engagement ⁴³⁹
3.	Henro Kruger, DA Councillor (On behalf of Witbank Residents) // The Administrator, Emalahleni Local Municipality (MP/2011/0134)	Mpumalanga	Complainant lodged a complaint against the respondent – a municipality currently under administration in terms of s 139 of the Constitution for its failure to provide residents with adequate, safe and clean water for a period of at least 6 days. That part of the reason for this was that the Municipal Council had allowed water purification and supply infrastructure to deteriorate	The Commission found that the respondents had violated the rights to health, water and dignity through a failure to maintain the infrastructure, provide interim measures for the supply of water	<p>The Commission recommended the following:</p> <ul style="list-style-type: none"> - That the respondent furnish an operational and maintenance plan to address the basic water challenges, having special regard to vulnerable groups, within 3 months - That minutes of feedback sessions convened every three months be submitted to the Commission, within 3 months - The Dept of Water Affairs furnish a capacity building support report relating to the supply of uncontaminated water within 6 months; that it continue to monitor the water supply and take regular water samples 	Report adopted by Commissioners in August 2013

No.	Name & Year of Report	Place/ Province	Summary	SAHRC Findings	Recommendations	Nature & Date of Engagement ⁴³⁹
4.	SAHRC (On behalf of Henneman Residents) / Matjhabeng Local Municipality (FS/12/13/0324)	Free State	The Commission, through news reports, became aware of violent service delivery protests in the Phomolong area in Henneman, Free State	<p>The Commission found that:</p> <ul style="list-style-type: none"> - The respondent failed to properly implement its project which forced residents to live in an undeveloped area with no infrastructure or municipal services - That the rights to a clean environment, water, human dignity, health, children's rights, housing and access to information were violated - The provincial and national departments had not adequately monitored the work of respondent or intervened in accordance with their legislative and Constitutional obligations 	<p>The Commission recommended that:</p> <ul style="list-style-type: none"> - The respondent complete the installation of toilets in Phomolong so that the residents could use them, have their dignity protected and basic sanitation needs met - That it also provide a proper system of waste removal so that residents could flush toilets without sewage flooding the streets - Furnish a progress report with regards to the same within 6 months - Furnish a progress report every three months in respect to the realisation of water and sanitation services - Submit a framework stipulating a manner for continued and meaningful consultation with the community and within three months and to provide minutes of meetings held for this purpose - The Free State Provincial Dept of Co-Operative Governance and the Dept of Human Settlements provide a report and detailed plan on strategies intended to deal with the challenges 	Report adopted by Commissioners in September 2013

No.	Name & Year of Report	Place/ Province	Summary	SAHRC Findings	Recommendations	Nature & Date of Engagement ^{t39}
5.	SAHRC (On behalf of Senekal Residents) / Setsoto Local Municipality (FS/1213/0305)	Free State	A complaint was lodged alleging poor workmanship on the building of toilets for residents, a lack of sufficient water and water unfit for human consumption	<p>The Commission found that:</p> <ul style="list-style-type: none"> - The rights to water, dignity and health care services had been violated - The respondent had failed to adequately involve/ inform citizens in the conceptualisation, planning or implementation of its water projects, violating their right to information - The provincial and national government departments had failed to adequately monitor the respondent in terms of their legislative and Constitutional obligations 	<p>The Commission recommended that:</p> <ul style="list-style-type: none"> - The respondent furnish a progress report every 6 months detailing measures taken to ensure sufficient, clean and safe water - The respondent submit a report every three months regarding the progressive realisation of the right to water - The respondent furnish the Commission with the minutes of community meetings held to address the water challenges every three months - That the provincial Dept of Water Affairs submit a report detailing strategies to deal with challenges and clear timeframes for addressing operational and capacity shortcomings in the municipality within three months 	Report adopted by Commissioners in September 2013

No.	Name & Year of Report	Place/ Province	Summary	SAHRC Findings	Recommendations	Nature & Date of Engagement ³⁹
7.	George Mkhwanazi (On behalf of the residents of Klipgat C) / Madibeng Local Municipality (NW/2009/0036)	North West	Complainant alleged that the rights to water and access to information had been violated due to no water being supplied to the residents for five weeks and that the respondent had refused/ failed/neglected to provide information regarding measures being undertaken to resolve the same	That the respondent violated the rights of the residents to access to clean, adequate drinking water as well as the complainant's right to information	<p>The Commission recommended that:</p> <ul style="list-style-type: none"> - The water service to Klipgat C be increased to three tanks, per section, every two days - The respondent submit reports detailing interim measures put in place to address water challenges, immediate measures to remove impurities from the water supply to the residents within 3 months - A report detailing measures taken to permanently resolve the situation be submitted within 6 months - The respondent furnish the Commission with the minutes of community meetings held to address the water challenges every three months 	Report adopted by Commissioners in September 2013

No.	Name & Year of Report	Place/ Province	Summary	SAHRC Findings	Recommendations	Nature & Date of Engagement ¹³⁹
8.	NomondeBozwana / North West Department of Education (GP/1213/0705)	Gauteng	The Complainant, the Chairperson of the National Association of School Governing Bodies, lodged a complaint against the Respondent because of the deplorable, unhygienic and unsafe conditions of the toilets being used by pupils at Polonia Primary School	<p>The Commission found that:</p> <ul style="list-style-type: none"> - The Respondent did not take reasonable steps to ensure that the toilets were at an acceptable standard and did not monitor the state of the toilets on a regular basis - Continued to expose learners to negative health risks by not ensuring the delivery of adequate portable toilets in the interim - The respondent violated the rights to dignity, a clean environment, access to water and sanitation, the rights of the child and the right to education 	<p>The Commission recommended that:</p> <ul style="list-style-type: none"> - The respondent visit the school within a month to assess the condition of the septic tank, number of available toilets in the new toilet facilities and if they would be enough, the cistern system in the new facilities and to submit a report detailing its findings within 6 months - Within 2 months of completing the above report to provide a plan to the Commission for identifying schools in the area still using the septic tank system, measures in place to ensure that emergency alternative interim assistance is given to learners when it is needed, the development of specific criteria when engaging with contractors appointed by the Respondent to assist with sanitation in schools, using the findings of the audit to develop a monitoring system and suitable contingency plans to ensure the implementation of proactive interim measures - That the principle immediately allow the learner's to use the basins in the toilets to wash their hands after using the toilets - To submit confirmation of the monitoring of the general health of the learners within 2 months 	Report adopted by Commissioners in September 2013

¹³⁹ The Commission's deliberations on recommendations.

