



Joint Submission
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Cultural Rights,
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Economic, Social and Cultural Rights in South Africa

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Executive Summary

About two decades after signing the International Covenant on Economic, Social and Cultural Rights (ICESCR), South Africa finally ratified the instrument in January 2015. In accordance with the provisions of the ICESCR, the South African government submitted its initial report to the United Nations Committee on Economic, Social and Cultural Rights (CESCR) in April 2017, where it articulated the steps and measures taken to comply with the provisions of the Covenant.

To complement the effort of the South African government, a coalition known as South Africa's Ratification Campaign of the International Covenant on Economic, Social and Cultural Rights and its Optional Protocol (the Campaign), in collaboration with the Institute for Poverty, Land and Agrarian Studies at the University of the Western Cape, and with input and participation of some individual experts, has produced this joint submission.

The report aims to provide a civil society perspective on Economic, Social and Cultural Rights (ESCR) in South Africa as well as to raise questions on each selected issue as a means of promoting greater accountability. Moreover, it reports on the compliance status of the government with regard to the ICESCR. Finally, it intends to propose a set of practical recommendations for the government to initiate necessary actions.

The drafting of the report entailed a participatory methodology. In addition to several telephonic meetings, two community dialogues were held in Cape Town and Johannesburg, where civil society groups, including community-based organisations, academia, and non-governmental organisations, participated and identified areas of focus for this report. These dialogues served as opportunities to feed into the report and, at the same time, critically review a draft version of the report.

This report relied on a range of primary and secondary sources; the primary sources consisted of the legislative instruments, executive orders, ordinances, rules and court judgments. The secondary sources include the South African government's initial report to the CESCR. In addition to these sources, the report also used information available on a wide array of academic papers, research reports of non-governmental organisations, media sources and electronic resources.

The report is divided into ten sections focusing on six main rights contained in the ICESCR, including article 2 on progressive realisation, article 9 (on social security), article 11 (on the right to an adequate standard of living including, housing, water and sanitation), article 12 (on the right to health) and article 13 (on the right to education). It provides an overview of the implementation status of each right, as well as recommendations to remedy identified shortcomings.

Abbreviations and Acronyms

CBO	Community-Based Organisation
CESCR	Committee on Economic, Social and Cultural Rights
CoGTA	Department of Cooperative Governance and Traditional Affairs
CPS	Cash Payment Services
DAFF	Department of Agriculture, Fishers and Forestry
DOI	Dullah Omar Institute for Constitutional Law, Governance and Human Rights
DPME	Department of Planning, Monitoring and Evaluation
DRDLR	Department of Rural Development and Land Reform
DTI	Department of Trade and Industry
DWA	Department of Water and Sanitation
HDA	Housing Development Agency
ICESCR	International Covenant on Economic, Social and Cultural Rights
IGDP	Integrated Growth and Development Policy for Agriculture, Forestry and Fisheries
MMR	Maternal Mortality Ratio
NFNSP	National Policy on Food and Nutrition Security
NGO	Non-Governmental Organisation
NHI	National Health Insurance
NPO	Not for Profit Organisation
NSNP	National School Nutrition Programme
OPA	Older Persons Act
PHM-SA	People's Health Movement South Africa
PLAAS	Institute for Poverty, Land and Agrarian Studies
SA	South Africa(n)
SAHRC	South African Human Rights Commission
SASSA	South African Social Security Agency
SDG	Sustainable Development Goals
SERI	Socio-Economic Rights Institute of South Africa
SLLDP	State Land Lease and Disposal Policy
SNGH	Special Needs Group Housing
SNH	Special Needs Housing
SPII	Studies in Poverty and Inequality Institute
StatsSA	Statistics South Africa
TRAs	Temporary Relocation Areas
UHC	Universal Health Coverage
USSD	Unstructured Supplementary Service Data
WHO	World Health Organization

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I. Introduction

1. This report on the implementation of economic, social and cultural rights in South Africa (focusing on selected issues and rights) is a joint initiative of members of the Steering Group of South Africa's Ratification Campaign of the International Covenant on Economic, Social and Cultural Rights and its Optional Protocol (the Campaign), in collaboration with the Institute for Poverty, Land and Agrarian Studies at the University of the Western Cape, and with input and participation by some individual experts.
2. The Campaign was organised within civil society in response to the delay of the South African government to ratify the ICESCR, despite having signed it in October 1994. The Campaign became operational in May 2009. Following the South African government's ratification of the ICESCR in January 2015, which was preceded by a series of engagements and advocacy efforts by the Campaign, the Campaign's focus has been on raising awareness of the ICESCR and ensuring its effective implementation (including domestication). In relation to the Optional Protocol to the ICESCR, the Campaign focuses on raising awareness of the Optional Protocol and its mechanisms, as well as advocating for its ratification by South Africa.

Current non-governmental organisation (NGO) members of the Steering Group of the Campaign are:

- a. Black Sash,¹ an organisation which works towards the realisation of socio-economic rights, as outlined in the Constitution of the Republic of South Africa, 1996 (the South African Constitution), with an emphasis on social security and social protections for the most vulnerable South Africans particularly women and children. It also works towards exploring options to significantly reduce poverty and inequality.
- b. Dullah Omar Institute for Constitutional Law, Governance and Human Rights (DOI),² based at the University of the Western Cape, promotes the realisation of socio-economic rights in South Africa and the African region. It conducts engaged, multi-disciplinary research and human rights education, and actively campaigns around key social justice issues. Through engaged research, teaching and advocacy, the Institute supports processes in South Africa and the region to build inclusive, resilient States that are accountable to citizens and responsive to human rights.
- c. People's Health Movement South Africa (PHM-SA)³ is the South African Chapter of the People's Health Movement (PHM), a global network of grassroots activists, civil society and academics, predominantly from low- and middle-income countries. PHM-SA was started in 2003 by a small group of health activists and launched in 2007 with its Right to Health Campaign. PHM-SA focuses on advocating for improved health-care services for all. It also works with communities and civil society organisations to improve the social determinants of health (SDH), namely, the conditions in which people are born, grow, work, live, and age, and the wider set of forces and systems shaping the conditions of daily life.
- d. Socio-Economic Rights Institute of South Africa (SERI)⁴ is a non-profit organisation and public interest legal services organisation that provides professional and dedicated socio-economic rights assistance to individuals, communities and social movements. SERI conducts applied legal research and public interest litigation, provides advocacy support, facilitates civil society mobilisation and coordination, and conducts popular education and training for poor

¹ For more information on Black Sash's activities, see: <https://www.blacksash.org.za/> .

² For more information on DOI's activities, see: <https://dullahomarainstitute.org.za/> .

³ For more information on PHM-SA's activities, see: <http://phm-sa.org/> .

⁴ For more information on SERI's activities, see: <https://www.seri-sa.org> .

communities, social movements and women's and migrant groups. SERI's main focus areas are protecting and fulfilling the right of access to adequate housing; challenging forced evictions; defending and promoting access to basic services; protecting the right to work for those in vulnerable employment; and protecting political space for peaceful organisation, expression, civil participation and protest.

- e. Studies in Poverty and Inequality Institute (SPII)⁵ is an independent research think tank which focuses on generating new knowledge, information and analysis in the field of poverty and inequality studies. In facilitating collaborative partnerships with and between institutions of democracy, academia and civil society organisations, SPII seeks to promote sustainable development and support the development of a tradition of effective public participation in policy-making and implementation. SPII has developed a unique measurement tool of the progressive realisation of the socio-economic rights in the South African Constitution by the State, which includes policy and budget reviews of line State departments.
 - f. In addition to the above organisations, some individual experts actively participate in the work of the Campaign, including Jackie Dugard⁶ and Lilian Chenwi⁷ (both based at the School of Law at the University of the Witwatersrand (Wits); both are also board members of SERI).
3. The Institute for Poverty, Land and Agrarian Studies (PLAAS),⁸ based at the University of the Western Cape, conducts research, and participates in policy engagement, teaching and training related to the dynamics of chronic poverty and structural inequality in southern Africa, with an emphasis on the key role of restructuring and contesting land holding and agro-food systems in the subcontinent and beyond. Its focus is on the analysis of marginalised livelihoods in southern Africa, especially of subsistence and smallholder farmers and farmworkers, of coastal and inland artisanal fisheries and fishing communities, and of informal self-employment in rural and urban areas.
 4. This report focuses on the ratification of the Optional Protocol to the ICESCR, domestication of the ICESCR in South Africa, and articles 2(1), 9, 11, 12, 13 and 14 of the ICESCR. The report includes issues and recommendations to be considered by the CESCR in reviewing South Africa's implementation of the ICESCR at its 64th session.
 5. The report has been compiled with input from the following: Alana Potter and Michael Clark (SERI); Ebenezer Durojaye and Gladys Mirugi-Mukundi (DOI); Lynette Maart and Hoodah Abrahams-Fayker (Black Sash); Leslie London, Lauren Paramoer, Anneleen de Keukelare and Michelle du Toit (PHM-SA); Refiloe Joala (PLAAS); Isobel Frye (SPII), Jackie Dugard and Lilian Chenwi (Wits School of Law and SERI Board members); and Zain Rizvi (Section27). In addition, two community dialogues were held in Cape Town and Johannesburg, where civil society groups, including community-based organisations (CBOs), academia, and non-governmental organisations (NGOs) participated and identified areas of focus for the report. These dialogues served as opportunities to enrich the content of the report and, at the same time, critically review a draft version of the report.
 6. We wish to express our gratitude to all those who have worked on this report. Without their efforts, this report would not have been possible.

⁵ For more information on SPII's activities, see <http://www.spii.org.za/> .

⁶ For more information on Jackie Dugard, see <https://www.wits.ac.za/staff/academic-a-z-listing/d/jackiedugardwitsacza/> .

⁷ For more information on Lilian Chenwi, see <https://www.wits.ac.za/staff/academic-a-z-listing/c/lilianchenwiwitsacza/> .

⁸ For more information on PLAAS' activities, see <http://www.plaas.org.za/> .

II. Ratification of the Optional Protocol to the ICESCR

A. Positive aspect and issue of concern

7. We welcome the SA government's indication in footnote 2 of the State's report that '[t]he Optional Protocol to the International Covenant on Economic, Social and Cultural Rights has not yet been acceded to and is receiving attention'. The report is, however, not clear on the specific steps that have been taken thus far towards its ratification, or the intended time-frames which would enable the CESCR to monitor the State's commitment in this regard.

B. Recommendation

8. We recommend that the CESCR, while noting that ratification of the Optional Protocol to the ICESCR is receiving attention, should ask the SA government to indicate the steps that have been taken thus far towards its ratification and the expected timeline for ratification, and encourage SA to conclude the ratification process as soon as possible and invite it to consider recognising the competence of the CESCR under article 11 of the Optional Protocol.

III. Incorporation of the Provisions of the ICESCR

A. Lack of clarity on extent of incorporation of the ICESCR

9. South Africa's initial report clearly sets out the constitutional requirement for domestication of treaties.⁹ However, it does not indicate if the ICESCR has been domesticated or is in the process of being domesticated. There are key differences between the Bill of Rights in the SA Constitution¹⁰ and the ICESCR. For example, rights that are contained in the ICESCR that are not expressly protected in the SA Constitution include: the right to work; the right to just and favourable conditions of work; 'widest possible protection and assistance should be accorded to the family'; '[p]rimary education shall be compulsory and available free to all'; and the right of everyone to enjoy the benefits of scientific progress and its applications. In addition, though SA has incorporated some human rights treaties, it has a record of partial incorporation of other human rights treaties.¹¹ It is therefore important that the ICESCR be fully incorporated in the domestic legal system.

B. Recommendation

10. We recommend that the CESCR urge SA to fully incorporate the rights indicated in paragraph 9 above that are recognised in the ICESCR but not expressly recognised or have not been confirmed

⁹ Ibid, para 35. UN CESCR, *Consideration of reports submitted by States parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights: Initial reports of States parties due in 2017: South Africa* (7 June 2017), UN Doc No. E/C.12/ZAF/1, para. 35, available at: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fZAF%2f1&Lang=en.

¹⁰ The Constitution of the Republic of South Africa, Act No. 108 of 1996, (SA Constitution), chapter 2, available at: <http://www.justice.gov.za/legislation/constitution/SACConstitution-web-eng.pdf>.

¹¹ For examples, see Lilian Chenwi, 'International Human Rights Law in South Africa' in Erika de Wet, Holger Hestermeyer & Rüdiger Wolfrum (eds) *The Implementation of International Law in Germany and South Africa* (Pretoria University Law Press, 2015), pp. 354 & 356-357, available at: <http://www.pulp.up.ac.za/component/edocman/the-implementation-of-international-law-in-germany-and-south-africa>.

by SA Constitutional Court jurisprudence as implicitly recognised in the SA Constitution, especially the rights to work and to just and favourable conditions of work.

IV. Article 2(1): Progressive Realisation to the Maximum of Available Resources and Minimum Core

A. Progressive realisation and available resources

11. All the socio-economic rights in the SA Constitution (apart from those rights specifically crafted for children in section 28 and the right to basic education in section 29(1)(a) of the Constitution) are expressly qualified with progressive realisation terminology.
12. Unlike the ICESCR, which uses the phrase ‘to the maximum of its available resources’, the SA Constitution employs the phrase ‘within available resources’, which on the face of it implies that the obligation placed on the State does not require more than its available resources. However, the SA Constitutional Court, in the *Grootboom* case, clarified that ‘progressive realisation’ in the Constitution bears the same meaning as in the ICESCR.¹²
13. While a State party to the ICESCR is not expected to provide universal enjoyment of all the rights in the ICESCR immediately, the State is required to make effective use of all its available resources (which includes resources both within a State and those available through international assistance and co-operation) towards the realisation of these rights.
14. *How* resources are raised and from *whom* are of critical importance in this regard, as well as *how* those resources are allocated, especially given the very high levels of poverty and income and wealth inequality in SA. In the 2018 national budget speech,¹³ which was delivered after the depositing of the first report by the SA government at the CESCR, the flat-rate Value Added Tax (VAT) was increased from 14% to 15% so that the government can ‘generate an additional R36 billion in tax revenue for 2018/19’. This increase has led to increased cost of living. There have thus been some concerns raised about the impact of this tax increase on poor people and on the State’s ability to guarantee progressive realisation of socio-economic rights. For example, as explained in section VI.F (paragraph 60) of this Joint Report, the VAT increase has had a negative impact on food security, especially for the poor, which affects the Constitutional Right to Food (section 27) as well as the Right to an Adequate Standard of Living in Article 11 of the ICESCR. Notwithstanding the regressive impact of this act of fiscal policy action, the state failed to justify this regressive step or provide a time bound period for the adoption of this regressive action. The state did appoint a committee to consider the expansion of zero-rating of certain goods and services that attract VAT, but this, we suggest, does not meet the Covenant’s requirements for rational justification of the adoption of regressive steps.
15. A related concern is that it is not clear from the State’s report what resources are available through international assistance and cooperation. It is thus not clear whether development aid received by SA has been allocated to priority sectors and used for the progressive realisation of rights.

B. Non-recognition of minimum core concept

16. Prior to the ratification by SA of the ICESCR, the SA Constitutional Court, as reflected in its judgments in the *Grootboom*, *TAC* and *Mazibuko* cases, has not been willing to recognise or endorse the minimum core concept as articulated by the CESCR on the basis of the diversity of

¹² *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC), para. 45.

¹³ See Budget Speech by Malusi Gigaba, Minister of Finance (21 February 2018), p. 11, available at: <http://www.treasury.gov.za/documents/national%20budget/2018/speech/speech.pdf>.

people's needs and contexts as well as due to institutional and democratic concerns (the Court saw itself as unequipped to determine what the minimum core standards should be). At the time of writing, we are not aware of any judgments post-ratification of the ICESCR explicitly endorsing the minimum core concept.

- a. In *Grootboom*, the Constitutional Court held that 'it is not possible to determine a minimum threshold for the progressive realisation of the right to adequate housing without first identifying the needs and opportunities for the enjoyment of such a right'.¹⁴
 - b. In *TAC*, the Constitutional Court stated that it is not possible to give everyone access even to a core service immediately, and all that is possible, and all that can be expected of the State, is that it acts reasonably to provide access to the socio-economic rights on a progressive basis.¹⁵
 - c. In *Mazibuko*, the Constitutional Court was also reluctant to set a minimum core content for the right to have access to water on the basis that, inter alia, 'what the right requires will vary over time and in context'.¹⁶
17. While in the SA Constitutional Court's view it might not be possible to give everyone access to a core service immediately, as explained by the CESCR in General Comment No. 3, the State must ensure that, at the very least, a significant number of individuals have access to minimum essential levels of the rights in the ICESCR.¹⁷
18. We do note that the SA Constitutional Court has unintentionally recognised, albeit to a limited extent, some elements of the minimum core concept in the notion of 'reasonableness' as interpreted by the Court. For example, whilst emphasising the progressive realisation of socio-economic rights, the Court states that people in desperate need should not be left without any form of assistance;¹⁸ the Court has also 'incorporated an obligation to meet, at the very minimum, the short-term needs into the notion of reasonableness'.¹⁹
19. However, a significant number of individuals in SA continue to suffer from poverty and socio-economic deprivation and exclusion. SA's rising poverty rate, which is increasingly intersectional (race, gender, class and age), is seen as an indicator of 'a deteriorating human rights situation' in the country.²⁰ The latest (2017) report by Statistics South Africa (StatsSA) on poverty trends in SA

¹⁴ *Grootboom* (note 12 above), paras. 32-33.

¹⁵ *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) [*TAC*], paras. 34-35 & 38-39.

¹⁶ *Mazibuko v City of Johannesburg* 2010 (3) BCLR 239 (CC), paras. 60 & 61.

¹⁷ Lilian Chenwi, 'Unpacking "Progressive Realisation", its relation to Resources, Minimum Core and Reasonableness, and Some Methodological Considerations for Assessing Compliance' (2013) 46(3) *De Jure* 742 at p. 754; and CESCR, *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)* (14 December 1990), UN Doc No E/1991/23, para. 10.

¹⁸ Chenwi, 'Unpacking "Progressive Realisation", its relation to Resources, Minimum Core and Reasonableness, and Some Methodological Considerations for Assessing Compliance' (note 17 above), p. 754.

¹⁹ Chenwi, 'Unpacking "Progressive Realisation", its relation to Resources, Minimum Core and Reasonableness, and Some Methodological Considerations for Assessing Compliance' (note 17 above), p. 754, citing David Bilchitz, *Poverty Reduction and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007), p. 149. See also David Bilchitz, 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence' (2003) 19(1) *South African Journal on Human Rights* 1, p. 11.

²⁰ Mawethu Nkosana Nkolomba & Vuyokazi Futshane, 'South Africa's Rising Poverty Rates are Indicators of a Deteriorating Human Rights Situation' *Huffington Post* (15 August 2017), available at: https://www.huffingtonpost.co.za/mawethu-nkosana/south-africas-rising-poverty-rates-are-indicators-of-a-deteriorating-human-rights-situation_a_23170066/.

between 2006 and 2015 revealed that 55.5% of SA population lives in poverty, which is also becoming increasingly intersectional (with race, gender, class and age). The report states:

Despite the general decline in poverty between 2006 and 2011, poverty levels in South Africa rose in 2015. When applying the upper-bound poverty line [UBPL] (R992 per person per month (ppm) in 2015 prices), we see that more than one out of every two South Africans were poor in 2015, with the poverty headcount increasing to 55,5% from a series low of 53,2% in 2011. This translates into over 30,4 million South Africans living in poverty in 2015.²¹

Using the food poverty line (FPL) of 'R441 ppm in 2015 prices' showed a decrease from 16.7 million in 2009 to 13.8 million in 2015 of South Africans living below the FPL. The report found that 'the financial health of South African households decline[d] under the weight of ... economic pressures [between 2011 and 2015] and, in turn, pulled more households and individuals down into poverty' and 'the poverty gaps also increased between 2011 and 2015', implying that 'not only were more people poor in 2015, but those who were poor were slightly further away from the poverty line relative to their position in 2011'.²² Stats SA's findings also 'show that there is still *significant* disparity in poverty levels between population groups and the sex of individuals', with generally 'black African females, children (17 years and younger), people from rural areas, those living in the Eastern Cape and Limpopo, and those with no education' being 'the main victims in the ongoing struggle against poverty'.²³ In fact, 'black Africans have always had higher proportions of people living below the LBPL relative to the national poverty rate' – the figure increased to 44.8% for poor black African males and to 49.2% for poor black African females in 2015.²⁴ Contrasting the statistics for black South Africans with that of other population groups shows the extent to which poverty disproportionately affects the former group:

[P]oor Indians/Asians decreased from 2,9% in 2011 to 1,2% in 2015. The proportion of poor females from this population group decreased by 71,0% from 3,1% in 2011 to just 0,9% in 2015, whereas the proportion for males decreased by 40,7% from 2,7% in 2011 to 1,6% in 2015. The proportion of poor whites decreased, but very slightly, from 0,5% to 0,4% for both males and females during that period.²⁵

In relation to 'population living below the LBPL by sex',

[t]he proportion of poor females living below the LBPL has increased from 38,1% in 2011 to 41,7% in 2015; meaning that more than two out of every five females in South Africa were poor. Males showed

²¹ Statistics South Africa (Stats SA), *Poverty Trends in South Africa: An Examination of Absolute Poverty between 2006 and 2015* (2017), p. 14, available at: <http://www.statssa.gov.za/publications/Report-03-10-06/Report-03-10-062015.pdf>. On poverty lines used in SA, 'Stats SA employed an internationally recognised approach – the cost-of-basic-needs approach – to produce three poverty lines, namely the food poverty line (FPL), the lower-bound poverty line (LBPL), and the upper-bound poverty line (UBPL). These lines capture different degrees of poverty and allow the country to measure and monitor poverty at different levels. The FPL is the rand value below which individuals are unable to purchase or consume enough food to supply them with the minimum per-capita-per-day energy requirement for adequate health. The LBPL and UBPL are derived using the FPL as a base, but also include a non-food component. Individuals at the LBPL do not have command of enough resources to purchase or consume both adequate food and non-food items and are therefore forced to sacrifice food to obtain essential non-food items. Meanwhile, individuals at the UBPL can purchase both adequate levels of food and non-food items.' (p. 7)

²² Ibid at, pp. 14 & 16. The 'poverty gap' is used to 'gauge how poor the poor are'. 'The gap measures the average distance of the population from the poverty line and is expressed as a percentage of the poverty line.'

²³ Ibid, p. 18. Emphasis added.)

²⁴ Ibid, p. 19. As explained by StatsSA, 'the lower-bound poverty line [LBPL] has emerged as the preferred threshold that is commonly used for the country's poverty reduction targets outlined in the Medium Term Strategic Framework (MTSF), National Development Plan, and Sustainable Development Goals' (p. 15).

²⁵ Ibid, p. 19.

a similar trend as females, with the percentage of males living below the LBPL increasing from 34,7% in 2011 to 38,2% in 2015.²⁶

On ‘population living below the LBPL by age’, the report indicates that ‘youth (18–24) had the second highest proportion of people living below the LBPL in 2015, with more than two out of every five (43,6%) youth living below this line’.²⁷

The increase in poverty levels in the country ‘means that the country has lost ground in the war on poverty and now will have to reduce poverty at a faster rate than previously planned’.²⁸

20. Realisation of, at the very least, minimum essential levels of the rights in the ICESCR is crucial to the fight against poverty in the country. It is therefore important that, following ratification of the ICESCR, the SA government should identify the various needs and opportunities, as well as the applicable contexts, for enjoyment of the rights in the ICESCR, so as to formally determine and make public, in the SA context, the applicable minimum threshold for the progressive realisation of rights in the ICESCR.

C. Recommendations

21. We recommend that the CESCR should urge SA to:
 - a. Consider how its macro-economic fiscal policy, and specifically the VAT increase, impacts on the progressive realisation of the rights in the ICESCR, with a view to addressing any negative impacts of the policy on the enjoyment of these rights in general and access to minimum essential levels of the rights in particular, especially for the poor.
 - b. Report on its institutional framework on the use of development aid, and provide statistical disaggregated data on resources available to it through international assistance and co-operation, including the extent to which such resources are allocated to priority sectors (and which) and used for the progressive realisation of rights, especially the rights of the most vulnerable and marginalised individuals and groups.
 - c. Undertake a comprehensive assessment and identify the various needs and opportunities, as well as the applicable contexts, for enjoyment of rights in the ICESCR in the country, with a view to determining and making public the applicable minimum threshold for the progressive realisation of rights in the ICESCR in the context.

V. Article 9: Right to Social Security

22. Currently, more than 17 million South Africans, about a third of the nation’s population, are reliant on some form of social assistance through social grants.²⁹
23. In his maiden State of the Nation Address on 16 February 2018, SA President Cyril Ramaphosa emphasised the importance of social assistance, saying, ‘Social grants remain a vital lifeline for millions of our people living in poverty.’³⁰ The President acknowledged the current uncertainty, confusion and fear facing those receiving social grants, due to the inefficiency of primary entity responsible for the administration and distribution of social grants in SA, the South African Social Security Agency (SASSA).³¹

²⁶ Ibid, p. 29.

²⁷ Ibid, p. 30.

²⁸ Ibid, p. 18.

²⁹ See Cyril Ramaphosa, ‘State of the Nation Address by President of the Republic of South Africa, Mr Cyril Ramaphosa’ (16 February 2018), available at: <http://www.thepresidency.gov.za/speeches/state-nation-address-president-republic-south-africa%2C-mr-cyril-ramaphosa>.

³⁰ Ibid.

³¹ Ibid.

A. Problems relating to the administration of social grants

24. The current practical administration of social grants has fallen short of constitutional promises. To date, SASSA has relied on an outsourced grant payments model. However, the use of an external service provider has put grant beneficiaries at risk of accessing the full cash value of their grants. There have been delays caused by SASSA in its process of phasing out the constitutionally invalid contract of Cash Paymaster Services (CPS), which is the current service provider contracted to distribute social grants.³² SASSA, in terms of the South African Social Security Agency Act 9 of 2004 (the SASSA Act) and an *AllPay2* Court Order in 2014,³³ was to move towards insourcing the administration of social assistance. The use of an external service provider has put grant beneficiaries at risk in terms of accessing the full cash value of their grants.
25. The SASSA bank accounts into which grants are paid have been subject to unexplained and unauthorised deductions (via debt orders and the Unstructured Supplementary Service Data [USSD] platform). Grant beneficiaries' confidential information collected during the registration process via a proprietary system was compromised. The information was used by the Net1 group of companies to sell financial services and generate large profits from grant beneficiaries without compensation. This has led to legal proceedings by civil society to challenge the status quo and hold the SA government accountable.
26. As observed by the SA Constitutional Court, the country's social assistance programme 'has had a material impact in reducing poverty and inequality and in mitigating the consequences of high levels of unemployment'.³⁴ But the SASSA problem – specifically referring to the conduct of the then Minister of Social Development Bathabile Dlamini and of SASSA – has put this 'achievement in jeopardy' and 'has precipitated a national crisis'.³⁵

B. Evidence of how South African grant beneficiaries are affected

27. The Black Sash, through its field work in SA, has found that the structural and systemic failures of SASSA have directly and negatively impacted the lives of grant recipients.³⁶
28. Many recipients reported unauthorised, fraudulent, unlawful deductions from their grant payments for financial and other services such as funeral policies, loans, airtime and electricity. An unpublished research report of the Black Sash highlights these concerns:

Once, a beneficiary was left with nearly half of her initial grant amount, and when she went to the bank teller, she was told that the money was gone and could not be withdrawn. When she reported the problem to SASSA, she was told that it was not their problem.³⁷

29. Many recipients have struggled, and continue to struggle, to secure recourse or administrative justice and refunds. The processes for accessing recourse are confusing. Grant beneficiaries are

³² The SA Constitutional Court declared the contract constitutionally invalid in *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC) (*AllPay 1*).

³³ *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* [2014] ZACC 12; 2014 (4) SA 179 (CC); 2014 (6) BCLR 641 (CC) (*AllPay 2*).

³⁴ *Black Sash Trust v Minister of Social Development and Others (Freedom Under Law NPC Intervening)* [2017] ZACC 8; 2017 (5) BCLR 543 (CC); 2017 (3) SA 335 (CC) (17 March 2017), Judgment, para. 1.

³⁵ *Ibid*, paras. 1 & 51.

³⁶ Black Sash submission to the Constitutional Court Panel of Experts under Case No CCT48/17 (December 2017). See also, Black Sash documentaries Grant Grabs, available at: <https://www.youtube.com/watch?v=Qa97QSi8F80>; <https://www.youtube.com/channel/UCPO93hlVXM3C3vKOfDiG1Vg>.

³⁷ Erin Torkelson, 'Easy Pay Everywhere Card Closures: Port Elizabeth, Limehill and Delft' Unpublished Black Sash Research Report (2017) (on file with Black Sash).

sent from pillar to post between SASSA, CPS, other service providers and the banks; their limited financial resources are consumed by prepaid airtime and transport in seeking redress. Any deductions without proper recourse compromises the integrity of the social grant system and the dignity of grant beneficiaries.

30. Grant beneficiaries' confidential data are compromised by proprietary access to biometric data collected on behalf of the state. This has resulted in unsolicited marketing and transfer of grant money from the SASSA account (endorsed by SASSA and government) to the Easy Pay Everywhere bank account (commercial account with Moneyline loan company). Both of these accounts are held by Grindrod Bank.
31. With grant beneficiaries receiving little or nothing of their grant on a monthly basis, they have fallen prey to reckless lending and indebtedness to loan sharks only interested in profit.

C. Inefficiency of the social grant

32. The amount grant beneficiaries receive is not enough to sustain their basic living needs. For example, the current Child Support Grant of R400³⁸ falls below the food poverty or extreme poverty line.³⁹ Yet, in 2015, '61,3% of poor households are supported by child support grants'.⁴⁰ Thus, using the definition of the food poverty line, these households 'are unable to purchase or consume enough food to supply them with the minimum per-capita-per-day energy requirement for adequate health'.⁴¹ There is therefore a need for the grant to be increased as a matter of urgency.
33. In addition, the unemployment rate in SA is 'stubbornly high', at 26.7% in 2016 and continuing to rise.⁴² This was affirmed by the Minister of Finance in his 2018 national budget speech.⁴³ The increasing and 'stubbornly high' unemployment rate, combined with, inter alia, low economic growth, continues to severely limit people's ability to make a living. Young people are the most affected, as well as poor men and women in the 18-59 age category. Youth, for example, account for 63.5% of the total number of unemployed persons.⁴⁴ The unemployment rate among those aged 15-34 was 38.2%, and among those aged 15-24 years was over 52%, in the first quarter of 2018.⁴⁵ It should be noted, as reported by StatsSA, that the youth unemployment rate is higher than others irrespective of education level.⁴⁶
34. A universal basic income grant is necessary as one of the strategies to fight the triple challenge of poverty, unemployment and inequality and lift people out of destitution. This must be done in line with International Labour Organization (ILO)'s Recommendation 202 on Social Protection Floors, which enjoins States to, at least, guarantee access to essential health care, including maternal health care, basic income for children, active unemployed persons and older persons.⁴⁷

³⁸ Budget speech (note 13 above) p. 15.

³⁹ In 2017, the food poverty line was adjusted from R441 (in 2015) to R531 per month (see Statistics South Africa (Stats SA), *Poverty Trends in South Africa* (note 21 above), p. 8).

⁴⁰ *Ibid.*, p. 37.

⁴¹ *Ibid.* at, p. 7.

⁴² *Ibid.* at, p. 44.

⁴³ Budget speech (note 13 above), p. 7.

⁴⁴ Statistics South Africa Stats SA, 'Youth Unemployment Still High in Q1: 2018', *Statistics South Africa* (15 May 2018), available at: <http://www.statssa.gov.za/?p=11129>.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ International Labour Organization, (ILO), *The Social Protection Floors Recommendation 202*, adopted at 101st ILC session, (June 2012.), available at: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R202.

D. Recommendations

35. With the change of Cabinet this year, South Africa has an opportunity to make significant shifts in its social grant administration processes.
36. We urge the SA government to give due consideration to the following recommendations on how the social grant system can be improved in order to progressively realise the right to social security and assistance:
 - a. Effective roll-out and implementation of the state-led hybrid social grant payment model⁴⁸ for beneficiaries to receive the full cash value of their grants, without deductions and excessive bank charges, and with proper and easily accessible recourse systems in place.
 - b. Social grant payments to be placed into a protected or special disbursement bank account so that beneficiaries receive the full cash value of their grants.⁴⁹
 - c. SASSA to ensure that the confidential data of grant recipients are fully protected.
 - d. The amount of the social grant, and especially the child support grant, which is below the food/extreme poverty line, must be indexed against a decent standard of living so that the poor are able to pay for living expenses. .
 - e. Social security and social assistance in particular, must make provision in future for those between the ages of 18 to 59 years with no or little income. In this regard, the government should revisit the discussion of a universal basic income grant in addition to existing social grants as one of the strategies towards improving the lives of the poor.
 - f. The leadership and governance structure of SASSA must be transparent and the Social Assistance Act 13 of 2004 should be amended to do away with concurrent decision-making.

IV. Article 11: Right to Adequate Food

37. The government of SA has adopted legislative instruments, policies and programmes within the context of national food security. Steps to ensure the realisation of the right to food in the country are expressed in the National Policy Food Security and Nutrition (2014) and the Integrated Growth and Development Policy for Agriculture, Forestry and Fisheries (IGDP) (2012) and related action plans based on the National Development Plan. A range of programmes, including the Department of Social Development's social grants programmes, the National School Nutrition Programme (NSNP) of the Department of Basic Education, and the Department of Health's nutrition education and food safety programmes, have been implemented.⁵⁰ On the basis of these multi-sectoral policies and programmes, the three main channels by which right to food is realised in SA include: (1) own production, which requires access and control over productive resources; (2) purchasing of food, which requires ability to earn income either through employment, self-employment or social transfers; and (3) direct food aid.

⁴⁸ See Jeff Radebe, 'Comprehensive Social Security Implementation', Statement by the Honourable Jeff Radebe, MP, Minister in the Presidency and Chairperson of the Inter-Ministerial Committee on Comprehensive Social Security Implementation (21 November 2017) p. 3, available at: <http://www.sassa.gov.za/index.php/newsroom/media?download=704:imc-statement-to-the-joint-sitting-of-committeess>. The 'hybrid approach will allow a set of public sector and private sector service providers by offering beneficiaries maximum choice, access and convenience'.

⁴⁹ South African Social Security Agency (SASSA), *E-Newsletter* (April 2018).

⁵⁰ Daniel McLaren, Busiso Moyo, & Jared Jeffery, 'The Right to Food in South Africa: An Analysis of the Content, Policy Effort, Resource Allocation and Enjoyment of the Constitutional Right to Food' The Socio-Economic Rights Monitoring Tool, SPII Working Paper 11 (2015), available at: <http://psam.org.za/research/1461663280.pdf>.

38. However, lack of effective enforcement and implementation of existing legal and policy frameworks undermines food-security programmatic efforts aimed at contributing towards the progressive realisation of the right to food. Hence, food insecurity and gaps in the realisation of the right to food remain.

A. Progress on food security has stagnated and remains uneven

39. While South Africa is considered food-secure at the national level, meaning it produces enough calories to feed the country's population of approximately 55 million,⁵¹ a significant proportion of the population still experiences hunger and inadequate access to food.⁵² Importantly, hunger and food insecurity are rampant among school-leavers and students at tertiary institutions. The 2016 General Household Survey by Stats SA revealed that

[a]lthough household access to food has improved since 2002, *it has but remained static since 2011*. The Household Food Insecurity Access Scale which is aimed at determining households' access to food showed that the percentage of South African households with inadequate or severely inadequate access to food decreased from 23,9% in 2010 to 22,3% in 2016. During this time, the percentage of individuals that were at risk decreased from 28,6% to 24,9%. Between 2002 and 2016, the percentage of households that experienced hunger decreased from 23,8% to 11,8% while the percentage of individuals who experienced hunger decreased from 29,3% to 13,4%.⁵³

From a provincial perspective, the survey showed that inadequate, and in some cases severely inadequate, food access problems were most common among households in the North West (36,6%), Northern Cape (33,6%), Mpumalanga (31,1%), and the Eastern Cape (26,4%).⁵⁴

In metropolitan areas, 18,4% of households 'experienced inadequate or severely inadequate access to food', with the most common areas being the City of Cape Town (29,7%), Mangaung (26,4%), and Nelson Mandela Bay (25,0%).⁵⁵ Vulnerability to hunger has generally been on a decline since 2002, with a spell in between, but there was a slight increase of 11.3% in 2015 to 11.8% in 2016 (for households) and 13.1% in 2015 to 13.4% in 2016 (for persons).⁵⁶

⁵¹ United Nations Food and Agricultural Organisation (UN FAO), *Country Briefs: South Africa*. Rome: GIEWS (Global Information and Early Warning System) (2016), available at: <http://www.fao.org/giews/countrybrief/country.jsp?code=ZAF>.

⁵² Also, a 2014 study by Oxfam revealed that more than half of the population are at risk of hunger (see Oxfam, *'Hidden Hunger in South Africa: The Faces of Hunger and Malnutrition in a Food-Secure Nation'*, Oxfam Research Report (2014), available at: https://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/hidden_hunger_in_south_africa_0.pdf.) South African National Health and Nutrition Examination Survey (SANHANES-1) 2013 found that almost 25% of South Africans were at risk of hunger and another 25% experienced hunger. It further noted that 15.3% of children in South Africa in 2012 lived in households that reported hunger. (see O Shisana, D Labadarios, T Rehle, L Simbayi, K Zuma, A Dhansay, P Reddy, W Parker, E Hoosain, P Naidoo, C Hongoro, Z Mchiza, NP Steyn, N Dwane, M Makoae, T Maluleke, S Ramlagan, N Zungu, MG Evans, L Jacobs, M Faber, & SANHANES-1 Team, *South African National Health and Nutrition Examination Survey (SANHANES-1)* (2013), available at: [http://www.hsrc.ac.za/uploads/pageNews/72/SANHANES-launch%20edition%20\(online%20version\).pdf](http://www.hsrc.ac.za/uploads/pageNews/72/SANHANES-launch%20edition%20(online%20version).pdf). African children were identified as the most likely to be living in household reporting hunger (16.9%) and the lowest percentage was amongst Indian children in 2012 (0.6%) (see African Centre for Biosafety, 'GM Contamination Cartels and Collusion in South Africa's Bread Industry' (2014), available at: <http://acbio.org.za/wp-content/uploads/2015/02/GM-Bread-201405.pdf>).

⁵³ Statistics South Africa, 'General Household Survey 2016' (2017), pp. 5-6 (emphasis added) (see also p. 59), available at: <https://www.statssa.gov.za/publications/P0318/P03182016.pdf>.

⁵⁴ Ibid, p. 60.

⁵⁵ Ibid.

⁵⁶ Ibid, p. 59.

40. The spatial dimension of food security in South Africa is important for understanding food system governance outcomes, specifically in relation to the accessibility and availability of food. Food environments – which can be understood as the physical, economic, policy and socio-cultural opportunities and factors that influence people’s food and drink consumption choices – impact on the accessibility, availability and adequacy of food within a given area, are powerful determinant of food behaviours and food system outcomes.⁵⁷ The availability and accessibility of food are constrained by the environments in which where people live, work and purchase food.⁵⁸
41. Another aspect of SA’s hidden food insecurity is the paradox of malnutrition and undernourishment, which points to the lack of food adequacy. High levels of underweight, overweight and obese children and adults have been attributed to the rapid reconfiguration of the food environment since the 1990s. These changes have contributed to the ‘nutritional transition’ from traditional diets consisting of cereals and fibre to more Western diets that are high in sugar, fats and animal-source products.
42. Food and nutrition insecurity can be understood in this context as resulting from lack of access to adequate and nutritious food, rather than a problem of availability. South Africa is faced with a complex food security problem characterised by diet-related non-communicable diseases and pervasive food insecurity and hunger, all of which have manifested in persisting malnutrition and undernourishment among poor and vulnerable households.

B. Policy incoherence is a major obstacle to progress on food security

43. Policy incoherence regarding food supply and food security and nutrition in SA is major obstacle to ensuring food security and thereby contributing to the progressive realisation of the right to food for all people.⁵⁹ While social grants and other food security measures by the government, such as school feeding schemes, have contributed to the reduction of hunger among poor and vulnerable people, these measures do not address the structural economic and social factors that undermine people’s ability to feed themselves.
44. There are underlying tensions between policy objectives set out by the various departments involved in driving and regulation of food supply, including the Department of Trade and Industry (DTI), the Department of Agriculture, Fisheries and Forestry (DAFF) and state agencies such as the Competition Commission, Department of Health, and Department of Social Development. These tensions are accentuated as the state seeks to balance economic growth priorities with health and social development outcomes and the right to food. At policy level, efforts to ensure the progressive realisation of the right to food are hindered by food supply and food security policy frameworks that tend to favour industry.
45. Based on a review of 40 policy documents and government initiatives relevant to food and nutrition, and 14 semi-structured interviews with 22 actors in the South African policy space in

⁵⁷ Boyd Swinburn, Vivica Kraak, Harry Rutter, Stefanie Vandevijvere, Tim Lobstein, Gary Sacks, Fabio Gomes, Tim Marsh, & Roger Magnusson, ‘Strengthening of Accountability Systems to Create Healthy Food Environments and Reduce Global Obesity’ (2015) 385(9986) *The Lancet*, pp. 2534–2545, available at: [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(14\)61747-5/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(14)61747-5/fulltext).

⁵⁸ Florian Kroll, ‘Foodways of the Poor in South Africa -: How Value-Chain Consolidation, Poverty & Cultures of Consumption Feed Each Other’, PLAAS Working Paper 36 (2016), available at: <http://www.plaas.org.za/plaas-publication/wp36-foodways-fk>.

⁵⁹ Anne Marie Thow, Stephen Greenberg, Mafa Hara, Sharon Friel, Andries du Toit & David Sanders, ‘Food Trade and Investment in South Africa: Improving Coherence between Economic Policy, Nutrition and Food Security’, PLAAS Working Paper 50 (2017), available at: <http://www.plaas.org.za/plaas-publications/working-paper-50-food-trade-and-investment-south-africa-improving-coherence>.

September 2016, Thow et al. sought to identify opportunities to improve policy coherence between actors that shape food security and nutrition in SA.⁶⁰ The National Policy on Food and Nutrition Security (NFNSP) places emphasis on the right to food, essentially calls for increased access to production inputs, and identifies the need to leverage government procurement as well as market interventions and trade measures for improving food security and addressing land tenure. Food security is recognised in the Integrated Growth and Development Plan through policy frameworks and programmes that are geared towards ensuring food security through economic growth, job creation and rural development, thereby contributing to food security through economic measures and increased food production output. However, Pereira and Drimie state that the current food and nutrition policy and implementation plan were developed and adopted through a flawed process that lacked genuine consultation with stakeholders in the food system.⁶¹

46. The failure of the government to enact legislation specific to the right to food has exacerbated policy incoherence. Of all the rights included in the Bill of Rights, the right to food is about the only one without a specific legislation to actualise it. The absence of specific legislation on the right to food has made it difficult for the government to clearly formulate concrete measures that would ensure the realisation of this right. Currently, the National Policy on Food and Nutrition Security, which provides important direction on the right to food, is not a binding document. This means that people cannot rely on it to secure or challenge the activities of the government with regard to the right to food. During its visit to South Africa in 2011, the Special Rapporteur on the right to food noted that poor or lack of implementation of laws and policies on the right to food has deprived many people the enjoyment of this right.⁶² It is believed that specific legislation on the right to food will galvanise action and response from various stakeholders in holding the government accountable to realise this right.
47. Moreover, there is no designated department to address the right to food in the country. Rather, different departments are involved in policies and programmes relating to the right to food. This sometimes leads to incoherence in policy formulation and implementation. Although the NFNSP makes provision for inter-sectoral coordination and makes recommendations for the integration of existing policies through the Office of the Presidency, it is unlikely that this process will overcome the shortcomings and lead to positive outcomes, due to lack of coordination between the government departments involved and to silence on the lines of accountability.
48. Different actors in the food system hold multiple perspectives, which represent one of the underlying reasons for persistent household food insecurity in SA.⁶³ There is a dearth of knowledge on appropriate food-system governance strategies to facilitate democratic food systems and enable actors and stakeholders to work collaboratively to address linked issues related to food. Food and nutrition policies and programmes are developed and implemented without adequate consultation with stakeholders across the food system and to the complete exclusion of intended beneficiaries.

C. Land reform has failed to promote sustainable land use

49. On the one hand, the land reform process has failed to deliver on policy and programme objectives that set out to promote sustainable land use, poverty reduction and resilient livelihoods, among

⁶⁰ Thow, Greenberg, Hara, Friel, du Toit & Sanders (note 59 above).

⁶¹ Laura Pereira & Scott Drimie, 'Governance Arrangements for the Future Food System: Addressing Complexity in South Africa' (2016) 58(4) *Environment: Science and Policy for Sustainable Development*, pp. 18-31, available at: <http://www.plaas.org.za/sites/default/files/publications-pdf/Pereira%20and%20Drimie%202016.pdf>.

⁶² Human Rights Council, 'Report of the Special Rapporteur on the Right to Food, Olivier De Schutter: Mission to South Africa' (2012), UN Doc. No A/HRC/19/59/Add.3 (2012), para. 60.

⁶³ Laura Pereira & Scott Drimie, 'Governance Arrangements for the Future Food System: Addressing Complexity in South Africa' (2016) 58(4) *Environment: Science and Policy for Sustainable Development*' (note 61 above), pp. 18-31, available at <http://www.plaas.org.za/sites/default/files/publications-pdf/Pereira%20and%20Drimie%202016.pdf>.

others, and on the other hand, the government continues to support the corporatised food system through subsidies, access to technical facilities and expertise, and policies that favour private investment.

50. Extensive amendments of the land reform policy and programmes, specifically new land redistribution policies, are undermining people's access to productive resources and livelihoods. In urban settings, inappropriate policy on land use zoning and arduous business permitting processes, which essentially require informal sector enterprises in township economies to formalise in order to obtain legal registration of any kind, marginalise actors in the informal food system. As a result of the lack of regulation in land use zoning by municipalities, informal businesses are unable to access credit from financial institutions, which constrains the potential for these businesses to function competitively and to attract investment.
51. The dominant corporate structure of South Africa's agro-food system entails that the government does not adequately recognise the role of small-scale subsistence and commercial farmers and small enterprises that operate on the margins in local markets. Following a series of changes in land redistribution policy and approaches since 1995, the current state leasehold model for land redistribution has been revised through the adoption of the State Land Lease and Disposal Policy (SLLDP) in 2013 that grants black farming households and communities 30-year leases, which can be renewed for 20-years before beneficiaries can apply for full ownership and title.
52. Black farming households and communities can access government support for on-farm infrastructure and production through the Recapitalisation and Development Programme, which requires them to enter into strategic partnerships with farming or agribusiness companies.⁶⁴ It is important to take into account that the purpose of the land redistribution programme is to ensure that poor and landless people access land for residential and productive purposes. The profound changes observed in land redistribution policy and programmes have had an adverse impact on the rural and peri-urban farming households and communities it is intended to benefit.
53. Research findings from a field study on land redistribution reveal that the new State Land Lease and Disposal Policy undermines land rights for beneficiaries, first due to lack of clarity about the tenure for beneficiaries and, secondly, because it introduced rent.⁶⁵ In response to the beneficiaries' inability to pay rent, the leases are converted into 'caretakership' agreements, which essentially exempt beneficiaries from rent but also mean that the beneficiaries become caretakers of state land rather than leaseholders with land rights. Although rural people in rural and peri-urban South Africa are increasingly accessing food through formal and informal food retailers, own production remains an important source of food and livelihoods. Insecure land tenure and lack of state support for small-scale agriculture present a direct threat to people's ability to feed themselves and remain free from hunger. The study also points to fundamental tensions between the Department of Rural Development and Land Reform (DRDLR) and the DAFF regarding each department's mandate as it relates to land reform beneficiaries. Provincial-level agriculture officials stated that the department will not provide support to black farming households and communities who are beneficiaries of the land redistribution programme, as they do not hold long-term leases.

D. Inadequate regulation of the corporate sector skews the food system

54. The dichotomous nature of SA's food system – evidenced by a dominant formal, commercial sector that is connected to international agribusiness and international finance and which operate

⁶⁴ Ruth Hall & Thembela Kepe, 'Elite Capture and State Neglect: New Evidence on South Africa's Land Reform' (2017) 44(151) *Review of African Political Economy*, pp. 122-130, available at: <http://www.plaas.org.za/sites/default/files/publications-landpdf/2017%20-%20Hall%20%26%20Kepe%20-%20Elite%20capture%20%26%20state%20neglect%20new%20evidence%20on%20South%20Africa%27s%20land%20reform%20-%20ROAPE.pdf>.

⁶⁵ Ibid.

alongside a large informal food sector made up of small-scale farmers and traders who function on the periphery of the formal sector – continues to perpetuate social injustice in the food system, as the distribution of assets such as land and capital remains skewed.

55. Laws and policies exist to control the activities of non-state actors and ensure access to safe and nutritious food for citizens. Some of these laws and policies include the Consumer Protection Act, No. 68 of 2008, the Foodstuffs Cosmetics and Disinfectants Act and its Regulations, the Food Labelling Regulations (R146 amended by R429), and the Regulations Relating to Foodstuffs for Infants and Young Children R991 setting out specific labelling requirements for various types of foodstuffs; the Agricultural Products and Standards Act and its regulations, which govern the labelling of agricultural products; the Liquor Act and Liquor Products Act, setting out requirements for the labelling of alcoholic beverages; and the South African Bureau of Standards, which has formulated a number of labelling standards which are industry-specific and set out the quality or standards-specification marking for different products. However, due to weak or absent monitoring, the activities of non-state actors have continued to undermine access to safe and nutritious food in the country.
56. Increased trade and foreign direct investment (FDI) by large and transnational food and beverage corporations⁶⁶ has resulted in the increased consumption of fats, packaged and processed food with high levels of salt, sugar and fats. A 2014 study by the African Centre for Biosafety (ACB) reveals that the white bread tested contained high levels of Monsanto’s genetically modified (GM) soya in the soya flour used in the bread, and that most companies are flouting GM-labelling laws and undermining the consumer’s right to know.⁶⁷ It further reveals that South Africa spent about R28 billion on GM bread, thereby enriching the country’s bread cartel made up of Tiger Brands, Premier Foods, Pioneer Foods and Foodcorp.

Table. 1 Genetically Modified content in white bread

Testing of the **GM** content of the soya flour used in popular white breads revealed:

White bread brand	GM content in soya flour	Produced by	Labelled as
Checkers white bread	91.09%	Shoprite Holdings	No GM label. (No ingredients labelled)
Woolworths white bread	85.62%	Woolworths	May be Genetically Modified
Spar white bread	72.69%	Spar	No GM label. (No ingredients labelled)
Blue Ribbon white bread	64.9%	Premier Foods	Not labelled
Pick n Pay white bread	42.82%	Pick n Pay	Not labelled
Albany superior white bread	23.23%	Tiger Brands	Not labelled
Sunbake white bread	20.46%	Foodcorp	Not labelled
Sasko white bread	so low as to be unquantifiable	Pioneer Foods	Produced using Genetic Modification

⁶⁶ Nicole Claasen, Marinka van der Hoeven and Namukolo Covic, ‘Food Environments, Health and Nutrition in South Africa: Mapping the Research and Policy Terrain’, PLAAS Working Paper 34 (2016), available at: <https://www.plaas.org.za/plaas-publication/wp34-foodenvironment-nc-et-al>.

⁶⁷ African Centre for Biosafety (ACB), ‘GM Contamination Cartels and Collusion in South Africa’s Bread Industry’ (2014), available at: <https://acbio.org.za/gm-contamination-cartels-and-collusion-in-south-africas-bread-industry/>.

57. According to the report, while the Consumer Protection Act requires that every ingredient in food products containing 5% or more GM content must be labelled ‘contains GMOs’ or ‘produced using genetic modification’, only one white bread brand tested (Sasko, belonging to Pioneer Foods) displayed a GM label – ironically, this brand did not need to be labelled in terms of the law because of the unquantifiable levels of GM soya content found. The report concludes that the labelling of white bread is misleading, confusing and misplaced. Based on the report, Zakiyya Ismail opines that ‘The current labels are either misleading, confusing or completely absent, leaving consumers utterly in the dark.’⁶⁸
58. An analysis of the scale and scope of the informal economy of South Africa across eight townships in Cape Town, Johannesburg, Ekurhuleni and Durban, reported that out of the 10,049 micro-enterprises they documented in the study, 3,966 (39% of the total) are engaged in the trade of food.⁶⁹ These enterprises range from primary food producers to a wide array of food retailers, from street vendors to house and spaza shops and informal food service enterprises.
59. A submission to the Grocery Retail Sector Market Inquiry highlights ‘[s]ome important factors that impact on grocery retailing in the township economy’.⁷⁰ These are:
- a. ‘Inappropriate government policies (in particular municipal policies towards informal micro-enterprises).’
 - b. ‘Unfair competition from the corporate retailing sector via shopping malls and large chain businesses by creating localised grocery retailing monopolies in the township residential setting.’
 - c. ‘Unfair competition from the corporate retailing sector by government outsourcing of SASSA grants distribution to corporate retailers “captures” an essential revenue stream.’

E. Impact of VAT increase on food security

60. The recent increase of VAT from 14% to 15%⁷¹ will have a negative impact on access to food for the poor.⁷² The government is of the view that the poor will not be negatively affected, based on the following: ‘[t]he current zero-rating of basic food items such as maize meal, brown bread, dried beans and rice will limit the impact on the poorest households’; the increase in social grants will compensate vulnerable households; and ‘[s]ome relief will be provided for lower income individuals through an increase in the bottom three personal income tax brackets and the rebates’. However, the government fails to take into consideration what people eat or need to prepare meals (the poor require other basic items that are not zero-rated foods) and the fact that social grant amounts are still inadequate despite the increase.

⁶⁸ African Centre for Biosafety (ACB), ‘Below the belt, below the Breadline - South Africa’s Inequitable and GM contaminated bread. Available industry’, *African Centre for Biosafety* (2018), available at: <https://acbio.org.za/below-the-belt-below-the-breadline-south-africas-inequitable-and-gm-contaminated-bread-industry/>.

⁶⁹ Leif M Peterson & Andrew J E Charman, ‘The Scope and Scale of the Informal Food Economy of South African Urban Residential Townships: Results of a Small-Area Micro-Enterprise Census’ (2018) 35 *Development Southern Africa*, pp. 1-23, available at: <https://www.tandfonline.com/doi/abs/10.1080/0376835X.2017.1363643>.

⁷⁰ Leif Peterson, ‘Submission to Grocery Retail Sector Market Inquiry’ (2017), available at http://www.plaas.org.za/sites/default/files/publications-pdf/Submission-to-Grocery-Retail-Sector-Market-Inquiry_Feb.pdf.

⁷¹ See Budget Speech (note 13 above).

⁷² Mervyn Abrahams, ‘Zero-Rated Foods Do Not Protect the Poor from the Negative Impact of the VAT Increase’, *Southern Africa Food Lab* (23 February 2018), available at: <http://www.southernafricafoodlab.org/zero-rated-foods-do-not-protect-the-poor-from-the-negative-impact-of-the-vat-increase/>.

F. Recommendations

61. We recommend that the CESCR should urge SA to:
- a. Consider as a matter of urgency the enactment of a law on the right to food in the country.
 - b. Consider identifying a specific department on food security in the country.
 - c. Consider adopting policies and programmes that will address hunger among school-leavers and students in tertiary institutions.
 - d. Promote critical dialogue and debate aimed at challenging and addressing the limitations of the dominant food system, exploring alternatives, and ensuring policy coherence and democratic and accountable governance of food systems.
 - e. Adopt a different approach to food security and food-system governance that promotes interaction across different government departments and with different stakeholders in order to facilitate multi-sectoral action.⁷³
 - f. Facilitate the expansion of the food-productive base⁷⁴ and consider retaining the few large-scale commercial and corporate agricultural producers that supply 80% of total domestic production alongside a rigorous land redistribution programme that offers beneficiaries sufficient and consistent support that facilitates agro-ecological practices and systems in order to integrate black land owners (or leaseholders).
 - g. Promote, where appropriate, informal food supply systems, as they play a significant role in facilitating food access to poor and vulnerable people.⁷⁵
 - h. Strengthen its oversight functions and monitoring of the activities of non-state actors with regard to safe and nutritious food in the country.
 - i. Review as a matter of urgency the zero-rated food list for VAT, with the view to include more basic food items to the list of goods that are zero-rated for VAT.
 - j. Ensure that food manufacturers comply with existing labelling legislation on GM food.

VII. Article 11: Right to Adequate Housing

62. South Africa has a progressive legal and policy framework governing the right to housing. As noted in paragraphs 99 to 102 of the State report, SA has established a comprehensive state-subsidised housing programme which seeks to redress the legacy of apartheid and grant eligible beneficiaries a variety of state-subsidised housing options. In terms of this framework, SA government has been able to make considerable gains over the years. However, these gains mask

⁷³ Pereira & Drimie, 'Government Arrangements for the Future Food System' (note 61 above).

⁷⁴ Stephen Greenberg, 'Corporate Concentration and Food Security in South Africa: Is the Commercial Agro-Food System Delivering?' Institute for Poverty, Land and Agrarian Studies (PLAAS) Rural Status Report 1 (2015), p. 18, available at: <http://www.plaas.org.za/sites/default/files/publications-pdf/PLAAS%20Rural%20Report%20Book%201%20-%20Stephen%20-%20Web.pdf>.

⁷⁵ There is need for food- system governance strategies that 'span complex technical and organisational capacity, and a continued flow of food' throughout all geographic areas along the urban-rural continuum; that enhance social equity and food justice; and that bring about a shift to ecologically sustainable food production and distribution. Greenberg, *Corporate Concentration and Food Security* (note 74 above), in an analysis of the South African agro-food system, lists some of the precise features that make the informal food system valuable. These, which include: flexible of informal food systems, advantageous and accessible locations, and packaging sizes that are appropriate for consumers and localness.

various systemic challenges that continue to compromise the enjoyment of the right of access to adequate housing.

63. These challenges stem not from the legal and policy framework governing housing but rather from the manner in which this legal framework has been implemented. The implementation of the right to adequate housing has, for example, been plagued by poor planning, a lack of coordination, insufficient capacity, a failure to adequately monitor the implementation of government policies, and a lack of political will.

A. Availability (housing backlog and implications)

64. State-subsidised housing plays a critical role in addressing the acute shortage of affordable housing available to poor and low-income households in South Africa. The State Party has consistently failed to adequately regulate the private sector, which has resulted in the formal housing market being inaccessible to the majority of South Africans.⁷⁶ The State Party's investment in the housing sector is therefore the primary means through which it has elected to give effect to the right of access to adequate housing.
65. It should be no surprise that the reality of housing in South Africa is full of contradictions. Although SA has made considerable gains in the delivery of state-subsidised housing by providing approximately 3.7 million housing opportunities since 1994,⁷⁷ there are substantial housing-related backlogs; these, in fact, are increasing due to natural population growth and rural-urban migration.⁷⁸
66. At the same time, SA's ability to provide state-subsidised housing at scale has increasingly been brought into question. For example, a governmental assessment of the total number of housing and residential units completed in terms of SA's housing programmes indicated a dramatic drop in the number of completed houses in recent years.⁷⁹ In fact, in 2014 and 2015 the number of completed houses reached an almost 20-year low (the lowest since 2000).⁸⁰ This is a serious concern, given the considerable reliance on the public sector to provide affordable housing amidst growing demand.

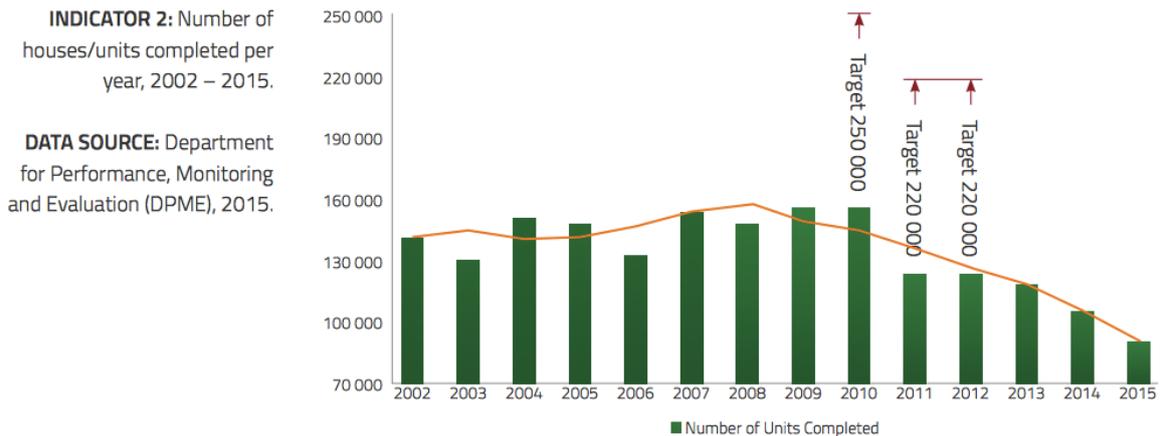
⁷⁶ The vast majority of poor and low-income households are unable to purchase their own properties or obtain a mortgage from a commercial bank to finance such a purchase. In addition, in most urban and metropolitan areas in SA, market-related rentals are unaffordable to poor and low-income households. This suggests the need for greater intervention by the government in regulating the housing market and potentially putting in place rent control measures. However, the government has, until now, not implemented any of these measures. See, for example, Socio-Economic Rights Institute of South Africa (SERI), *Affordable Public Rental Housing*, SERI Policy Brief No 1 (2015); Socio-Economic Rights Institute of South Africa (SERI), *Minding the Gap: An Analysis of the Supply of and Demand for Low-Income Rental Accommodation in the City of Johannesburg*, SERI Research Report (2013); and Ndifuna Ukwazi, *I Used to Live There: A Call for Transitional Housing for Evictees in Cape Town*, Ndifuna Ukwazi Research Report (2017).

⁷⁷ South African Human Rights Commission (SAHRC), *South African Human Rights Commission Investigative Hearing Report* (2015), p. 9, available at: <http://www.sahrc.org.za/home/21/files/Access%20to%20Housing%202015.pdf>. See also Hopolang Selebalo & Dennis Webster, *Monitoring the Right of Access to Adequate Housing in South Africa*, SPII Working Paper No 16 (2017), p. 8, available at: http://www.spii.org.za/wp-content/uploads/2018/02/Right-to-Housing_2017.pdf.

⁷⁸ See National Treasury, 'Chapter 6: Human Settlements', in *Provincial Budgets and Expenditure Review 2005/06-2011/12* (September 2009), p. 10, available at <http://www.treasury.gov.za/publications/igfr/2009/prov/>.

⁷⁹ The assessment was conducted by the Department of Planning, Monitoring and Evaluations (DPME). See Selebalo & Webster, *Monitoring the Right of Access to Adequate Housing* (SPII) (note 77 above), p. 32.

⁸⁰ *Ibid.*



67. SA has focused on fully formalised state-subsidised housing as its preferred model for housing provision, which has meant that housing provision has been a very slow, expensive and highly bureaucratic process that has also suffered from corruption and, perhaps inevitably, failed to address local housing needs. A lack of information in opaque systems for allocating houses has led to popular perceptions that corruption, maladministration and fraud not only siphon off the funds aimed at housing provision, but also frustrates attempts to ensure rational allocation.⁸¹ This means that poor and low-income households often wait many years or even decades to be allocated a home. The process of registering housing beneficiaries' formal titles has also been extremely slow and ineffective, meaning that, in many cases, title has not been conferred as it should have been, leaving recipients in ownership limbo and vulnerable to having their homes 'hijacked' (reoccupied by force) or re-allocated.⁸² This is evident in the significant discrepancies between the number of housing subsidies granted and the number of formal titles received – the figures suggest that, 'potentially, over 1.5 million housing subsidy beneficiaries who received a state housing asset have not had the house registered in the Deeds Registry and do not have formal title'.⁸³

B. Accessibility (location of housing away from social amenities)

68. In response to the drop in delivery, SA has attempted to scale up the provision of housing by focusing on catalytic projects or mega-projects (large-scale housing projects on peripheral greenfields developments).⁸⁴ However, the focus on large-scale provision of housing has had the

⁸¹ See Kate Tissington, Naadira Munshi, Gladys Mirugi-Mukundi & Ebenezer Durojaye, 'Jumping the Queue', *Waiting Lists and Other Myths: Perceptions and Practice Around Housing Demand and Allocation in South Africa*, Community Law Centre, University of Western Cape and SERI Research Report (2013), available at: http://www.seri-sa.org/images/Jumping_the_Queue_MainReport_Jul13.pdf. See also *Thubakgale and Others v Ekurhuleni Metropolitan Municipality and Others*, Judgment, North Gauteng High Court, Case No 39602/2015 (15 December 2017), available at: <http://www.saflii.org/za/cases/ZAGPPHC/2017/923.html>. This was also raised as a key issue during the Campaign's second community dialogue on the implementation of socio-economic rights held in Johannesburg on 24 July 2018.

⁸² Jackie Dugard with Michael Clark, Kate Tissington & Stuart Wilson, *The Right to Housing in South Africa*, Foundation for Human Rights (FHR) Position Paper (2016), p. 32, available at: <http://www.seri-sa.org/images/Housing.pdf>.

⁸³ Shisaka Development Management Services, *Housing Subsidy Assets: Exploring the Performance of Government Subsidised Housing in South Africa – Overall Analysis* (November 2011), p. 23, available at: www.housingfinanceafrica.org/wpcontent/uploads/2011/12/RDP-Assets-MAIN-OVERALL-REPORT-FINAL-Nov11.pdf.

⁸⁴ See Michael Clark and Liza Rose Cirolia, 'Briefing Paper on Urban Land Rights', Mandela Initiative Briefing Paper (2018), p. 2, available at: http://www.seri-sa.org/images/Clark_and_Cirolia_Mandela_Initiative_Brief.pdf; Philip Harrison, 'Mega Projects as 'New'

unintended consequence of exacerbating the spatial inequalities that remains a pervasive feature of South African cities. Recent research has shown that there is a direct relationship between where people live in SA cities and the likelihood that they will find employment opportunities.⁸⁵

69. The quality of poorly located housing is therefore inferior, as households are located far away from schools, health facilities and other social amenities, and are obliged to spend a greater proportion of their household expenditure on transportation costs.⁸⁶ SA's focus on mega-projects therefore directly contributes to the persistence of poverty, inequality and unemployment in the country. The SA government needs to urgently shift its focus away from mega-projects in poorly located areas towards housing developments and informal-settlement upgrading in well-located areas that are close to economic activity.

C. Informal settlements (inadequate housing conditions)

70. As a result of the critical lack of affordable housing, many poor and low-income households have had to resort to living in SA's growing informal settlements. According to conservative estimates, between 1.1 and 1.4 million households, or between 2.9 and 3.6 million people, live in informal settlements in South Africa.⁸⁷ The extent of the housing crisis in South Africa is evident when disaggregating the number of households by dwelling type. Data from StatsSA's General Household Survey indicate that 79.3% of households live in formal dwellings, while 13.9% of households live in informal dwellings and 5.9% of households live in traditional dwellings.⁸⁸ While the proportion of households living in formal dwellings has increased by 5.6% between 2002 and 2016, the percentage of households living in informal dwellings has remained virtually unchanged during the same period.

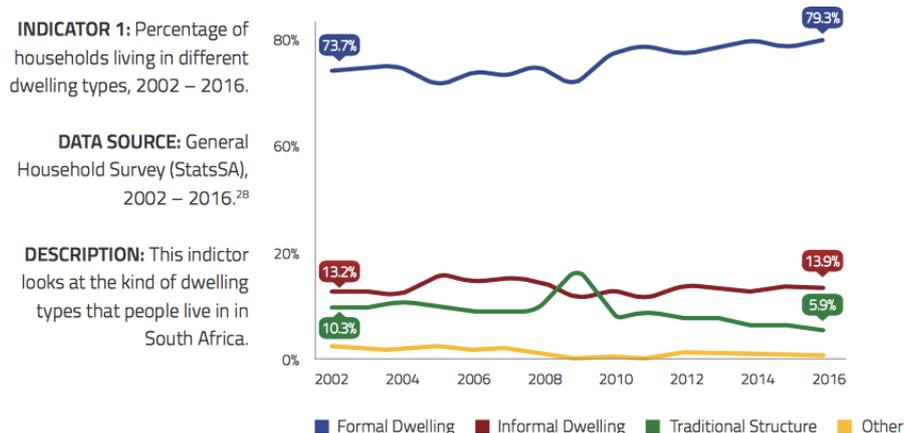
Discourse in South Africa's Housing Policy', Presentation (2017), available at: <http://afesis.org.za/wp-content/uploads/2017/08/Mega-Projects-as-new-discourse-in-South-Africas.pdf>; and Rejul Bejoy, 'Experts caution government over new housing mega-projects' *Ground Up* (14 June 2016).

⁸⁵ See Josh Budlender & Lauren Royston, *Edged Out: Spatial Mismatch and Spatial Justice in South Africa's Main Urban Areas*, Socio-Economic Rights Institute of South Africa (SERI) Research Report (2016), available at: http://www.seri-sa.org/images/SERI_Edged_out_report_Final_high_res.pdf. See also SPII, *Monitoring the Right of Access to Adequate Housing* (note 77 above), pp. 49-50. Spatial inequality was also raised as a key issue during the Campaign's second community dialogue on the implementation of socio-economic rights held in Johannesburg on 24 July 2018.

⁸⁶ Selebalo & Webster, *Monitoring the Right of Access to Adequate Housing* (note 77 above) pp. 49-50.

⁸⁷ These figures are based on conservative estimates from 2011 and are therefore likely to be under-representative. See Mark Napier, 'Government Policies and Programmes to Enhance Access to Housing: Experience from South Africa', paper delivered at the Bank of Namibia Annual Symposium in Windhoek (29 September 2011); and Selebalo & Webster, *Monitoring the Right of Access to Adequate Housing* (note 77 above), p. 33.

⁸⁸ The Stats SA General Household Survey (GHS) describes a formal dwelling as any structure built according to approved plans i.e. a house, an apartment or a room within a formal dwelling. An informal dwelling is defined as a makeshift structure that is not erected in terms of approved architectural plans such as corrugated iron shacks or shanties in informal settlements, serviced stands or proclaimed townships, as well as backyard shacks and other dwelling types. Traditional structures are referred to as all dwellings constructed from clay, mud, reeds or other locally available materials such as huts or rondavels. See Selebalo & Webster, *Monitoring the Right of Access to Adequate Housing* (note 77 above), p. 31.



71. The figures indicate that in 2016, approximately 1 in 7 households in South Africa lived in informal dwellings (this figure is higher in metropolitan areas, where 1 in every 5 households lived in an informal dwelling).⁸⁹ Moreover, the Housing Development Agency (HDA) has noted that these figures are likely to under-represent the real growth in informal settlements.⁹⁰
72. These figures show many poor and low-income people in SA continue to live in informal settlements or slums, and suggest that the government’s housing programmes are not adequately addressing the growing challenges posed by informal settlements. The State party noted that official policy documents and programmes such as its Upgrading of Informal Settlements Programme (UISP) recognise the need to provide for the phased, *in situ* upgrading of informal settlements throughout South Africa; however, in reality the State Party is failing to implement these policies appropriately.
73. Notwithstanding SA’s formal commitment to *in situ* upgrading, the dominant approach of the government in relation to informal settlements has been to try to eradicate existing informal settlements and prevent the emergence of new informal settlements.⁹¹ This approach has frequently been implemented coercively through forced evictions, demolitions and relocations.⁹² These policies have had the effect of perpetuating a cycle of insecure tenure, as well as, ironically, entrenching informality. However, even in instances where the State Party has attempted to implement *in situ* upgrading, it has failed dismally.

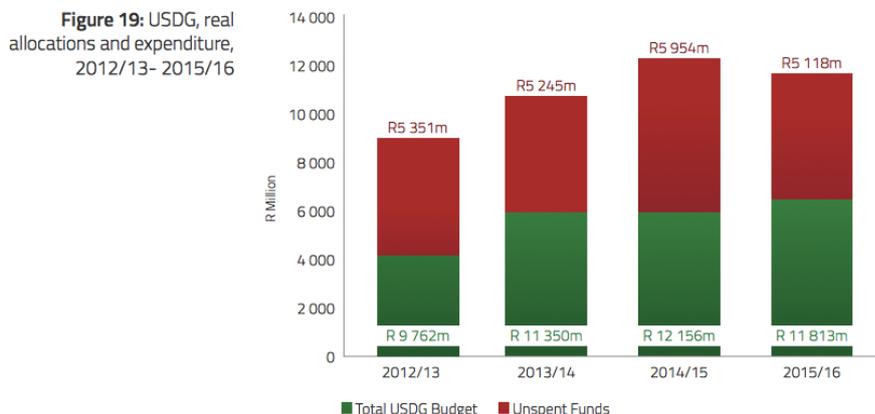
⁸⁹ Selebalo & Webster, *Monitoring the Right of Access to Adequate Housing* (note 77 above), p. 31.

⁹⁰ In particular, these figures are likely to under-represent informal dwellings in backyards or adjoined to other formal dwellings due to issues arising from outdated survey sampling frames or the non-inclusion of newer settlements. See, for example, Housing Development Agency, *South Africa: Informal Settlements Status* (2012), p. 9, available at: http://thehda.co.za/pdf/uploads/multimedia/HDA_Informal_settlements_status_South_Africa.pdf; and Housing Development Agency, *South Africa: Informal Settlements Status* (2013), p. 5, available at: http://www.thehda.co.za/uploads/files/HDA_South_Africa_Report_Ir.pdf.

⁹¹ See Marie Huchzermeyer, *Cities with ‘Slums’: From Informal Settlement Eradication to a Right to the City* (2011), p. 3. The participants involved in the Campaign’s second community dialogue on the implementation of socio-economic rights held in Johannesburg on 24 July 2018 also underscored the importance of informal settlement upgrading as a critical tool to address the acute lack of adequate housing in South Africa.

⁹² See, for example, Lillian Chenwi, ‘Legislative and Judicial Responses to Informal Settlements in South Africa: A Silver Bullet?’ (2012) 23(3) *Stellenbosch Law Review*, pp. 540-563; and Michael Clark & Kate Tissington, ‘Courts as a Site of Struggle for Informal Settlement Upgrading’ in Liza Cirolia, Tristan Görgens, Mirjam van Donk, Warren Smit & Scott Drimie (eds), *Upgrading Informal Settlements in South Africa: Pursuing a Partnership Based Approach to Incremental Informal Settlement Upgrading in South Africa* (2016), pp. 376-391.

74. For example, according to the Department of Human Settlements (DHS)' own indicators, only 52 349 households' dwellings were upgraded in 2015 / 2016 (this is approximately 30% of the planned target for the year).⁹³ These figures are also likely to be under-representative as the numbers reported by the DHS often include conventional formalised housing projects that are 'repackaged' as upgrading projects.⁹⁴



75. There has also consistently been an underspend on the Urban Settlements Development Grant (USDG) – the conditional grant that is earmarked for the installation of bulk infrastructure and the *in situ* upgrading of informal settlements. Over the last five years, less than half of the budget allocated for the USDG has been spent by metropolitan municipalities.⁹⁵ The State Party has therefore been unable to upgrade informal settlements despite ample funding and an enabling policy framework.

D. Forced evictions (and the failure to provide emergency housing)

76. Although no comprehensive study has been done of the number of evictions in urban areas since 1994, it is evident from the sheer volume of litigation regarding eviction proceedings that evictions from urban areas have continued to take place without proper legal safeguards and, particularly, the provision of adequate alternative accommodation to those rendered homeless as a result of evictions.⁹⁶ The enduring practice of evicting (whether by public or private landowners) poor and

⁹³ Department of Human Settlements, 'Annual Report 2015/2016' (2016). See also Selebalo & Webster, *Monitoring the Right of Access to Adequate Housing* (note 77 above), p. 32.

⁹⁴ Selebalo & Webster, *Monitoring the Right of Access to Adequate Housing* (note 77 above), p. 33.

⁹⁵ *Ibid.*, pp. 27-28.

⁹⁶ A micro study based on an access to information request from the City of Johannesburg estimated that, on a conservative estimate, between 2002 and 2006 approximately 10 000 people were evicted from derelict buildings or land in inner-city Johannesburg. However, the number of evictions of attempted evictions seem to have grown since then (Stuart Wilson, 'Human Rights and Market Values: Affirming South Africa's Commitment to Socio-Economic Rights', Centre for Applied Legal Studies (CALS) Newsletter). For example, in April 2018 SERI, a public interest legal services organisation that represent poor and low-income people in eviction proceedings in South Africa, were involved in over 53 active eviction cases, representing over 77 800 people (records on file with SERI). For a comprehensive analyses of litigation related to the right to housing, see Dugard et al, *The Right to Housing in South Africa* (note 82 above), pp. 14-29; and Michael Clark and Stuart Wilson, *Evictions and Alternative Accommodation in South Africa 2000-2016: An Analysis of Jurisprudence and Implications for Local Government*, SERI Research Report (2016), available at: http://www.seri-sa.org/images/Jurisprudence_Revised_2016_Final_to_print.pdf.

The participants involved in the Campaign's second community dialogue on the implementation of socio-economic rights held in Johannesburg on 24 July 2018 also highlighted the prevalence of forced evictions. Some mentioned that evictions regularly occur without court orders or are authorised by courts without the appropriate legal safeguards.

low-income households that cannot afford market rates for housing without alternative accommodation seriously compromises the State Party's efforts to ensure that everyone's right to adequate housing is realised.

77. Two additional concerning developments should be noted in this regard. First, there is an emerging trend of governmental non-compliance with court orders directing them to provide alternative accommodation to households that would be rendered homeless as a result of an eviction.⁹⁷ This means that households or public interest non-profit organisations often have to go back to court several times to ensure compliance with orders for the provision of alternative accommodation. Such failure by the executive branch of government to uphold court orders is a deeply worrying development.
78. Secondly, where emergency housing programmes are in place, the programmes are typically inadequate to meet the demand and their implementation often problematic (in some instances these programmes may even infringe basic human rights). For example, the City of Johannesburg-managed care-shelter model of transitional housing required residents to live according to draconian shelter rules, which included gender-segregated dormitories (which had the effect of splitting up families) and daylight lockout (which meant that residents were forced to wander the streets during the day, even when taking care of sick family members).⁹⁸ While these specific rules have been declared unconstitutional by the Constitutional Court, the City is yet to develop a new programme.
79. In other instances, emergency housing has taken the form of temporary relocation areas (TRAs) or 'transit camps'. These are ostensibly temporary solutions to the housing backlog. TRAs, as well as the temporary structures provided in these areas, have, however, been widely criticised by academics, practitioners and the people living in these areas. The primary criticism levelled against TRAs is that they fail to satisfactorily address the housing and development needs of those living in these areas and that households are 'often left [in these areas] indefinitely with no timeline on when they will receive permanent accommodation'.⁹⁹ Some have also argued that households that are moved to TRAs are 'off the "backlog radar"' as they are neither in dire need of housing assistance nor have they received formal housing assistance from the state'.¹⁰⁰ To compound these issues, municipal officials have been hesitant to invest further in these areas, given their temporary nature.

C. Inadequate prioritisation of housing for vulnerable/special needs groups

80. Although the general principles of the Housing Act No. 107 of 1997 recognise the need to address the various housing needs of persons and/or households with special housing needs, the one major

⁹⁷ See, for example, the description of the *Hlophe and Others v City of Johannesburg and Others*, available at: <http://www.seri-sa.org/index.php/litigation/securing-a-home?id=196:hlophe-and-others-v-city-of-johannesburg-and-others-hlophe>.

⁹⁸ See *Dladla and Another v City of Johannesburg and Others* 2018 (2) BCLR 119 (CC), available at: <http://www.saflii.org/za/cases/ZACC/2017/42.html>.

⁹⁹ See Kate Tissington, *A Resource Guide to Housing in South Africa 1994-2010: Legislation, Policy, Programmes and Practice*, SERI Resource Guide (2010), p. 96, available at: https://www.seri-sa.org/images/stories/SERI_Housing_Resource_Guide_Feb11.pdf. See also Mark Hunter, 'Case Study: The Difference that Place Makes: Some Brief Notes on the Economic Implications of Moving from an Informal Settlement to a Transit Camp', Department of Geography, University of Toronto (2010); Kerry Chance, Marie Huchzermeyer & Mark Hunter, 'Listen to the Shackdwellers', *Mail & Guardian* (24 June 2009); Biënne Huisman, 'From Boerestaat to Blikkiesdorp', *Times Live* (11 March 2012) (who describes TRAs as 'human dumping grounds'); and David Smith, 'Life in "Tin Can Town" for South Africans evicted ahead of the World Cup', *The Guardian* (1 April 2010), available at: <https://www.theguardian.com/world/2010/apr/01/south-africa-world-cup-blikkiesdorp> (who describes TRAs as 'concentration camps').

¹⁰⁰ Tissington, *A Resource Guide to Housing* (note 100 above), p. 96.

obstacle consistently encountered at both policy development and advocacy levels appears to be the fact that the National Housing Code does not expressly make provision for the development of a national special-needs housing policy. This in turn impedes the development of such policies at provincial and local government levels.

81. A 2017 study by the South African Human Rights Commission (SAHRC) found that the Special Needs Housing Policy and Programme¹⁰¹ had not been finalised due to a lack of consensus about which government department's mandate most appropriately covers the provision of special-needs housing.¹⁰² A research study by Werksman's Attorneys recommends that special-needs group housing facilities are social services but simultaneously also housing programmes, which accordingly should fall under the scope of the national housing framework.¹⁰³
82. Persons with special needs face a myriad obstacles to obtaining adequate housing.¹⁰⁴ Though our submission focuses on special-needs group housing (SNGH), some people with special needs can live independently with the necessary adjustments to their housing that take into consideration their special needs. The draft 2015 programme acknowledges that more has to be done to cater for persons with special needs who cannot live independently within normal housing delivery programmes.
83. Special-needs housing (SNH) is an active de facto programme since 1998 in at least three provinces, namely KwaZulu-Natal, Eastern Cape and Gauteng.¹⁰⁵ Not-for-profit organisations (NPOs) play a central role in providing accommodation and special care services for persons with

¹⁰¹ Special Needs Housing Policy and Programme (June 2015). The Special Needs Housing Policy and Programme (2015 draft) states that Special Housing Needs refers to housing opportunities for persons who for a variety of reasons are unable to live independently in normal housing or require assistance in terms of a safe, supportive and protected living environment and who therefore need some level of care or protection, be it on a permanent or temporary basis. These persons include, but are not limited to, orphans and vulnerable children, persons with disabilities, older persons, terminally ill persons, victims of domestic abuse, persons in transitional phases.

¹⁰² South African Human Rights Commission, 'Creating an Enabling Environment for the Realisation of the Right to Adequate Housing for Persons with Special Needs: Expediting the Special Needs Housing Policy and Programme', Economic and Social Rights Research Policy Brief 2016/2017 (2017), available at: <https://www.sahrc.org.za/home/21/files/SAHRC%20Research%20Policy%20brief%202016-2017%20--The%20Right%20to%20Adequate%20Housing%2031%20March%202017%20-v3.pdf>. The policy was drafted as a result of advocacy engagements between government officials and various civil society groups who advised that current legislation and policy lack specifics in respect of special needs housing effort by various NGO.

¹⁰³ Werksmans Attorneys. 'Special Needs Group Housing Policy: Investigation of Obligations, Powers and Functions of Certain Government Departments in Relation to the Provision of Capital Funding for Special Needs Group Housing' (March 2015).

¹⁰⁴ DG Murray Trust, 'Towards a More Inclusive Special Needs Group Housing Programme in South Africa: Addressing a Situation of Crisis', Learning Brief 43 (2013), available at: <http://dgmt.co.za/towards-a-more-inclusive-special-needs-group-housing-programme-in-south-africa-addressing-a-situation-of-crisis/>. For further information on the plight of those with special needs in terms of accessing housing and the need for national SNH policy, see South African Human Rights Commission (SAHRC), 'Creating an Enabling Environment for the Realisation of the Right to Adequate Housing for Persons with Special Needs' (note 102 above); Lilian Chenwi, 'Taking Those with Special Housing Needs from the Doldrums of Neglect: A Call for a Comprehensive and Coherent Policy on Special Needs Housing' (2007) 11(2) *Law, Democracy & Development*, pp. 1-18, available at <http://www.saflii.org/za/journals/LDD/2007/10.pdf>; and Annette May, 'Provincial Powers to Adopt and Implement Provincial Special Needs Housing Policies', Legal Research Brief (2014) Dullah Omar Institute, University of the Western Cape (on file with DOI).

¹⁰⁵ Werksmans Attorneys, 'Special Needs Group Housing Policy: Investigation of Obligations, Powers and Functions of Certain Government Departments in Relation to the Provision of Capital Funding for Special Needs Group Housing' (2015), p. 10, available at: <https://www.werksmans.com/wp-content/uploads/2015/03/Final-Executive-Summary-SNGH-Review.pdf>.

special housing needs. Many such NPOs have long waiting lists (e.g. those accommodating and caring for those with physical and intellectual disabilities, older persons and victims of domestic violence), indicating that the country has a special-housing-needs-facility backlog.

84. Although the state provides certain types of facilities which it owns, and which are directly operated by either national Department of Social of Developments and the Department of Health, or NPOs in terms of Service Level Agreements, most facilities and facility types are owned and operated by NPOs.
85. The Department of Social Development recognises that NPOs are the main providers of accommodation and housing and related services to persons with special needs, and that a source of capital funding is therefore required for NPOs to provide for these much-needed facilities. A research study by Werksman's Attorneys indicates that the Department of Social Development limits its funding to operational costs and that capital funding is not provided. Currently, there is no national special needs housing programmes in terms of which NPOs can access capital funding for providing for special-housing needs; hence, they struggle with funding in the provision of housing for people with special needs.¹⁰⁶
86. Despite the high levels of domestic violence and violence against women and girls in the country, there are insufficient shelters to house destitute women and girls in vulnerable situations.¹⁰⁷ The findings from the research study show that shelters for abused women and children that are run by NPOs sampled in the Western Cape, Gauteng, Mpumalanga and KwaZulu-Natal often faced severe funding constraints.¹⁰⁸ Without adequate funding, services to vulnerable women and children – who often have no other alternative – remain limited.
87. An investigative hearing into systemic complaints relating to the treatment of older persons¹⁰⁹ found that many elder-care facilities suffer from overcrowding, lack of equipment and poorly maintained buildings. Many NPO facilities failed to meet the norms and standards of care or the requirements as set out in the SA Older Persons Act of 2006 (OPA), because they often were underfunded and therefore inadequate. The 2016 Life Esidimeni debacle illustrates not just the need for special-need facilities, but the need for institutional funding and capacity to facilitate housing for person with special needs at these residential NGOs (see paragraphs 124-128 of this report for details on this incident).

D. Recommendations

88. We recommend that the CESCR should urge SA to:

¹⁰⁶ See, for example, 'Mental-Health NGOs Struggle with Inadequate Subsidies' *Business Day* (17 October 2017), available at: <https://www.businesslive.co.za/bd/national/health/2017-10-17-mental-health-ngos-struggle-with-inadequate-subsidies/>.

¹⁰⁷ Joy Watson & Claudia Lopes, 'Shelter Services to Domestic Violence Victims – Policy Approaches to Strengthening State Responses', Policy Brief No. 1 (2017), available at: https://za.boell.org/sites/default/files/policy_brief_final_02_web.pdf. Also see Mary-Anne Gontsana, 'Shelters for Abused Women Battle to Find Funds', *Ground Up* (18 May 2018), available at: <https://www.groundup.org.za/article/shelters-abused-women-battle-find-funds/>.

¹⁰⁸ See Claudia Lopes & Patience Mpani, 'Shelters Housing Women Who Have Experienced Abuse: Policy, Funding and Practice - Profiling Shelters in Mpumalanga' (2017), available at: https://za.boell.org/sites/default/files/mp_housing_women_who_have_experienced_abuse_final-web.pdf; Kailash Bhana, Lisa Vetten, Lindiwe Makhunga & Dianne Massawe, 'Shelters Housing Women Who Have Experienced Abuse: Policy, Funding and Practice', Johannesburg: Tshwaranang Legal Advocacy Centre (2012), available at: https://za.boell.org/sites/default/files/downloads/Gauteng_Shelters_Report.pdf.

¹⁰⁹ South African Human Rights Commission (SAHRC) 'Investigative Hearing into Systemic Complaints Relating to the Treatment of Older Persons' (2016), available at: <https://www.sahrc.org.za/home/21/files/SAHRC%20Investigative%20hearing%20report.pdf>.

- a. Consider, as a matter for urgency, shifting its focus away from mega-projects in poorly located areas, towards housing developments and *in situ* informal settlement upgrading in well-located areas that are close to economic activity.
- b. Enforce its policies and programmes governing the *in situ* upgrading of informal settlements.
- c. Enforce the prohibition on forced evictions contained in the South African Constitution by ensuring that evictions do not take place without proper legal safeguards and, particularly, the provision of adequate alternative accommodation to those rendered homeless as a result of evictions. Where alternative accommodation is provided, this accommodation should meet international law standards for adequate housing.
- d. Ensure the collection of complete and updated statistical data (disaggregated according to municipality and urban/rural areas) about the enjoyment of the right to adequate housing, which should record the number of forced evictions annually.
- e. Take substantive measures to address the challenges related to the allocation of state-subsidised housing and ensure that the tenure security of those that are granted state-subsidised housing is legally recognised. In particular, measures should be taken to address the backlog of unregistered title deeds for state-subsidised housing.
- f. Expedite the finalisation and adoption of the Special Needs Housing Policy and Programme.
- g. Enhance coordination between the departments of Social Development, Human Settlements, Health, Correctional Services and Public Works at the national, provincial and municipality government levels, in providing housing for people with special needs.

VIII. Articles 11 and 12: Right to Water and Sanitation

89. Water and sanitation services are central to human dignity, health and equality. For this reason, the right of access to sufficient water is explicitly referenced in the South African Constitution.¹¹⁰ The right to sanitation is also implicated in a number of provisions in the Constitution.¹¹¹ The Constitution enjoins SA to take reasonable legislative and other measures to progressively realise these rights within its available resources. Local government, in particular, has a clear legislative mandate to provide basic services to everyone in their jurisdiction.

A. Inadequate access

90. There has been significant progress in basic services provision in SA. By 2016, 89.8% of households had access to piped water; 63.4% to flush toilets; 63.9% to refuse removal services; and 87.6% to electricity. Of the 89.9% of households with access to piped water, 44.4% had access to water inside their dwelling; 30% inside their yards; 1.9% from a neighbour; and 13.5% from a communal tap.¹¹²

91. These achievements, however, obscure profound inequalities in basic services provision. Access to safe water supply and sanitation is determined by settlement type, which is still largely determined by municipal category. Water and sanitation backlogs are concentrated in predominantly rural B4 municipalities where more than a quarter (27.5%) of households do not have access to an improved water source. Of the 4.1 million households that were estimated to lack access to improved sanitation, 1.6 million resided in rural B4 municipalities that were constrained by finances and

¹¹⁰ SA Constitution, section 27(1).

¹¹¹ Ibid, sections 9, 10, 24, 26 and 27.

¹¹² Statistics South Africa (StatsSA), 'The state of basic service delivery in South Africa: In-depth analysis of the Community Survey 2016 data', *Statistics South Africa* (2017).

distance. The sustainable provision of services was also negatively affected by persistent under-investment and insufficient maintenance and refurbishment of infrastructure. Although 75.6% of households have access to improved sanitation nationally, access varies widely between different municipalities. The backlog is lowest (12.7%) in metropolitan municipalities, and highest in the largely rural B4 municipalities (50.6%).¹¹³

92. Thirty-one per cent of households in rural B4 municipalities compared to 1.7% in metropolitan municipalities (metros) do not have access to piped water. Sixty-two per cent of households in metros have access to piped water in their dwelling, compared to only 6.8% of households in rural B4 municipalities. Although 83.5% of households receive water from municipalities, 4.7% of households still rely on unsafe sources such as rivers, dams and streams nationally; 22.5% of these are situated in the Eastern Cape¹¹⁴
93. The poorer and more rural the municipality a person lives in, the more likely he or she is to receive sub-standard water and sanitation services. At least half of people living in rural municipalities do have access to adequate basic sanitation.
94. While there is a paucity of information on water and sanitation in informal settlements, localised research suggests that communal standpipes are inadequate to meet demand and that residents wait in long queues to collect water. In the Marikana settlement in Philippi, Western Cape, for example, there were fewer than 50 municipally provided communal tap stands serving at least 60,000 residents.¹¹⁵
95. Public investment in water and sanitation facilities declines with the degree of formality and urbanisation of the settlement. Because only formal household services are routinely monitored, the lack of sanitation in informal settlements is underestimated, but we know that at least 41% of informal settlements have inadequate sanitation in Gauteng, as many as 90% in Kwa-Zulu Natal, and 69% in Limpopo province. Of the approximately 400,000 people living in informal settlements in Gauteng, approximately 25% of these have chemical latrines and 66% have lived there for five years or longer.¹¹⁶ In the Western Cape, chemical toilets proliferate in the streets in informal settlements, many of which have been there for ten years or more. Lack of physical access to safe water and sanitation disproportionately affects women and people with disabilities.

B. Problems relating to functionality, reliability and quality of water and sanitation services

96. A 2014 report of the SAHRC noted that, in 2011, at least 3.8 million households with access to improved sanitation were at risk of service delivery failure because the systems were not adequately operated or maintained.¹¹⁷ The percentage of households with access to safe sanitation declined from 82% in 2011 to 76% in 2016.¹¹⁸
97. In 2016, Statistics South Africa's Community Survey for the first time provided data on the quality and reliability of water and sanitation infrastructure. The survey found a strong inverse correlation

¹¹³ Ibid.

¹¹⁴ Ibid.

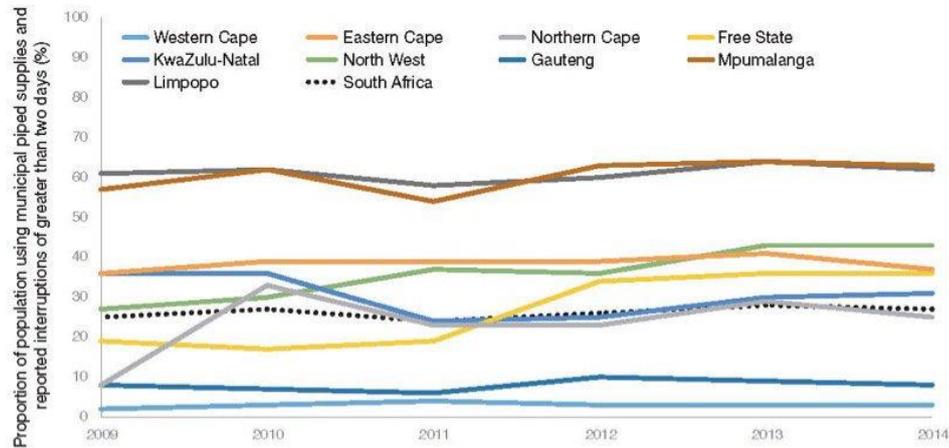
¹¹⁵ Socio-Economic Rights Institute of South Africa, 'Our Land to Keep: Marikana Informal Settlement', in *Informal Settlement in South Africa: Norms, Practices and Agency* (forthcoming, 2018) (on file with SERI).

¹¹⁶ Housing Development Agency, Gauteng: Informal Settlements Status (2013), available at http://www.thehda.co.za/uploads/files/HDA_Gauteng_Report_lr.pdf.

¹¹⁷ South African Human Rights Commission, Report on the Right to Access Sufficient Water and Decent Sanitation in South Africa (2014), p. 13, available at [https://www.sahrc.org.za/home/21/files/FINAL%204th%20Proof%204%20March%20-%20Water%20Sanitation%20low%20res%20\(2\).pdf](https://www.sahrc.org.za/home/21/files/FINAL%204th%20Proof%204%20March%20-%20Water%20Sanitation%20low%20res%20(2).pdf).

¹¹⁸ Statistics South Africa, *The State of Basic Service Delivery in South Africa: In-depth Analysis of the Community Survey 2016 Data*, Report No. 03-01-22 (2016), available at <http://www.statssa.gov.za/publications/Report%2003-01-22/Report%2003-01-222016.pdf>.

between municipal poverty headcount and the quality of water infrastructure installed in a municipality. Water infrastructure was better in municipalities with fewer poor households. The lowest quality infrastructure index scores were found in Limpopo, Eastern Cape, North West and KwaZulu-Natal provinces. Water quality scores were consistent with this picture, as were measures of water supply interruptions lasting longer than two days:



C. Unaffordability of water and sanitation services

98. The Municipal Systems Act (2000) states that municipalities need to develop indigent policies to provide free basic services to poor households. In developing their own indigent policies, municipalities are guided by the Department of Cooperative Governance and Traditional Affairs' (CoGTA) National Indigent Policy Framework and Guidelines¹¹⁹ (National Framework), which aims to improve access to basic services and goods and consequently reduce levels of poverty.
99. Most municipalities identify indigent households through means-testing, using monthly household income to determine indigent status according to municipally defined thresholds. Qualifying households are required to register as indigent. While indigent policies are required, in no way does the National Framework recommend the use of indigent registers to target the allocation of free basic services. The National Framework, referring to section 9 of the Constitution, also states that the principle of non-discrimination implies that municipal indigent programmes must be accessible to all residents.¹²⁰
100. There are endemic problems with indigent registration. Extensive documentation is required, including a South African ID, thus excluding the undocumented poor and foreign nationals; this is problematic because the Constitution states that everyone living in the country has the right to free basic services. Proving eligibility comes at high cost to the poor, and in instances where individuals are employed in the informal economy, it is, arguably, impossible. Indigent registers are a means to exclude rather than include genuinely poor people and invert the poverty-alleviation objective of free basic services provision.

¹¹⁹ Department of Cooperative Governance and Traditional Affairs, 'National Indigent Policy Framework and Guidelines' (September 2005), available at https://www.westerncape.gov.za/text/2012/11/national_framework_for_municipal_indigent_policies.pdf.

¹²⁰ Department of Cooperative Governance and Traditional Affairs, 'National Indigent Policy Framework and Guidelines' (2005), p. 16, available at https://www.westerncape.gov.za/text/2012/11/national_framework_for_municipal_indigent_policies.pdf.

D. Poor sanitation in schools

101. Sanitation in schools is crucial to school attendance and the safety of learners, which in turn have profound impacts on future socio-economic development. The deaths of Michael Komapi and Lumka Mketwa, both aged 5, in unimproved pit latrines in rural schools in the last year¹²¹ have underscored a lack of responsiveness of the Department of Basic Education to the audit conducted on basic school infrastructure undertaken in 2011¹²² and a lack of compliance with the Norms and Standards for School Infrastructure.¹²³

E. Recommendations

102. We recommend that the CESCRR should urge SA to:

- a. Shift its emphasis in political and financial priority from the target-driven roll-out of water and sanitation facilities to a focus on services and improved engagement with and accountability to consumers. The quality of infrastructure and materials needs to be regularised across municipalities and better quality-control mechanisms put in place.
- b. Develop a coherent and workable monitoring system of service delivery and progress in the realisation of the right to water and sanitation for all that is municipally aligned and that should include data on the progressive realisation of the rights to water and sanitation in all settlement types. Unless municipalities know where services are failing, they are unable to take action to address problems. The Department of Water and Sanitation (DWS), CoGTA and the Department of Planning, Monitoring and Evaluation (DPME) should lead the development of the monitoring system.
- c. Assess the application of indigent registers as a municipal free-basic-services-provision mechanism and propose viable alternatives such as direct cash transfers.¹²⁴
- d. Clarify the role of provincial government and CoGTA in addressing dysfunctional municipalities, including placing them under administration. Assess and ramp up the efficacy of CoGTA's Back to Basics municipal support programme, including municipal human resources and skills development strategies to improve integrated planning and technical capacity within municipalities. Less reliance on water-borne sanitation options will be important in the context of water scarcity.
- e. Assess the causes of under-expenditure in provincial and municipal basic services infrastructure provision and maintenance, including the efficacy and intergovernmental cooperation issues related to financing mechanisms intended to address equity and non-discrimination, such as the application of the Equitable Share (ES), the Municipal Infrastructure Grant (MIG) and the Urban and Urban Settlements Development Grant (USDG) to basic services provision.

¹²¹ For further information, see <http://www.enca.com/south-africa/exhibition-on-death-of-komape-held-at-constitution-hill> and <https://equaleducation.org.za/2018/03/16/statement-angie-motshekga-mathanzima-mweli-mandla-makupula-and-themba-kojana-must-be-held-accountable-for-the-death-of-5-year-old-viwe-jali/>.

¹²² National Education Infrastructure Management System (NEIMS) Report, Department of Basic Education, May 2011, available at: <https://edulibpretoria.files.wordpress.com/2008/01/school-infrastructure-report-2011.pdf>.

¹²³ South African Schools Act 84 of 1996, Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure, published under Government Notice R920 in Government Gazette 37081 of 29 November 2013.

¹²⁴ Jackie Dugard, 'The Right to Water in South Africa' in Foundation for Human Rights, *Socio-economic Rights: Progressive Realisation?* (2014), p. 352, available at https://www.fhr.org.za/files/8015/1247/0285/Socio_Economic_Rights.pdf.

- f. Develop a comprehensive plan for basic services in informal settlements with improved vertical and intersectoral alignment.
- g. Ensure better regulation and oversight of household and school sanitation. The role of the DWS as national regulator is essential in this regard.

IX. Article 12: Right to the Highest Attainable Standard of Health

A. Inadequate and unequal access to emergency medical services

103. South Africa is plagued by vast inequalities in access to health care. Discrepancies between urban and rural, rich and poor, public and private, exist as a legacy of the country's divided past.¹²⁵ The South African health-care system is two-tiered, consisting of a private sector and a public sector. The private sector only serves 16% of the population, despite over 50% of the 8.9% of SA's gross domestic product (GDP) that is spent on health care being spent in the private sector. The public sector therefore has to serve a greater number of people with fewer resources.¹²⁶
104. These inequalities in access to and quality of care are particularly evident regarding emergency medical services. The South African Constitution recognises the right to emergency medical services.¹²⁷ This right is not subject to progressive realisation or available resources.
105. There is a lack of public emergency medical services in rural areas, such as the Eastern Cape. Such rural areas are sparsely populated, underdeveloped, poverty-stricken and lacking infrastructure such as viable roads and even clinics. In such rural areas, the lack of emergency medical services disproportionately impacts on the most vulnerable.¹²⁸
106. The cause of the failing emergency medical services can be attributed to historical neglect during apartheid and a continuation of poor planning and budgeting. Many factors contribute to the lack of emergency services, particularly the lack of road infrastructure (making it physically impossible for ambulances to commute), the number of ambulances, reception services and ability to contact and request emergency medical care, and lack of personnel. Due to these factors, the lengthy response times can be death sentences.

¹²⁵ Michelle du Toit 'An Evaluation of the National Health Insurance Scheme in light of South Africa's Constitutional and International Law Obligations Imposed by the Right to Health' (unpublished LLM Thesis, Stellenbosch University, 2017); Coovadia et al, 'The health and health system of South Africa: historical roots of current public health challenges' (2009) 374 *Lancet* 817-834.

¹²⁶ Michelle du Toit 'An Evaluation of the National Health Insurance Scheme in light of South Africa's Constitutional and International Law Obligations Imposed by the Right to Health' (note 125 above), p. 28.

¹²⁷ SA Constitution, section 27(3).

¹²⁸ Treatment Action Campaign & Section 27, *Emergency Medical Services in the Eastern Cape*, available at <http://section27.org.za/wp-content/uploads/2015/10/SECTION27-EMS-Report-2015.pdf>; South African Human Rights Commission, Hearing Report into Access to Emergency Medical Services in the Eastern Cape (2015), available at <https://www.sahrc.org.za/home/21/files/SAHRC%20Report%20on%20Access%20to%20Emergency%20Medical%20Services%20in%20the%20Eastern%20Cape....pdf>. See also Rural Health Advocacy Project, 'National Inquiry into EMS and Eastern Cape Commitments to Solving Emergency Service Problems', available at <http://www.rhap.org.za/national-inquiry-into-ems-and-eastern-cape-commitments-to-solving-emergency-service-problems/>.

C. Access to medicines (unavailability and unaffordability)

107. International and SA law recognise the right to health to include the right to access to medicines.¹²⁹ General Comment 14 states that providing essential drugs, as defined by the WHO Action Programme on Essential Drugs, is a core obligation under the ICESCR.¹³⁰ The Human Rights Council has clarified that the right to health includes access to medicines generally, not just medicines on the WHO list.¹³¹
108. While SA rightly acknowledges increased access to HIV/AIDS medicines in paragraph 130 of the state report, many other medicines remain inaccessible. A recent study found that 17 out of 24 cancer medicines, including four World Health Organization (WHO) essential medicines, were not available in the public sector. High prices, caused by poor quality patents, likely precluded access.¹³²
109. In paragraph 134 of the state report, SA highlights specific price reductions for medicines, but overlooks the structural barriers that drive excessive pricing. SA patent law does not take advantage of public health flexibilities contained in the Agreement Trade-Related Aspects of Intellectual Property Rights (TRIPS), the Doha Declaration on Public Health¹³³ and the clarifications provided by the CESCR in General Comment No. 17.¹³⁴ A patent law reform process began in 2009, but nearly a decade later no new legislation has been enacted.
110. The Human Rights Council, the Special Rapporteurs in the field of cultural rights and health, and the UN Secretary General's High-Level Panel on Access to Medicines have all suggested that to fulfil human rights obligations, states must include TRIPS flexibilities in their national laws. Following this emerging consensus, South Africa must introduce legislation to incorporate TRIPS flexibilities and use these flexibilities to promote access to medicines.

D. Universal health coverage: National health insurance

111. In 2015, the Department of Health released a White Paper on a National Health Insurance ('White Paper') scheme for South Africa.¹³⁵ This was followed by the release of the National Health Insurance Policy Document ('Policy Document') on 30 June 2017.¹³⁶ The NHI scheme, as per the Policy Document, is a financing system for universal health coverage. It seeks to address the social determinants of health, the structural problems in the health care system, and the burden of disease.

¹²⁹ In terms of ICESCR article 12, General Comment No. 14, and SA law, see *Minister of Health and Others v Treatment Action Campaign* 2002 (5) SA 703.

¹³⁰ Article 12(1) and Article 12.2 (d), in particular, require the provision of essential drugs.

¹³¹ Human Rights Council, 'Access to medicines in the context of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health', UN Doc. A/HRC/23/L.10/Rev.1 (June 11, 2013).

¹³² Cancer Alliance and Fix the Patent Laws, *Exploring Patent Barriers to Cancer Treatment Access in South Africa: 24 Medicine Case Studies* (October 2017), available at: <https://www.canceralliance.co.za/wp-content/uploads/2017/10/Exploring-Patent-Barriers-to-Cancer-Treatment-Access-in-SA-24-Medicine-Case-Studies-October-2017.pdf>. (Of the 24 medicines, 15 were available in India—which better incorporates TRIPS flexibilities—for less than half of the price offered to the South African private sector.)

¹³³ Declaration on the TRIPS Agreement and Public Health, Doha WTO Ministerial 2001, WT/MIN(01)/DEC/2, 20 November 2001.

¹³⁴ Committee on Economic, Social and Cultural Rights, *General Comment No. 17: The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (article 15, paragraph 1 (c), of the Covenant)* E/C.12/GC/17 (2006)

¹³⁵ Department of Health *White Paper on National Health Insurance* GG 39506 of 11-12-15.

¹³⁶ Department of Health *National Health Insurance Policy Document* GN R627 in GG 40955 of 30-06-2017.

112. The Policy Document reflects the State's commitment to take reasonable legislative and other measures, within its available resources, to progressively realise the right of access to health care.¹³⁷ The NHI scheme proposes a policy shift to tackle poverty, the underlying determinants of health and the persisting inequalities in access to and quality of health care inherited from colonialism and apartheid.¹³⁸
113. The South African government report described the National Health Insurance as a far-reaching reform plan to revitalise and restructure the South African health care system as well as break down the inequitable divide between public and private health care, and one which will promote equity and efficiency to ensure that all South Africans have access to affordable, quality health-care services regardless of their employment status and ability to make a direct monetary contribution to the NHI Fund. It is specifically presented as a Universal Health Coverage (UHC) initiative, which has been described as being the practical expression of the right to health¹³⁹.
114. In any health system reform aiming to promote Universal Health Coverage (UHC), central to the intent of risk-pooling and cross-subsidisation is the need to address the most vulnerable first.¹⁴⁰ However, in response to the state report, two developments suggest that the Department of Health's policy intent is losing direction.
115. First, the implementation structures referred to in the National Health Insurance (NHI) policy¹⁴¹ indicates that five distinct funding pools will be created in the transition phases – civil servants, the formally employed in SMEs, the formally employed in big businesses, those working in the informal sector, and the unemployed. Secondly, the gazette also introduces the idea of making medical scheme membership mandatory for formally employed workers, hitherto never on the policy agenda.
116. The problem with this approach is that it cements divided funding pools from the inception of the NHI and risks creating beneficiary groups with better access who will strongly resist any future efforts to create a single risk pool. By concentrating on consolidating government employees and formal sector workers first, the restructuring is creating an elite group of beneficiaries rather than focusing on the most vulnerable first. In short, such a conception of an NHI fails to meet the basic conception of UHC and fails to meet the general human rights standard of placing greater emphasis on the needs of vulnerable populations first.

a. Key concerns relating to NHI

117. Financing, structural organisation and administration of the proposed NHI remains uncertain. This lack of foundational information on the development and implementation of the NHI is stalling the state's commitment¹⁴² to the realisation of the right to access to health care for all.

¹³⁷ Ibid, para 3.

¹³⁸ Ibid, paras 14-16; Michelle du Toit 'An Evaluation of the National Health Insurance Scheme in light of South Africa's Constitutional and International Law Obligations Imposed by the Right to Health' (note 125 above).

¹³⁹ Ooms G, Latif LA, Waris A, Brolan CE, Hammonds R, Friedman EA, Mulumba M, Forman L. Is universal health coverage the practical expression of the right to health care? *BMC International Health and Human Rights* 2014, 14:3.

¹⁴⁰ Joseph Kutzin., 'Health Financing for Universal Coverage and Health System Performance: Concepts and Implications for Policy' (2013) 91 *Bull World Health Organ.* 602–611.

¹⁴¹ Department of Health. NHI Implementation: Institutions, bodies and commissions that must be established. *Government Gazette* 7 July 2017; Vol 625; No 40969. Pretoria.

¹⁴² In terms of the Constitution, ICESCR and Sustainable Development Goals.

118. It further remains unclear how citizen participation will be incorporated into the development and implementation of the NHI. Participation and engagement are a fundamental part of primary health care. WHO recognises collaborative dialogue and stakeholder participation as key elements of primary health care. Moreover, primary health care is needs-based, and thus engagement is necessary to determine the health-care needs of the population.¹⁴³

b. Financing of the NHI

119. The NHI scheme recognises that multiple factors can influence health expenditure, including rate of economic growth.¹⁴⁴ South Africa spends 8.9% of its GDP on health care, exceeding the WHO's recommendation of 5%¹⁴⁵ but falling short of the Abuja Declaration commitment of 15% of annual budget allocations on health.¹⁴⁶ A reallocation of resources could benefit the whole population.

120. Funding the NHI scheme requires the reallocation or redistribution of resources or raising public revenue for health. The NHI contemplates taxation as a means to accumulate funds for the NHI scheme.¹⁴⁷

121. The lack of clarity on the financing of the NHI is a cause of concern. The possibility of payroll taxation fails to recognise South Africa's large informal sector and would limit access to health care to the formal employment sector.¹⁴⁸

122. A VAT increase (to generate revenue for health in this instance) would amount to a regressive measure as the burden would unfairly impact on the poor.

123. The SAHRC has recommended that resource allocation should reflect a needs-based system and long-term commitment to a national health system ensuring access for all.¹⁴⁹

c. Mental health care and community participation under the NHI scheme

124. The Life Esidimeni tragedy illustrates the need for mental health care and care for persons with intellectual disability to be addressed under health reform. In 2015, the Gauteng Province Health Department terminated the contract of a chronic-care facility, Life Esidimeni, and embarked on what has been confirmed to be the hasty, ill-planned and dangerous discharge of 1,711 long-term patients with mental health needs, including many patients with intellectual disability,¹⁵⁰ most of

¹⁴³ WHO *Primary Health Care* <http://www.who.int/topics/primary_health_care/en> (accessed 10 April 2017); Michelle du Toit 'An Evaluation of the National Health Insurance Scheme in light of South Africa's Constitutional and International Law Obligations Imposed by the Right to Health' (note 125 above).

¹⁴⁴ Department of Health *National Health Insurance Policy Document* GN R627 in GG 40955 of 30-06-2017 para 204.

¹⁴⁵ World Health Organisation *World Health Statistics* (2015) <<http://www.who.int/countries/zaf/eg/>> (accessed 2 June 2016).

¹⁴⁶ African summit on HIV/AIDS, Tuberculosis and other related infectious diseases. Abuja Nigeria. 24-27 April. Abuja Declaration on HIV/AIDS, Tuberculosis and other related infectious diseases. OAU/SPS/ABUJA/3. Accessed at: http://www.un.org/ga/aids/pdf/abuja_declaration.pdf.

¹⁴⁷ Department of Health *National Health Insurance Policy Document* GN R627 in GG 40955 of 30-06-2017 paras 214-215.

¹⁴⁸ Michelle du Toit 'An Evaluation of the National Health Insurance Scheme in light of South Africa's Constitutional and International Law Obligations Imposed by the Right to Health' (note 125 above).

¹⁴⁹ 7.

¹⁵⁰ Capri C, Watermeyer B, Mckenzie J, Coetzee O. Intellectual disability in the Esidimeni tragedy: Silent deaths. *S Afr Med J* 2018;108(3):153-154. DOI:10.7196/SAMJ.2018.v108i3.13029.

whom were sent precipitously with little preparation to various NGOs over a period of nine months, ending in June 2016.¹⁵¹

125. The NGOs to which patients were transferred were ill-equipped for the patients referred to them, lacked the competence to tend to their needs adequately, and were all NGOs operating without valid licenses. The conditions under which discharged patients were housed in many of these facilities were appalling. In the words of the arbitrator investigating the circumstances related to the Esidimeni deaths, “these NGOs ... turned out to be sites of death and torture of mental health care users under their care. As a result, at least 144 people in their care died and ... just over 1400 patients survived the tortuous conditions after their forced displacement from Life Esidimeni facilities.”¹⁵²
126. The Ombud’s investigation and the arbitration found that the contract termination and subsequent deaths, in excruciating circumstances, amounted to human rights violations involving the rights to health, life and dignity,¹⁵³ amongst others, and breached the Constitution as well as the National Health Act and the Mental Health Care Act 17 of 2003.¹⁵⁴
127. The primary driver for the unlawful, hasty and unplanned discharges appeared to be a desire on the part of senior health officials and the MEC concerns to bring down costs, without considering the impacts on the quality of care for vulnerable patients.¹⁵⁵ The urge to cut costs cannot in any circumstances be used to justify violation of the rights of vulnerable populations.
128. The efforts of family members and civil society organisations to halt the untimely discharge and to warn the health officials and the MEC concerned as to the risks of the policy fell on deaf ears.¹⁵⁶ As an illustration of the unwillingness of the health system to respond to community and civil society concerns, the tragedy highlights broader issues regarding the lack of responsiveness of the health system to community concerns and to the voice of civil society. For example, despite a provision in the National Health Act to mandate the establishment of health committees to act as vehicles for community participation in health,¹⁵⁷ the number of primary care facilities with health committees has been estimated at about 50%, and of these existing committees, only about 50% are thought to be functioning effectively.¹⁵⁸ Even those committees that are functioning, suffer from

¹⁵¹ See Malegapuru W Makgoba ‘The Report into the “Circumstances Surrounding the Deaths of Mentally Ill Patients: Gauteng Province” - NO GUNS: 94+ Silent Deaths And Still Counting’ Office of The Health Ombudsman, available at: <https://www.sahrc.org.za/home/21/files/Esidimeni%20full%20report.pdf>; and Moseneke D. Report: Arbitration between Families of Mental Health Care Users affected by the Gauteng Mental Marathon Project and the National Minister of Health of the Republic of South Africa, the Government of the Province of Gauteng, the Premier of the Province of Gauteng, Member of the Executive Council of Health Province of Gauteng. Available at <http://www.gauteng.gov.za/government/departments/office-of-the-premier/Life%20Esidimeni%20Documents/Life%20Esidimeni%20arbitration%20award%20by%20retired%20Deputy%20Chief%20Justice%20Dikgang%20Mosenke.pdf>.

¹⁵² Moseneke, Ibid.

¹⁵³ Ferlito BA & Dhai A. The Life Esidimeni Tragedy: Some Ethical Transgressions. *S Afr Med J* 2018;108(3):157. DOI:10.7196/SAMJ.2018.v108i3.13012

¹⁵⁴ Makgoba (note 151 above); Moseneke (note 151 above).

¹⁵⁵ Makgoba (note 151 above); Moseneke (note 151 above); Ferlito & Dhai (note 153 above).

¹⁵⁶ Makgoba (note 151 above); Moseneke (note 151 above).

¹⁵⁷ Department of Health. National Health Act. Act 61 of 2003. Government Gazette 23 July 2004. See paras 42, sections 1 to 3.

¹⁵⁸ Padarath A, Friedman I. (2008). *The Status of Clinic Committees in Primary Level Public Health Sector Facilities in South Africa*. Durban: Health Systems Trust.

many obstacles, including lack of support, unclear mandates, absence of training, and poor or non-existent articulation with policy-making structures in the health system.¹⁵⁹

129. The NHI scheme needs to address mental health care and be clear on how it seeks to improve the quality of care and access to care for patients with mental health needs, and provide stronger guidance on how community participation can be operationalised in the future South African health system to guarantee meaningful community voice.¹⁶⁰

F. Poor and inadequate maternal health care services and implications

130. While the SA government has adopted legislative and budgetary measures to realise the right to health, maternal mortality rates remain unacceptably high, as the government missed the target set by the Millennium Development Goals (Goal 5). Under the Sustainable Development Goals (No. 3), SA is expected to reduce the maternal mortality ratio to fewer than 70 deaths per 100,000 live births by 2030.¹⁶¹ According to the 1998 Demographic and Health Survey (DHS), the maternal mortality ratio (MMR) in South Africa was 150 maternal deaths per 100,000 live births.¹⁶² Estimates from vital registration statistics show that between 2002 and 2009, SA experienced a significant increase in maternal deaths, with MMR estimated at 134 per 100,000 in 2002 and 311 per 100,000 in 2009.¹⁶³
131. Recent reports of the Confidential Enquiry into Maternal Deaths in SA put the figures at 169, 158 and 147 deaths per 100,000 live births in 2011, 2012 and 2013, respectively.¹⁶⁴ While this would show a reduction in maternal deaths, a significant number of women still die during pregnancy and childbirth in the country.
132. Reports show that dearth of skilled health workers, negative attitudes of health care providers, and lack of transportation and infrastructure in rural areas contribute to maternal deaths in the country.¹⁶⁵ SA currently experiences an acute shortage of health-care providers. It is estimated that 70% of all doctors in SA work in the private sector. This implies that only about 10,600 doctors provide services for approximately 85% of South Africans that do not have health insurance.¹⁶⁶ In

¹⁵⁹ Levendal E, English R, Schneider H, London L, Haricharan H. Health governance. In: Eds Fryatt RJ, Andrews G, Matsoso MP. *South Africa health reforms 2009 – 2014: Moving towards universal coverage*. Juta, Cape Town, 2015: 244-280.

¹⁶⁰ Michelle du Toit 'An Evaluation of the National Health Insurance Scheme in light of South Africa's Constitutional and International Law Obligations Imposed by the Right to Health' (note 125 above); Report on National Colloquia X 2; Padarath A, Sanders D, London L, Boule T, Haricharan H, King J., 'Community Participation in the Post-apartheid Era: Progress and Challenges' in Fryatt RJ, Andrews G, Matsoso MP (eds.) *South Africa Health Reforms 2009 – 2014: Moving Towards Universal Coverage*. Juta, Cape Town (2015): 224-243.

¹⁶¹ United Nations, 'A New Global Partnership: Eradicate Poverty and Transform Economies through Sustainable Development' The Report of the High Level Panel of Eminent Persons on the Post-2015 Sustainable Development Agenda, New York, United Nations (2013).

¹⁶² Statistics South Africa, *Millennium Development Goals: Country Report* (2015) 78.

¹⁶³ Ibid.

¹⁶⁴ Department of Health, *Saving Mothers 2011-2013: Sixth Interim Report on the Confidential Enquires into Maternal Deaths in South Africa* Department of Health (2013) 4.

¹⁶⁵ Human Rights Watch, "'Stop Making Excuses": Accountability for Maternal Health Care in South Africa (2011) 16, available at: <https://reliefweb.int/report/south-africa/%E2%80%9Cstop-making-excuses%E2%80%9D-accountability-maternal-health-care-south-africa>; see also Amnesty International, 'Struggle for Maternal Health: Barriers to Antenatal Care in South Africa (2014), available at <https://www.amnestyusa.org/reports/struggles-for-maternal-health-barriers-to-antenatal-care-in-south-africa/>.

¹⁶⁶ Health Economics and HIV& AIDS Research Division, 'Human resources for health: a needs and gaps analysis of HRH in South Africa' (2009) 4, available at <https://www.heard.org.za/research-post/human-resources-for-health-a-needs-and-gaps-analysis-of-human-resources-for-health-in-south-africa-2/>.

essence, at least 46% of SA's 49 million rural people are served by 12% of doctors and 19% of nurses in the public sector.¹⁶⁷ This tends to aggravate maternal mortality in rural areas.

B. Recommendations

133. On *emergency medical services*, we recommend that the CESCR should urge SA to:
- a. Address, as a matter of urgency, the state of the road infrastructure, as required under its obligation to take immediate steps and to prioritise the most vulnerable.
 - b. Prioritise emergency medical services in the Eastern Cape and other rural communities in poor provinces at both budgetary and governance level. It should consider providing incentives for personnel to ensure sufficient human resources, and should provide adequate vehicles.
 - c. Engage communities on their health needs and the barriers faced, so as to adequately address their situation and needs.
134. On *access to medicines*, we recommend that the CESCR urge SA to pursue patent law reform and introduce legislation to incorporate TRIPS flexibilities and use these flexibilities to promote greater access to medicines. This would accord with the general recognition by, for example, the Human Rights Council, the Special Rapporteurs in the field of cultural rights and health, and the UN Secretary General's High-Level Panel on Access to Medicines, of TRIPS flexibilities as necessary to fulfil its obligations regarding the right to health.¹⁶⁸
135. On *national health insurance*, we recommend that the CESCR invite SA to provide clarity on the key concerns relating to the NHI (stated in paragraphs 117 and 118 above, of this Joint submission) which may undermine progress toward Universal Access. Both within the NHI and more broadly, the South African Department of Health should develop a roadmap for how to effect meaningful community participation in health. For example, it should harmonise policy on health committees and hospital boards as the voices for communities in the health system, and it should develop a national programme to ensure health committees are capacitated to act as vehicles to assist communities to realise the right to health.
136. On *maternal health care services*, the CESCR should urge SA to take more concrete measures to reduce maternal mortality in line with Goal 3 of the Sustainable Development Goals.

X. Articles 13 and 14: Right to education

A. Problematic nature of South Africa's declaration

137. SA's declaration in relation to the right to education, specifically articles 13(2)(a) and 14 of the ICESCR (entered upon ratification and referred to in paragraph 139 of the state report), is of concern. Considering the absence of a blanket application of 'progressive realisation' to the right to education in SA Constitution, with the right 'to a basic education, including adult basic education' not subject to progressive realisation as seen from the phraseology in the Constitution,¹⁶⁹ a blanket declaration as intended could have the effect of limiting the effective enforcement of the right to education and its entitlements as guaranteed in the ICESCR. If the declaration is interpreted and applied in a way that limits this right, it will be contrary to SA's constitutional and international human rights commitments.

¹⁶⁷ Ibid

¹⁶⁸ United Nations Secretary General's High Level Panel Report on Access to Medicines (14 September 2016), UN Secretary and Co-Chairs of the High Panel.

¹⁶⁹ See SA Constitution, section 29(1).)

B. Recommendation

138. We recommend that the CESCR should urge SA to ensure that its declaration is not interpreted and applied in a way that limits the right to education and is contrary to its international and domestic obligations.

XI. Conclusion

139. Black Sash, DOI, PHM-SA, PLAAS, SERI and SPII respectfully request that these submissions be considered and included in the CESCR's concluding observations on the initial report of SA, and that, jointly, we are invited to participate in the 64th session of the CESCR from 24 September to 12 October 2018.