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## INTRODUCTION

1. This Report, as required in terms of Article 62 of the African Charter, is South Africa's First Periodical Report to the African Commission on Human and Peoples' Rights. The Report serves to provide basic information on the country; it depicts developments and difficulties since the presentation of the Initial Report, and identifies areas for further action. To avoid a lengthy report, reference is made in some pages of the Report to the Initial Report.

2. The South African Constitution provides for decentralised policy-making and service delivery among the various sectors at national, provincial and local level. This Report is largely based on information provided by national departments. The Report depicts a broad national picture and hence there may be some gaps in the Report as far as regional and local activities are concerned.

3. Although much has been done thus far, the Government is still in the process of developing legislation, policy and strategies for implementation in order to ensure that the legal system is in line with the South African Constitution and other relevant human rights instruments such as the African Charter on Human and Peoples' Rights. There are still many inadequacies and shortcomings in this area and much work remains to be done. To address the legacy of the past and to set new standards, the Government is committed to the full realisation of each and every human right. Generally, the Government has made advances on the promotion and protection of civil and political rights. The promotion and protection of economic, social and cultural rights remain a huge challenge, the major problem being the lack of resources as underscored in **Soobramoney v Minister of Health, KwaZulu-Natal 1998(1) SA 765 (CC)**.

4. South Africa has, after its attainment of constitutional democracy, entered the area of consolidation of democracy, namely the reflection of what South Africans and their democratically elected government have achieved to date since the coming into operation of the **Republic of South Africa Constitution Act, 1996 (Act 108 of 1996)**, with regards to the promotion and protection of human rights and reflection on the challenges ahead in giving effect to human rights.

5. The major achievement was to unite our people across the colour and ethnical lines at the height of political violence that swept across our country. However, racism and racial discrimination remain a challenge. The **Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act 4 of 2000)**, provides a legal framework to deal with the

problem, including policy and administrative measures.

6. Measures taken to address some of the challenges include the following:
  - The Integrated Justice System (IJS), which has replaced the National Crime Prevention Strategy (NCPS), which was preventive in nature, is the basis for the criminal justice cluster system comprising the Departments of Justice and Constitutional Development, Correctional Services, Police and Social Development. There are prospects of dealing with crime effectively in terms of this system.
  - A **Juvenile Justice Bill** to be enacted into law during 2002 seeks to introduce a juvenile justice system that is sensitive to the rights of children, who are a vulnerable group.
  - As noted in the African Commission's general observations and recommendations on South Africa's initial report, South Africa, especially the Department of Correctional Services is grappling with the problem around the deteriorating prison conditions. Financial resources are indeed a problem regarding the need to revamp prisons and build new ones in line with international standards. Indeed overcrowding and conditions in prisons are impacted by the criminal justice system, in particular awaiting-trial prisoners.
  - South Africa has developed an HIV/AIDS Strategic Plan, which deals with public awareness and the response to the epidemic. The Plan's main objective is to reduce the number of new HIV infections and the impact of HIV/AIDS on individuals, families and communities. The **Employment Equity Act, 1998 (Act 55 of 1998)** prohibits unfair discrimination against an employee on, *inter alia*, HIV status. The **Compulsory HIV Testing of Sexual Offenders Bill** is another legal framework aimed at dealing with HIV/AIDS.
  - Although the level of unemployment in South Africa still remains very high due to misallocation of resources under the apartheid regime, some advances have been made after the dawn of the democratic South African government. The following legislation is, *inter alia*, a legal framework aimed at turning around the level of unemployment. The **Skills Development Act, 1998 (Act 97 of 1998)**, **Skills Levies Development Act, 1999 (Act 9 of 1999)** and **Employment Equity Act, 1998 (Act 55 of 1998)**. There are various policies complementing the above legal frameworks.
  - South Africa is taking the issue of refugees very seriously. Asylum seekers and refugees are dealt with in terms of the Refugees Act, 1998 (Act 130 of 1998). Further, an **Immigration Bill** that aims at regulating the admission of persons to their residence in and their departure from the Republic was developed. (This Bill has been passed into law and is now the Immigration Act 13 of 2002. It is due to come

into force on 12 March 2003.)

- The Judiciary is being transformed so as to represent the demographics of our society. The ***Judicial Service Commission Act, 1994 (Act 9 of 1994)*** serves as a legal framework to transform the judiciary from a white male dominated judiciary to a non-racial and non-sexist judiciary.
- Transformation of South Africa's education system with a view to dealing with inequalities created by the apartheid education system, is being urgently attended to. Legal frameworks of importance around transformation include the following: the ***National Student Financial Aid Scheme Act, 1999 (Act 56 of 1999)***, ***South African Council for Educators Act, 2000 (Act 31 of 2000)*** and ***Adult Basic Education and Training Act, 2000 (Act 52 of 2000)***. Various white papers and policies have been developed in this regard.
- Land distribution remains one of the major challenges of South Africa. The South African government with its scarce resources is returning land to those who were disowned after purchasing it from the present owners, in particular white farmers.

## CHAPTER 1

### HISTORY OF THE REPUBLIC OF SOUTH AFRICA

#### Structure of the Government

7. South Africa is a constitutional democracy. The ***Constitution of the Republic of South Africa Act, 1996 (Act 108 of 1996)*** is the product of a negotiation process that began in 1990. Pursuant to the elections, the Constitutional Assembly, consisting of both Houses of Parliament, negotiated and drafted the new Constitution, which became an Act of Parliament in 1996. The Constitutional Court was created as the guardian of the Constitution.

8. The South African Constitution provides for a separation of powers. On the national level, the Executive, consisting of the President, Deputy President, Cabinet and the state departments, are in charge of policy and administration. Parliament, the legislative body, consists of two houses: the National Assembly and the National Council of Provinces. The National Assembly consists of 400 members, elected by proportional representation in national elections held every five years. The National Council of Provinces, a structure designed to create a joint forum for South Africa's nine provinces, consists of equal representation from the provincial legislatures. Both houses are responsible for the passing of legislation, nationally and provincially, respectively.

9. South Africa is governed on the basis of the principle of co-operative governance. The South African Constitution provides for national, provincial and local spheres of government. The national government is responsible mainly for policy, while the provincial and local spheres are responsible mainly for the implementation thereof. Each of the nine provinces has an elected legislature and its own executive council. There are almost 850 local government structures in South Africa.

#### Land and People

##### Geography

10. South Africa is situated on the southern tip of Africa. It is bounded by the Atlantic Ocean to the west and the Indian Ocean to the east. Its northern borders are shared with Namibia, Botswana, Zimbabwe and Mozambique. Lesotho is entirely within the Republic and Swaziland is partially within its boundaries. The total area is approximately 1 219 080 square kilometers.

11. The ***Constitution of the Republic of South Africa Act, 1993 (Act 200 of 1993)***, hereafter referred to as the Interim Constitution, which was adopted in December 1993, created nine provinces. These formed the basis of the first democratic elections in April 1994. They replaced four provinces, four nominally "independent states or homelands and six self-governing territories". The new provinces are the Eastern Cape, the Free State, Gauteng, KwaZulu-Natal, Mpumalanga, Northern Cape, Northern Province, North West and Western Cape.

12. The geography and climate of South Africa vary widely. The provincial capital with the highest rainfall is Pietermaritzburg (KwaZulu-Natal), which receives approximately 1149 mm per annum, while the driest capital is Kimberley in the Northern Cape, which receives only 64 mm per annum.

### **Ethnic and demographic characteristics**

13. It is estimated that the population of South Africa in 1999 was 43 054 306 (see "The statistics provided in this section below have been obtained from Statistics South Africa"). The table below indicates the racial composition of the population. The last census, from which information is available, was conducted in 1996. A new census was taken in October 1996.

#### **Population mid-1999**

<b>RACIAL DESCRIPTION</b>	<b>POPULATION</b>
Africans/Blacks	33 239 879
Coloureds	3 792 631
Indians/Asians	1 092 254
Whites	4 538 727
Others and Unspecified	390 815
<b>TOTAL</b>	

Source: PO302: Mid-1999 estimates

14. Women represent about 52% of the total population. Fifty-four percent of the population live in urban areas and 46% live in rural areas. The Northern Province has the highest percentage of its population living in rural areas (89%), while Gauteng has the highest percentage in urban areas (96%).

15. The pattern of official immigration into South Africa and emigration from this country in 1998 was as follows:

### Immigration and emigration: 1998

DESTINATION	IMMIGRANTS	EMIGRANTS
Europe	1614	3138
Australasia	61	2513
Asia	1284	399
Africa	1200	1502
Americas	203	1383
Other	9	96
<b>TOTAL</b>	<b>4371</b>	<b>9031</b>

Source: Census '96

16. There are also widely varying estimates of illegal immigrants in South Africa (mainly from Southern African countries) and many people seeking refugee status.

### Economy

#### Gross Domestic Product (GDP)

17. South Africa has the largest economy in Southern Africa. In 1994, according to World Bank data, South Africa accounted for 43,9% of the combined gross national product of all countries in the sub-Saharan African region.

18. In 1998 the primary sector represented 10,3% of South Africa's GDP, the secondary sector 25,4% and the tertiary sector 64,3%. Mining and quarries are the major industries within the primary sector, together accounting for 6,5% of the GDP. Manufacturing is the major component of the secondary sector, being 19% of the GDP. In the tertiary sector finance, insurance, real estate and business services represent 18,4% of the GDP and wholesale and retail trade, catering and accommodation account for 13,2%. General government services account for 17,2% of the GDP.

#### External Debt (SA Reserve Bank)

19. During the first half of the 1980s there was a dramatic increase in South Africa's external debt from 16,9 billion US dollars to 24,3 billion US dollars. This was exacerbated by the decline in the external value of the rand over this period. Since 1986 there has been a series of Interim Debt Arrangements entered into and South Africa has substantially reduced its foreign debt. By the end of 1995, the amount of affected debt was 3 billion US dollars and non-affected debt was 10,1 billion US dollars.

## Unemployment

20. One of the most serious problems confronting South Africa is the high level of unemployment, particularly amongst the previously disadvantaged population groups. During October 1997 11,2 million of the 25,1 million South Africans aged between 15 and 65 years were economically active. Of the 11,2 million economically active, 8,7 million were employed and 2,5 million or 22% were unemployed. Again the unemployment figures show the legacy of previous policies with Africans being the most affected by unemployment, as the following rates of unemployment as a percentage of the economically active population show: -

### Unemployment rates (official definition)

GENDER	AFRICAN/ BLACK	COLOURED	INDIAN/ ASIAN	WHITE
MALE	23,9%	13,1%	8,5%	3,1%
FEMALE	33,8%	18,3%	12,2%	5,3%
TOTAL	28,3%	15,3%	9,8%	4,0%

Source: October Household Survey 1997

## Informal Sector

21. A significant proportion of economically active persons work in the informal sector, often in micro enterprises. Informal sector activities include the production of marketable products, distribution of merchandise and rendering of services. The following extract from the "Prospectus" on the Republic of South Africa produced by the Department of Finance in October 1996 illustrates the point: -

*"Informal enterprise is an important haven for self-employment in rural areas, for the newly urbanized and for unemployed or laid-off persons. In addition, it mobilizes capital at a grass-roots level for the provision of dwellings and community-based services.*

*The businesses typically operate at a low level of organisation, with little or no division between labour and capital, and on a small scale. Where more than one individual is involved, labour relations are mostly based on casual employment, kinship or personal and social relations rather than contractual arrangements with formal guarantees. Formal sector economic activity, by contract, is conducted within the formal structures created by the legal system of the country".*

## Literacy rate

22. The adult literacy rate in South Africa is largely influenced by race, with Whites nearly always being literate and Blacks being the most disadvantaged by the apartheid education system.

The figures for 1991 were: -

#### Literacy rate

RACIAL DESCRIPTION	PERCENTAGE LITERATE
Africans/Blacks	76,64%
Coloureds	91,06%
Indians/Asians	95,48%
Whites	99,52%
TOTAL	82,16%

Source: Census 1996

#### Religion

23. The majority of South Africans (about 75,5%) belong to the Christian faith. Other faiths include traditional African religion, Hindu, Islam and Judaism = (about 3,4%) and uncertain/none (about 21,1%).

#### Home Language

24. Under the new constitutional dispensation there are 11 official languages in South Africa. The South African Broadcasting Corporation has incorporated some of these other languages into their programmes and operations. Community radio stations using the language of the local area are a popular form of communication.

25. The distribution of home languages is as follows: -

#### Home language

LANGUAGE	PERCENTAGE OF POPULATION
Afrikaans	14,4%
English	8,6%
IsiNdebele	1,5%
Sepedi	9,2%
Sesotho	7,7%
SiSwati	2,5%

Xitsonga	4,4%
Setswana	8,2%
Tshivenda	2,2%
IsiXhosa	17,9%
IsiZulu	22,9%
Other	0,6%

Source: Census 1996

### Life expectancy at birth

26. The table below illustrates the significant racial differences in life expectancy:

#### Average life expectancy (years)

Race	Women	Men	All
African	64,6	59,6	62,1
Coloured	66,2	61,2	63,7
Indian	67,1	62,1	64,6
White	73,7	65,7	69,7

Source: Census 1996

### Birth Rates and Infant Mortality

27. Birth rates amongst the various population groups are as follows: -

#### Birth rates

Birth rate per 1000	African/Black	Coloured	Indian/Asian	White
	25,3	21,7	18,1	13,7

Source: Household Survey October 1994

28. Latest available infant mortality rates show a similar racial disparity, partially reflecting the uneven provision of medical services and lack of adequate nutrition. In the case of Africans, 52 infants die for every 1 000 live births. Amongst Whites the infant mortality rate is 1.7 per 1 000.

### Population by Age Group

29. Data collected in the October 1997 Household Survey reflects a fairly even distribution of people by age and gender between urban and non-urban areas. The main trend would appear to be that during the peak income earning years the number of men in

urban areas exceeds that of women, while women slightly predominate in the non-urban areas.

**Population by age, gender and location**

<b>Gender and Location</b>	<b>0 - 19 yrs</b>	<b>20 - 39 yrs</b>	<b>40 - 59 yrs</b>	<b>Over 60 yrs</b>	<b>TOTAL</b>
Urban male	4109000	4151000	2056000	650000	11056000
Urban female	4240000	4147000	2061000	920000	11395000
Non-urban male	5032000	2358000	1039000	481000	8910000
Non-urban female	5034000	2871000	1334000	835000	10074000
% of population	44,6%	32,8%	15,7%	7,0%	100% = 41435000

Source: PO317: October Household Survey October 1997

## **CHAPTER 2**

### **THE SOUTH AFRICAN LEGAL SYSTEM**

#### **Sources of South African Law**

30. Reference is made to the Initial Report regarding the sources of the South African law (see pages 14 – 16).

### **THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, ACT 1996 (ACT 108 OF 1996)**

#### **National Institutions Supporting Democracy**

##### **The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities**

31. In addition to the institutions that strengthen and support democracy set out in the initial report, there are moves to establish the abovementioned Commission as required by Section 181(1) of the Constitution (see p17-19 of the initial report).

32. In terms of section 185(1) of the Constitution, the primary objects of this Commission are –

- (a) To promote respect for the rights of cultural, religious and linguistic communities.
- (b) To promote and develop peace, friendship, humanity, tolerance and national unity among cultural, religious and linguistic communities, on the basis of equality and non-discrimination.
- (c) To recommend the establishment or recognition, in accordance with national legislation, of a cultural or other council or councils for a community or communities in South Africa.

33. Section 185(2) provides that the Commission has the power, as regulated by national legislation, necessary to achieve its primary objects, including the power to monitor, investigate, research, educate, lobby, advise and report on issues concerning the rights of cultural, religious and linguistic communities.

34. A Bill which establishes the Commission and provides for its functions has been developed and such Bill is before Cabinet for approval to be passed into law by Parliament. The establishment of the Commission is crucial for our new democratic country given our diverse nation in terms of race, culture and language. To build a united South African

nation, an institution such as the Commission is critical. Central to the function of the Commission is to foster mutual respect regarding our diverse religious, linguistic and cultural backgrounds. Furthermore, equality should be a guiding principle.

### **Judicial Service Commission**

35. There are developments towards the extension of the Judicial Service Commission so as to embrace magistrates.

## **COURTS AND ADMINISTRATION OF JUSTICE**

### ***Restructuring of the Courts***

36. During October 2000 a Colloquium was held with a view to discussing a range of issues relating to the restructuring of the courts. In the main the Colloquium discussed and expressed views on –

- Structure, hierarchy and location of the courts
- Court Management and Effective and Efficient Resource Utilisation
- Testing the administration of justice against constitutional imperatives and public expectations

### ***Structure of the Courts***

37. The main points raised during the discussion –

- There were mixed views as to whether we have a single judiciary or not. One view expressed was that there is already a single judiciary created by the Constitution, whereas others were of a view that the Constitutional arrangement does not necessarily reflect a single judiciary. As to the latter view, it was argued that the Constitution only deals with the courts and does not necessarily reflect the creation of a single judiciary, for example, the distinction made between magistrates and judges in the Constitution.
- There was, however, virtual consensus on the need for the independence of the judiciary, that is in all branches of the judiciary.
- It was pointed out that there are artificial barriers which give rise to the perception that there is not a single judiciary and which impacts on judicial independence. Amongst others the following barriers were identified:
  - The lower courts do not mirror the High Courts
  - the magistracy is still perceived to be part of the Executive
  - there is a perception that magistrates cannot become judges
  - magistrates' courts do not have constitutional jurisdiction or inherent jurisdiction
  - magistrates should also be called judges

- As to the relationship between the Constitutional Court and Supreme Court of Appeal, there were no views expressed in favour of a merger between these courts. A number of options were highlighted as a solution to deal with inconsistencies and uncertainties around these courts. There was a strong view on the need for a leader of the judiciary (a "Chief Justice" of South Africa) to give guidance, to help formulate policy, to address protocol problems in this regard, to head the apex court and to chair the Judicial Service Commission. It was suggested that the Chief Justice should be the President of the Constitutional Court – this court is the highest court of the land.
- There was a strong view that the High Courts should be rationalised as soon as possible in line with the Constitution. Debates, following the Hoexter Commission of Inquiry into the Structure and Functioning of the Courts, were cited, but no final viewpoints emerged in this regard.
- As to the Lower Courts, many participants pointed out that these courts do not always enjoy the recognition and status of the superior courts, which is in conflict with the Constitution. It was agreed that this problem can be addressed, among others, by upgrading infrastructure and skills.
- As to the problems of administration of justice in general, especially the problem of backlog of cases, many participants felt very strongly that most problems could be addressed if there were adequate resources. It was suggested that serious consideration be given to approaching government for sufficient funding to carry out what has been discussed at the Colloquium, especially in the light of the judiciary being one of the pillars of a democratic government.

***Court management and effective, efficient resource utilisation***

38. The discussion centred on these matters -

- There was a view expressed that court management and accountability go hand in hand, and that the judicial officer should be the person to be held responsible and accountable for proper court management. It was, however, pointed out that, particularly in criminal trials, court management is a multi-faceted task, which involves various role-players who fall outside of the jurisdiction of the judicial officer, e.g., the prison authorities, the police, social welfare officers, etc.
- It was recommended that to deal with the complex issue such as court management, means should be found whereby cooperation, consultation and coordination between the various role-players could be improved, and it was specifically recommended that judges become more proactive in this regard.
- It was recommended that officers of the Department of Justice, in particular judicial

officers, should be trained so as to develop efficient court personnel.

- As to the accountability of the judiciary, there were no discussions, since both the Judicial Service Commission and Magistrates Commission are considering the development of codes of conduct.

***Testing the administration of justice against constitutional imperatives and public expectations***

39. Under the above heading, the Colloquium discussed the following issues:

- As to judicial independence, there was consensus that judicial independence in relation to the judicial decisions and judicial process was well established and secure. However, matters such as the creation of a code of conduct for judges, the need for the unification of the judiciary, etc., should be addressed, as they relate to the element of accountability, which is inseparable from judicial independence.
- Access to justice, courts and legal representation should be strengthened. It was recommended, *inter alia*, that the Legal Aid Board continues to be the agent tasked with a State-funded legal service delivery, internships for law graduates who would provide free legal services in both urban and rural areas should be introduced, the possibility of obtaining legal services rendered on a *pro amico* basis from the private legal sector should be explored, etc.
- As to which language to be used in court proceedings, it was recommended that the right of every person to use the language of his/her choice must be respected, provided that the State provides experienced interpreters where this is practical, as prescribed by the relevant constitutional imperative. However, for practical reasons the language of record should be confined to one language only, namely English, on condition that experienced interpreters be provided to ensure that the persons involved are not prejudiced in any way.
- As to Traditional and Community Courts, various problems were raised pertaining to the function and operation of traditional courts such as denial of right to legal representation, corporal punishment meted out, etc. Community Courts were welcome and these courts could serve a useful purpose in addressing the increasing backlog problem by diverting the less serious cases of the district magistrates' courts to such courts and improving access to justice for isolated/rural communities. It was recommended that traditional courts continue to operate, pending the research on harmonisation of the traditional courts with the Constitution conducted by the South African Law Commission. The possibility of creating a criminal small claims court with limited jurisdiction so as to reduce the criminal courts case backlogs should be investigated.

### **Integration of the Legal Profession**

40. Following the National Legal Forum on Legal Practice that took place in Pretoria in November 1999, a Draft Legal Practice Bill has been developed.

- The Bill touches on the following issues, which reflect consensus reached at the Forum:
  - All legal practitioners and paralegal practitioners are to be regulated by one Statute
  - There should be one statutory regulatory body
  - The freedom on the part of legal practitioners and paralegal practitioners to practise as members of professional voluntary associations would be respected
- The Bill is being currently discussed by all stakeholders, namely Law Societies, National Paralegal Institutes, etc., whereafter it will be tabled before Cabinet for consideration
- It should be noted that there are mixed feelings about this move, especially within the ranks of the SA Bar Council, who think their profession for advocates will be compromised.

### **United Nations Special Rapporteur fact-finding mission to South Africa on the independence of judges and lawyers**

41. On 7 – 13 May 2000 the UN Special Rapporteur, Dato' Param Kumaraswamy, undertook the above mission. The issues examined by the Special Rapporteur can be summarised as follows:

- a. Independence of magistrates
- b. Proposed complaints mechanisms for judges
- c. A unified judiciary
- d. Minimum sentence legislation and its impact on judicial independence
- e. The appointment of acting judges and whether that impacts on the independence of the courts
- f. The position of public prosecutors and the extent of their independence
- g. An integrated legal profession
- h. Legal aid and access to justice
- i. Judicial training and continued legal education

The above issues are almost similar to those discussed at the abovementioned Colloquium. A copy of the Special Rapporteur Report can be accessed from the Internet (website: [www.UNHCHR.CH.documentE/CN.4/2001/65/ADD2](http://www.UNHCHR.CH.documentE/CN.4/2001/65/ADD2)).

### **Heath Commission Special Investigation Unit**

42. The Constitutional Court has ruled that the Heath Commission Special Investigation Unit should not be headed by a Judge (Justice W Heath). In the case of the **South African Association of Personal Injury Lawyers v Heath and Others 2001(1) SA 883 (CC)** the court held that it is not in keeping with the Constitution for a judge to play the roles envisaged in the Special Tribunal Act, 1996 (Act 74 of 1996). The Court then gave the Government a period of one year within which to amend the legislation in order to facilitate a smooth and orderly transfer of the powers of the head of the Unit to a functionary who is not a member of the judiciary.

43. The Special Investigating Units and Special Tribunals Amendment Bill, 2001, provides for the appointment, by the President, of a person who is a South African Citizen and who, with due regard to his or her experience, conscientiousness and integrity, is a fit and proper person to be entrusted with the responsibilities of that office, as Head of a Special Investigating Unit established by the President. In line with this provision, reference to a judge as Head of the Special Investigating Unit has been deleted from the entire Bill. The effect of the above Bill is to bring the appointment of the Head of a Special Investigating Unit in line with the judgment of the Constitutional Court.

## CHAPTER 3

### GENERAL MEASURES OF IMPLEMENTATION

#### MAJOR HUMAN RIGHTS INSTRUMENTS TO WHICH SOUTH AFRICA IS A PARTY

44. Basic human rights instruments ratified or acceded to:
- **International Covenant on Civil and Political Rights – 16 December 1966**  
South Africa ratified the Covenant on 10 December 1998
  - **Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment – 10 December 1984**  
South Africa ratified the Convention on 10 December 1998
  - **Convention on Prevention and Punishment of the Crime of Genocide**  
South Africa ratified the Convention on 10 December 1998

#### MEASURES OR STEPS (INCLUDING LEGISLATION OR POLICY) TAKEN BY SOUTH AFRICA TO IMPLEMENT THE RIGHTS PROTECTED BY THE CHARTER

##### Civil and political rights

##### *Articles 2 and 3 of the African Charter*

***Article 2: Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.***

***Article 3: 1. Every individual shall be equal before the law.***

***2. Every individual shall be entitled to equal protection of the law.***

##### Legislation and Policy

##### ***Recognition of Customary Marriages Act, 1998 (Act 120 of 1998)***

45. The Bill on Recognition of Customary Marriages has been passed into an Act of Parliament, namely the ***Recognition of Customary Marriages Act, 1998 (Act 120 of 1998)***. In the main, the Act provides for the recognition of customary marriages. Section 3 of the Act provides for the consent of prospective spouses, aged above 18 years, before a valid customary marriage can be concluded. Section 6 provides for the equal status and

capacity of spouses who concluded a customary marriage. This includes a wife's capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have under customary law. Section 7 provides that a customary marriage entered into after the commencement of the Act, is a marriage in community of property and of profit and loss between the spouses, unless such consequences are specifically excluded by the spouses in an ante nuptial contract, which regulates the matrimonial property system of their marriage. This piece of legislation reinforces the right to equality among different races, while also taking into account divergent cultures, especially different forms of marriage in South Africa. Furthermore, the Act underlines the right to equality amongst different sexes. According to customary law a wife could be caused to marry without her consent and did not enjoy equal status with her husband during the subsistence of the customary marriages.

***Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act 4 of 2000)***

46. The Equality Legislation Drafting Project has completed its mandate that enabled Parliament to pass the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000. The Act gives effect to Section 9 of the Constitution, which provides for the right to equality before the law and the right to equal protection and benefit of the law.

47. Chapter 2 of the Act provides for the prevention and general prohibition of unfair discrimination, prohibition of unfair discrimination on the ground of race, prohibition of unfair discrimination on the ground of gender, prohibition of unfair discrimination on the ground of disability, prohibition of hate speech, prohibition of harassment, and prohibition of dissemination and publication of information that unfairly discriminates.

48. Chapter 3 provides for the determination of fairness or unfairness. Hate speech and harassment are not subject to determination of fairness.

49. Chapter 4 provides that every magistrate's court and every High Court is an equality court for the area of its jurisdiction. The equality courts have power to hold an inquiry in the prescribed manner and determine whether unfair discrimination, hate speech or harassment, as the case may be, has taken place, as alleged. After holding an inquiry, the court may make an appropriate order in the circumstances. A court order by a magistrate court is appealable to the High Court and an order of the High Court to the Constitutional Court.

50. Chapter 5 provides for the general responsibility to promote equality – the State and all persons. Furthermore, the chapter provides for special measures to promote equality with regard to race, gender and disability – if it is proved in the prosecution of any offence that unfair discrimination on one of these grounds played a part in the commission of the offence, this must be regarded as an aggravating circumstance for purposes of sentence. This chapter also provides for an illustrative list of unfair practices in certain sectors concerned in the schedule to the Act.

51. The United States Agency for International Development (USAID) is funding a project on the implementation of the Act. The Agreement between the Department of Justice and Constitutional Development and USAID resulted in the establishment of the Equality Legislation Education and Training Unit (ELETU). The mandate of this Unit is to facilitate the implementation of the Act, in particular the implementation of education and training programmes.

- ELETU Programme 1: Equality Court Training for Judges and Magistrates
- ELETU Programme 2: Equality Court Education and Training for Clerks and Registrars
- ELETU Programme 3: Judicial Information Service for Equality Courts
- ELETU Programme 4: Public Awareness
- ELETU Programme 5: Capacitating Government
- ELETU Programme 6: Equality Education for Master's Division (office for administration of estates)

52. Challenges ahead include the following:

- Decentralisation of Equality Court Education and Training to all nine provinces
- Publishing of the Equality Court Bench and Resource Books
- Finalisation and publishing of first issue of the newsletter
- Publishing of Monographs on Equality/Non-discrimination
- Production of Educational Videos for Equality Court Education and Public Awareness.

### **Developments on South African Law Commission Projects having a bearing on discriminatory laws**

#### ***Islamic marriages***

53. An issue paper on recognition of rules of Islamic Law relating to marriage and related matters was published for general information and comment on 30 May 2000. A draft discussion paper and draft legislation are being finalised for consideration by the

Commission.

***Harmonisation of common law and indigenous law***

54. A report on conflicts of law, namely conflict between Customary Law and Common Law, was tabled in Parliament on 29 May 2000. The Application of Customary Law Bill is ready for consideration by Parliament. A discussion paper on the alignment of customary law of succession with the Constitution was published on 8 August 2000 and the closing date for comment was 22 September 2000. Comments received are being evaluated with a view to workshopping them. A discussion paper on the alignment of the law of administration of estates (in both customary law and under the ***Administration of Estates Act, 1965 (Act 66 of 1965)***) with the Constitution was published in December 2000. Comments received are being evaluated.

***Family law and law of persons***

55. The Maintenance Law Amendment Bill and Domestic Violence Bill, which are the result of the review of all aspects of family law and law of persons, have now been translated into Acts of Parliament, namely, the ***Maintenance Act, 1998 (Act 99 of 1998)*** and the ***Domestic Violence Act, 1998 (Act 116 of 1998)*** respectively.

***Sexual offences***

56. A discussion paper on sexual offences committed against children and adults: substantive law, was approved on 12 August 1999 and subsequently released for public comment. Comments received have been collated.

57. A discussion paper on sexual offences: process and procedure, is receiving attention. This discussion paper addresses issues such as bail for sexual offenders, making it easier for victims of sexual offences to testify in court, and the sentencing of persons convicted of sexual offences, etc.

58. A Comprehensive Bill covering substantive and procedural aspects on sexual offences will be developed for consideration by Parliament. A third discussion paper on adult prostitution is also receiving attention. The preparation of a discussion paper on adult pornography will receive attention when the draft on adult prostitution has been finalised.

***Review of the Child Care Act, 1983 (Act 74 of 1983)***

59. In scope, the investigation goes beyond the review of the present ***Child Care Act, 1983 (Act 74 of 1983)*** and includes a comprehensive review and redraft of all child care

legislation. The preparation of a draft discussion paper is receiving attention.

***Aspects of the law relating to AIDS***

60. Interim reports on pre-employment HIV-testing (Second Interim Report on Aspects of the Law Relating to AIDS) and HIV/AIDS and discrimination in schools (Third Interim Report on Aspects of the law relating to AIDS) were tabled in Parliament on 13 August 1998. The recommendations in the Second Interim Report were incorporated in the Employment Equity Act, 1998 (Act 55 of 1998). Section 6 of this Act prohibits unfair discrimination against an employee on, *inter alia*, HIV status. The Department of Education has promulgated the Commission's draft national policy on HIV/AIDS for learners in public schools (contained in the Third Interim Report) on 10 August 1999. A report on compulsory HIV-testing of persons arrested in sexual offences cases resulted in the development of the Compulsory HIV-Testing of Sexual Offenders Bill.

**Developments relating to ongoing review of legislation**

***Employment Equity Act, 1998 (Act 55 of 1998)***

61. The purpose of this Act is to achieve equity in the workplace by promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workplace.

62. Section 5 of the Act provides that every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice. Section 6 provides for prohibition of unfair discrimination on any of the listed grounds. Section 13 provides that every designated employer must, in order to achieve employment equity, implement affirmative measures for people from designated grounds in terms of the Act. Section 15 provides for a non-exhaustive list of affirmative action measures. Section 20 provides that a designated employer must prepare and implement an equity plan which will achieve reasonable progress towards employment equity in the employer's workforce, sections 21 and 22 provide for the development of a report by a designated employer that employs fewer than 150 employees and publication of such a report respectively.

63. Section 28 provides for the establishment of the Commission for Employment Equity. Section 30 provides for the functions of this Commission that include advising the Minister on codes of practice issued by the Minister, regulations made by the Minister, and policy and

any other matters concerning this Act. Section 32 provides that, in performing its functions, the Commission calls for written representations from members of the public; and hold public hearings at which it may permit members of the public to make oral representations. The Commission must, in terms of section 33, submit an annual report to the Minister.

64. Section 34 provides that any employee or trade union representative may bring an alleged contravention of this Act to the attention, *inter alia*, of a trade union, or the Commission. Section 36 provides for the power of a labour inspector to seek, from a designated employer, an undertaking to comply with requirements that seek to ensure the implementation of the Act as contained in this section. Section 37 provides for a discretionary power vested on the labour inspector to issue a compliance order to a designated employer if that employer has refused to give a written undertaking when requested to do so; or failed to comply with a written undertaking. A designated employer may make written representation to the Director-General of the Labour Department with objections against the order of the labour inspector and appeal to the Labour Court against the order of the Director-General in terms of sections 39 and 40 respectively.

65. A progress report on the preparation and implementation of the employment equity plan regarding all labour sectors obtained from the Department of State Administration is currently being prepared.

### **Transformation of the Public Service**

66. The transformation of the Public Service with a view that it reflects the major characteristics of South African demography is an ongoing process.

### **Case Law**

67. In the Constitutional judgment of **Premier, Western Cape v President of the Republic of South Africa 1999(3) SA 657 (CC)** it was held that 3(3)(b) of the amended **Public Service Act**, which permitted the Minister to direct that the administration of provincial laws be transferred from a provincial department to a national department or other body, clearly infringed on the executive authority of the province to administer its own laws. The provisions of Chapter 3 of the Constitution were designed to ensure that in fields of common endeavour the different spheres of government co-operated with each other to secure the implementation of legislation in which they all had a common interest. The Constitutional Court found that certain amendments to the **Public Service Act, 1994 (Act 103 of 1994)** formed part of a legislative scheme aimed at the structural transformation of the public service and were not invalid.

68. In **National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others 2000 (2) SA 1 (CC)** the applicants had brought an application in a High Court for an order, *inter alia*, declaring Section 25 of ***the Aliens Control Act 96 of 1991*** (the Act) to be inconsistent with the Constitution of the Republic of South Africa Act 108 of 1996 on the basis that it discriminated against partners in permanent same-sex life partnerships, in that Section 25(5) of the Act provides for an exemption from the provisions of Section 25(4) for the spouse of a person permanently and lawfully resident in the Republic, which by implication did not extend the exemption to partners in permanent same-sex life partnerships.

The Court held that the present case could and ought to be decided on the basis of whether Section 25(5) unconstitutionally limited the rights of South African partners (the failure of the Act to grant any recognition at all to same-sex life partnerships impacted in the same way on South African partners as it did on foreign-national partners).

The Court held that 'spouse', as used in Section 25(5), was not reasonably capable of a broad construction to include partners in permanent same-sex life partnerships. The word 'spouse' was not defined in the Act, but its ordinary meaning connoted a 'married person' a wife, or husband. There was also no indication that the word 'marriage' as used in the Act extended any further than those marriages that were ordinarily recognised by the law.

The Court held further, that the discrimination in Section 25(5) constituted overlapping or intersecting discrimination on the grounds of sexual orientation and marital status, both specified in Section 9(3) and presumed to constitute unfair discrimination by reason of Section 9(5) of the Constitution.

The Court held, accordingly, that Section 25(5) constituted unfair discrimination and a serious limitation of the Section 9(3) equality right of homosexuals who were permanent residents in the Republic and who were in permanent same-sex life partnerships with foreign nationals. Section 25(5) simultaneously constituted a severe limitation of the Section 10 right to dignity, enjoyed by such homosexuals.

The Court held further, that the constitutional defect in Section 25(5) could be cured with sufficient precision by reading in, after the word 'spouse' the following words: 'or partner in a permanent same-sex life partnership', and that it had to be cured in this manner. 'Permanent' in this context meant an established intention of the parties to cohabit with one another permanently. Such a reading in, seen in the light of the Legislature's right to fine-

tune the section as so extended and other provisions that may have been relevant thereto, did not intrude impermissibly upon the domain of the legislation.

69. In **Moseneke and others v the Master and Another 2001(2) SA 18 (CC)** applicants attacked the unconstitutionality of Section 23(7) of the **Black Administration Act 38 of 1927** and regulation 3(1) promulgated under this Act. Section 23(7) provides that letters of administration from the Master of the Supreme Court shall not be necessary in, nor shall the Master have any powers in connection with the administration and distribution of the estate of any black that has died leaving no valid will. Regulation 39 provides for the administration of the property of a black person who died leaving no valid will, under the supervision of a magistrate.

The Court held that there could be no doubt that both Section 23(7) and regulation 3(1) imposed differentiation on the grounds of race, ethnic origin and colour (as contemplated in Section 9(3) of the Constitution) and as such constituted discrimination which was presumptively unfair in terms of Section 9(5) of the Bill of Rights. Even if there were practical advantages for many people in the system, it was noted that racial discrimination severely assailed the dignity of those concerned and it undermined attempts to establish a fair and equitable system of public administration. Any benefits did not need to be linked to this form of racial discrimination but could be made equally available to all people of limited means or to all those who lived far from the urban centres where the office of the Master is located. Both provisions created unfair discrimination within the meaning of Section 9(3) of the Constitution and constituted a limitation of the right to dignity entrenched in Section 10.

The Court held, further, that the provisions of Section 23(7) and regulation 3(1) were not reasonable and justifiable in an open and democratic society based on equality, freedom and dignity. No such society would tolerate differential treatment based solely on skin colour. The Court held, accordingly, that Section 23(7) and regulation 3(1) were inconsistent with the Constitution and invalid.

70. In **National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others 1999(1) SA 6 (CC)** applicants sought an order declaring unconstitutional and invalid the common law offence of sodomy; the common law offence of commission of an unnatural sexual act to the extent that it criminalises acts committed by a man or between men which, if committed by a woman or between women or between a man and a woman, would not constitute an offence; Section 20A of the **Sexual Offences Act, 1957 (Act 23 of 1957)**, the inclusion of sodomy as an item in Schedule 1 to the **Criminal**

**Procedure Act, 1977 (Act 51 of 1977)**; and the inclusion of sodomy as an item in the Schedule to the **Security Officers Act, 1987 (Act 92 of 1987)**. The order of the Witwatersrand High Court, insofar as it declared provisions of the Acts of Parliament invalid, was referred to the Constitutional Court for confirmation in terms of Section 177(2)(a) of the Constitution.

The Constitutional Court (the Court) held, as to the common law offence of sodomy, that, although the constitutionality of the common law offence of sodomy was not directly before the Constitutional Court, a finding of constitutional invalidity of the offence was an indispensable and inadvisable step in concluding that the impugned provisions of the Criminal Procedure Act and Security Officers Act were constitutionally invalid.

The Court held, further, that the criminalisation of sodomy constituted discrimination on a ground listed in Section 9(3) of the Constitution and that it had to be presumed, in terms of Section (5), that the differentiation constituted unfair discrimination unless it was established that the discrimination was fair. After considering all the circumstances, in particular that gay men were a permanent minority in society and had suffered in the past from patterns of disadvantage, their private conduct caused no harm to anyone else and the discrimination had gravely affected the rights and interests of gay men and deeply impaired their dignity, the Court held that the discrimination was unfair and therefore in breach of Section 9 of the Constitution.

The Court held, further, that there was no justification for the limitation since that was a severe limitation of a gay man's right to equality in relation to sexual orientation and at the same time a severe limitation of the gay man's rights to privacy, dignity and freedom. The Court held, accordingly, that the common law offence of sodomy was inconsistent with the 1996 Constitution and invalid. The Court held, further, that the inclusion of the offence in the Statutes is consequently constitutionally inconsistent.

71. In **Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening) 1999(2) SA 1 (CC)** applicant instituted an action for damages arising from injuries she had suffered after falling in the respondent's supermarket, where she was employed. The respondent raised a special plea to the effect that the applicant's claim was barred by Section 35(1) of the **Compensation for Occupational Injuries and Diseases Act, 1993 (Act 130 of 1993)**, which provides that employees cannot institute an action against their employers for damages in respect of any occupational injury or disease sustained or contracted in the course of their employment, but are confined to proceedings in terms of the Act. The special plea elicited a replication that Section 35(1) was

inconsistent with the 1993 Constitution, in that its provisions violated the right to equality before the law and the equal protection of the law, the right not to be unfairly discriminated against, the right of access to courts, and right to fair labour practice. The equality challenge was not based on any grounds specified in Section 8(2) of the 1993 Constitution but on a contention that employees, by being deprived of the common law right to claim damages from employers, were placed at a disadvantage in relation to people who were not employees and who retained that right.

The Court held that the matter had to be decided on in terms of the 1993 Constitution since it was in force at the time when applicant's cause of action arose and the validity of Section 35(1) accordingly had to be determined against Ss 8(1) and (2), 22 and 27(1) of the 1993 Constitution.

The Court held, further, as to the alleged infringement of Section 8(1) and 8(2) of the 1993 Constitution, that the correct approach to cases in which there was alleged to be an infringement of those subsections, but where the differentiation was not based on any ground specified in Section 8(2), was as follows: (a) the first enquiry was whether there was a rational relationship between the differentiation and a legitimate government purpose: if there was no rational relationship, the differentiation in question amounted to a breach of Section 8(1); (b) the issue as to whether there was unfair discrimination in terms of Section 8(2) would ordinarily only arise if there was such a relationship: if so, the party challenging the constitutionality of the differentiation had to establish that the differentiation amounted to unfair discrimination; (c) if unfair discrimination was established, the party seeking to support the disputed measure attracted a duty to establish that the measure passed the test for limitation laid down in Section 33 of the 1993 Constitution.

The Court held, further, that the Legislature clearly considered that it was appropriate to grant employees certain benefits not available under common law, while excluding certain common law rights. Section 35(1) of the Compensation Act was therefore logically and rationally connected to a legitimate government purpose, namely a comprehensive regulation of compensation for disablement caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment.

The Court held, further, as to the alleged infringement of Section 22 of the 1993 Constitution, that Section 35(1) did not deny an employee access to the courts. The fact that a plaintiff could not go to court to claim damages against her employer followed from the removal of the right to claim common law damages. The Court held, accordingly, that Section 35(1) of

the Compensation Act was not constitutionally invalid.

72. **Christian Education South Africa v Minister of Education, 2000(4) SA 757 (CC)** discussed *infra* is relevant to the right in issue.

#### **Article 4 of the African Charter**

***Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.***

#### **Constitution**

73. Given the level of crime in South Africa, there are calls for the return of the death penalty. This entails the reviewing of the right to life provided for by section 11 of the Constitution, on which the Constitutional Court has made a pronouncement, namely that the death penalty is unconstitutional (see **S v Makwanyane and Another 1995 BCLR 665**).

74. The Government policy on the death penalty is clear. The return of the death penalty will not serve as a deterrent for the commission of serious offences. South Africa needs to deal with the underlying causes of the commission of such crimes such as the regeneration of moral values of society, significant reduction of levels of unemployment and eradication of poverty in general. In other words we need a combination of preventive and punitive measures; the latter need not include the death penalty.

#### **Legislation**

##### **Criminal Law Amendment Act, 1997**

75. The Minister for Justice and Constitutional Development is still continuing with his mandate of referring death sentence cases to the relevant courts for the review of such sentences as required by the **Criminal Law Amendment Act, 1997 (Act 105 of 1997)**. Since the landmark Constitutional Court ruling in **S v Makwanyane** (above), there are currently 211 prisoners on death row waiting for substituted sentences.

#### **Article 5 of the African Charter**

***Every individual shall have the right to the respect of the inherent dignity in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.***

## Legislation and Policy

### Review of ***Sexual Offences Act, 1957 (Act 23 of 1957)***

76. This Act is being reviewed by the SA Law Commission as stated above under Discussion Paper 102 (Project 107) with a closing date for comments set for 28 February 2002.

77. The National Policy Guidelines for victims of sexual offences was released in 1988. This document covers inputs by the:

- SAPS – Support to victims of sexual offences
- Department of Health – Uniform national health guidelines for dealing with survivors of rape and other sexual offences
- Department of Welfare – Procedural guidelines to social welfare agencies and appropriate NGOs in assisting victims of rape and other sexual offences
- Department of Justice – National guidelines for prosecutors in sexual offences cases
- Department of Correctional Services – National guidelines

## Case law

78. The cases listed below, as discussed *supra*, are relevant to the right in issue:

- **The National Coalition for Gay and Lesbian Equality v the Minister of Home Affairs and Others 2000(2) SA 1 (CC)**
- **National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others, 1999(1) SA 6 (CC)**
- **Moseneke and Others v the Master and Another 2001(2) SA 18 (CC)**
- **Christian Education South Africa v Minister of Education 2000(4) SA 757 (CC)**

### ***Article 6 of the African Charter***

***Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law, in particular, no one may be arbitrarily arrested or detained.***

## Legislation and Policy

### ***Proceeds of Crime Act, 1996 (Act 76 of 1996)***

79. This Act has been repealed by the Prevention of Organised Crime Act, 1998 (Act 121 of 1998). The latter Act incorporates provisions of the former. Incorporated provisions

include criminalisation of money laundering and failure to report suspicious transactions relating to money laundering. As an extension of provisions contained in the repealed Act, the Prevention of Organised Crime Act, 1998, criminalises racketeering and active participation in or membership of a gang.

***Witness Protection Act, 1998 (Act 112 of 1998)***

80. The Witness Protection Bill, 1998, has been passed into the abovementioned Act. The purpose of the Act is to ensure the protection of witnesses and related persons that include accommodation in places of safety, pending a case in which a witness is to give evidence. Section 7 provides that any witness who has reason to believe that his or her safety or the safety of any related person is or may be threatened by any person or group or class of persons, may report such belief and apply in the prescribed manner that he or she or any related person be placed under protection.

***Domestic Violence Act, 1998 (Act 116 of 1998)***

81. The Domestic Violence Bill has been passed into the abovementioned Act. Section 4 of the Act provides that any complainant may in the prescribed manner apply to the court for a protection order. Section 5 provides that if the court is satisfied that there is *prima facie* evidence that the respondent is committing, or has committed an act of domestic violence and undue hardship may be suffered by the complainant as a result of such domestic violence if a protection order is not issued immediately, the court must issue an interim protection order against the respondent.

82. Section 6 provides that the court may issue a protection order if the respondent is not present on the return date or after the hearing when it finds, on a balance of probabilities, that the respondent has committed or is committing an act of domestic violence.

**National Crime Prevention Strategy (NCPS)**

83. The NCPS has been replaced by the **Integrated Justice System (IJS)**. The NCPS visualised the transformation of the existing criminal justice system into an IJS. The criminal justice system involves four core departments: Safety and Security (the main component of which is the South African Police Service), Justice and Constitutional Development, Correctional Services and Social Development. This system is not functioning effectively, due mainly to the fact that the four departments operate in isolation. Another important factor contributing to the inefficient functioning of the system is the lack of reliable and timely information. The criminal justice system has an unacceptably high rate of undetected cases,

case withdrawals at various stages of the process and low conviction rates. It is also rapidly running out of capacity. The main objective of the IJS, therefore, is to transform the criminal justice system into a modern, efficient, effective and integrated system.

84. A User Board, consisting of senior members of the four departments, was established in 1997 to oversee the transformation of the criminal justice system. A Project Office, staffed by facilitators of the core departments and professionals seconded by Business Against Crime, was established to assist the User Board in its task. Following extensive consultation, a public tender for the design of an IJS was issued in July 1997 and awarded to the Mulweli Consortium. The approach that was followed was to -

- review the business processes involved in managing an offender and his/her case through the criminal justice system;
- identify blockages which hamper the functioning of the system;
- apply local and international best practices to develop an architectural framework, which will form the basis of the transformation of the system;
- identify solutions to the blockages; and
- cost the proposed projects.

85. The Mulweli team produced a number of reports reflecting how the IJS should function and how the present system could be transformed. One hundred and forty-six blockages were identified during the investigation. Most blockages were found to exist as a result of a lack of, or shortfalls in respect of -

- business and functional integration;
- team work and team training;
- common positive identification of offenders;
- timely access to criminal history records;
- timely notification of events; and
- levels of automation and use of technology.

86. The Mulweli team identified a considerable number of solutions. These were categorised as Quick Fix Projects, that could be implemented fairly quickly and at relatively little cost (such as the provision of lock-up facilities to secure dockets); Fast-Track Projects, that would take about 18 months to complete (such as Automated Court Resource Scheduling); and Enterprise Level Projects, that require substantial funding and a number of years to implement (such as the Automatic Fingerprint Identification System).

87. Representatives of all relevant departments (Safety and Security, Justice and

Constitutional Development, Correctional Services and Social Development), who act as facilitators for their respective departments, are stationed permanently at the IJS Project Office, in order to ensure that all the cross-cutting activities of the criminal justice system are carried out in a co-ordinated manner. The work of the IJS Project Office is controlled by a high-level management structure, the IJS Board, and enjoys considerable support and assistance from Business Against Crime.

88. The type of activities that the IJS has recently been involved in include: facilitating the establishment of electronic data interchange within the IJS departments; the development of a standardised toolkit for use at crime scenes; the professional management of exhibits and other pieces of evidence to secure the chain of evidence; the effective and efficient management of the offender and his/her case throughout the system; ensuring the availability of previous conviction records at bail and adjudication hearings; the establishment of a management information system for the IJS; the development of a National Photo Identification System for the efficient identification of suspects and accused persons; and the identification of suitable technology for the tracking of prisoners. Both the court process project and the awaiting-trial prisoner projects referred to above, fall within the ambit of the IJS Project Office.

89. Orderly implementation of the IJS project will result in substantial improvements in the efficiency of the criminal justice system, and lead to increased public confidence in the effectiveness, integrity and fairness of the system.

### **Case law**

90. **Christian Education South Africa v Minister of Education, 2000(4) SA 757 (CC)** discussed under article 5 is applicable in regard to the article in issue.

91. In **S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat, 1999(4) SA 623 (CC)** the Court underlined the background of bail *vis-à-vis* freedom of an arrested person. Section 35(1)(f) of the Constitution provides that everyone who is arrested for allegedly committing an offence has the right to be released from detention if the interests of justice permit, subject to reasonable conditions. Section 35(1)(f) of the Constitution, in its context, makes three things plain. The first is that the Constitution expressly acknowledges and sanctions that people may be arrested for allegedly having committed offences, and may for that reason be detained in custody. The Constitution itself therefore places a limitation on the liberty interest protected by Section 12. The second is that notwithstanding lawful arrest, the person concerned has a right, but a circumscribed one, to be released from custody subject to reasonable conditions. The third basic proposition flows from the second,

and really sets the normative pattern for the law of bail. It is that the criterion for release is whether the interests of justice permit it.

92. In **Freedom of Expression Institute and Others v President, Ordinary Court Martial, and Others 1999(2) SA 471(c)** the Cape High Court considered an application for the unconstitutionality of the ordinary court martial as structured under **the Defence Act, 1957 (Act 44 of 1957)**, and Military Discipline Code. The legislative framework allowed members of the court and prosecutor without legal training, to convene a court for purposes of trial, convictions and sentences. The Court held, *inter alia*, that to the extent that neither the Act nor the Code required that members of the ordinary court martial be legally qualified and thereby permitted by members of the ordinary court martial to convict and imprison people up to two years, they were unconstitutional in that they violated Section 174(1) of the Constitution, which required that a judicial officer be an appropriately qualified woman or man who is a fit and proper person, and Section 12(1)(b) read with Section 35(3), which guaranteed the right not to be detained without a public trial before an ordinary court.

93. In **Christian Lawyers Association of SA and Others v Minister of Health and Others, 1998(4) SA 1113 (T)** the High Court considered an application seeking an order declaring the **Choice on Termination of Pregnancy Act, 1996 (Act 92 of 1996)**, to be unconstitutional and striking it down in its entirety. The application contended that Section 11 of the **Constitution of the Republic of South Africa Act, 1996 (Act 108 of 1996)**, which provides that everyone has the right to life, applied also to unborn children from the moment of conception. The defendant excepted to the applicants' particulars of claim on the ground that they do not disclose a cause of action, because Section 11 conferred no rights in a *foetus* and did not preclude the termination of pregnancy in the circumstances and manner contemplated by the Act.

The Court held, as to whether the word 'everyone' in Section 11 included the unborn child, that plaintiffs' argument that the *foetus* qualified for protection because 'the life of a human being starts at conception' and that therefore human beings were from conception persons as envisaged by the section, was a *non sequitur*: the question was not whether the *conceptus* was human, but whether it should be given the same legal protection as everyone else.

The Court held, further, that while the status of the *foetus* was, at best for the applicants, somewhat uncertain under common law, the Constitution contained no express provision affording the *foetus* legal personality or protection and in Section 12(2) provided specifically

that everyone had the right to make decisions concerning reproduction and to security in and control over their bodies, without anywhere qualifying a woman's rights in this regard in order to protect the *foetus*. The Court held, further, that had the drafters of the Constitution wished to protect the *foetus*, they would have done so in Section 28, which specifically protected the rights of the child; there were clear indications that the safeguards in Section 28 did not extend to protect the *foetus*. A child was defined as a person under the age of 18 years. Age commenced at birth and a *foetus* was not a 'child' of any 'age'. If Section 28 did not include the foetus within the ambit of its protection, then it could hardly be said that the other provisions of the Bill of Rights, including Section 11, were intended to do so. The Court held, accordingly, that the *foetus* was not a legal person under the Constitution and that the particulars of claim did not make out a cause of action and that the exception had to succeed.

#### **Article 7 of the African Charter**

**1. Every individual shall have the right to have his cause heard.**

***This comprises:***

- (a) The right to an appeal to competent national organs against acts of violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force;***
- (b) the right to be presumed innocent until proved guilty by a competent court or tribunal;***
- (c) the right to defence, including the right to be defended by counsel of his choice;***
- (d) the right to be tried within a reasonable time by an impartial court or tribunal.***

**2. No one may be condemned for an act or omission, which did not constitute a legally punishable offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.**

#### **Legislation and Policy**

##### **Legal Practitioners Bill**

94. As indicated already under the topic on the South African legal system, the above Bill seeks to broaden the scope of access to justice.

##### **Family Courts Bill**

95. This Bill seeks to broaden the scope of settlement of family disputes, such as

separation, divorce, etc.

### **Rationalisation of Courts Bill**

96. This Bill is intended to make provision for the interim rationalisation of the areas of jurisdiction of High Courts where this is necessary. This will, in a sense, improve access to justice and the courts.

### **Juvenile Justice Bill**

97. The Bill seeks to introduce a justice system that is in line with the rights of children. To that extent, children will enjoy special access to justice and the courts.

### **Judicial Service Commission Amendment Bill**

98. This Bill, which provides for a mechanism of complaints, has been combined with the Judicial Officers Amendment Bill, 2001, which is currently before Parliament.

### **Citizen Advice Desks**

99. The aim of these desks is to incorporate and expand community participation in the administration of justice, as they will be the first point of contact for the public. These desks will provide useful information and general advice for court users, as well as information regarding the court system, the administration of justice and people's rights. This project aims to improve the overall quality of service delivered by magistrates' courts.

### **Information desks at courts**

100. Some courts have established information desks, which offer legal information, advice and referral to appropriate agencies. Personnel who have knowledge of the law and human rights staff these desks and they also receive complaints on poor treatment received in courts. Victims can approach these desks for information on their rights.

### **Witness friend**

101. Some courts have set up a 'witness friend' who assists witnesses with issues such as ushering witnesses to the correct courts. They also attend to some of the concerns of witnesses and provide support.

### **One-Stop Centres**

102. One Stop Centres have been established by the Department of Justice and Constitutional Development, whereby all criminal justice sector service providers can render services to victims of domestic violence or sexual offences at the same place, to reduce secondary victimisation and to increase prosecution. At present there are 2 pilot projects on

One Stop Centres; one in the Eastern Cape and one in the Western Cape. The Department is in the process of making them available in other provinces.

### **Access to legal services**

103. With the help of the Paralegal Movement and university clinics, the Department of Justice and Constitutional Development has been able to improve access to legal services for strengthening the integration of rural communities in the legal system. Activities of the Department regarding access to legal services have included the transformation and empowerment of traditional institutions such as the traditional courts and the extended family. The Department is also using mobile courts to facilitate access to justice to rural and isolated communities.

104. The provision of legal aid in civil matters including labour matters is being investigated. It is envisaged that disadvantaged groups such as domestic workers and farm workers would benefit enormously from this intervention.

105. Additional and Saturday Courts project provided an important tool to effectively deploy the highly limited resources of the Court where it was most needed. As at the end of December 2001 cases with a verdict that were finalised, totalled 13 544.

### **Research by the SALC relating to Access to Justice**

#### **Project 42: Time limits for the institution of actions against the State (supplementary report)**

106. The National Assembly passed the *Institution of Legal Proceedings against Organs of State Bill* on 28 September 2000. A decision by the Constitutional Court is being considered before the legislation will be proceeded with.

#### **Project 88: The recognition of class actions in South African Law**

107. The *Public Interest and Class Actions Bill* has already been submitted to Cabinet, but requires discussions by the Minister with certain other Ministers.

#### **Project 90: Customary law**

108. A discussion paper on the judicial powers of traditional leaders was published on 6 May 1999. The closing date for comments on the discussion paper was extended to 31 August 1999. It is envisaged that a draft report on the judicial powers of traditional leaders will be finalised for consideration by the Commission early in 2002.

### **Project 94: Arbitration**

109. Community dispute resolution structures: A discussion paper on community dispute resolution structures was published for general information and comment in September 1999. A national workshop on the discussion paper was held from 27 - 28 October 1999. A subcommittee was established to make additional recommendations. A draft report will be finalised early in 2002.

### **Project 100: Family law and the law of persons**

110. Maintenance: Following an investigation by the Law Commission, the **Maintenance Act 99 of 1998** came into operation on 26 November 1999 (Discussed above).

111. Domestic violence: The investigation into domestic violence led to the passing of the **Domestic Violence Act, 1998 (Act 116 of 1998)**. The Act came into operation on 15 December 1999. (Discussed above.)

### **Project 107: Sexual offences**

112. A discussion paper on sexual offences: process and procedure was published for general information and comment in December 2001. The closing date for comment is 28 February 2002. This discussion paper addresses, *inter alia*, the issue of making it easier for victims of sexual offences to testify in court.

### **Project 110: Review of the Child Care Act, 1983**

113. In scope, the investigation goes beyond the review of the present Child Care Act, 1983 and includes a comprehensive review and redraft of all childcare legislation. A comprehensive discussion paper was published for general information and comment in December 2001.

### **Case law**

114. In **S v Boesak 2001(1) SA 912 (CC)** applicant sought special leave to appeal to the Constitutional Court against the decision of the Supreme Court of Appeal (SCA) upholding the convictions of the High Court on three counts. The basis of the application is that the decision of the SCA constitutes an infringement of applicant's constitutional rights in Ss 12(1)(e) and 35(3)(h) of the Constitution, namely, the right not to be deprived of freedom and security without just cause and the right to a fair trial', to be presumed innocent, to remain silent, and not to testify during the proceedings'. The Court held that the question whether evidence is sufficient to justify a finding of guilt beyond reasonable doubt is not a constitutional matter. The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the

trial. If there is evidence calling for an answer and an accused chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient, in the absence of an explanation, to prove the guilt of the accused. The Court held, further, that where just cause exists for the person's imprisonment, and no infringement of his or her Section 35(3) fair trial right has been established, the question whether on the facts, a court correctly came to a conclusion that the person's guilt had been proved beyond reasonable doubt, does not encroach on the rights to freedom. It is not a constitutional matter or an issue connected with a constitutional matter over which the Constitutional Court has jurisdiction. The Court, accordingly, refused the application for leave to appeal.

115. In **S v Steyn 2001(1) SA 1146 (CC)** applicant and an *amicus curiae* were convicted of serious offences. Their applications to the regional court and High Court for leave to appeal were refused. The applicant contends that the leave to appeal and petition procedure created by SS 309 B and 309 C of the **Criminal Procedure Act** denies him the right to a full and meaningful hearing by a higher court, more in particular that the above sections infringe on Section 35(3)(o) of the Constitution, namely, the right to appeal to, or review by a higher court. The Court, after citing some differences, held that the situation of an accused person wanting to appeal from a magistrate's decision, was very much less favourable than one who sought to appeal against a conviction or sentence in a High Court; and accordingly, that the risk of an error leading to an injustice was substantially higher in the magistrates' courts than in High Courts. The Court held, further, that the features of the Section 309 B and Section 309 C procedure made it unsuitable for the purpose envisaged in the Constitution, in that the procedure did not accord with an adequate reappraisal and the making of an informed decision. The attenuated appeal procedure consisting in the leave and petition procedure, contained in Ss 309 B and 309 C, even if supplemented by an application for leave to appeal against a High Court's refusal of leave and a petition to the Chief Justice, instituted a limitation of the right of appeal to, or review by a Higher Court as entrenched in S35 (3)(o) of the Constitution. The Court held, further, that the State had failed to establish that Section 309 B and Section 309 C procedure was reasonable and justified and an argument based on Section 36 of the Constitution also had to fail. The declaration of invalidity was suspended to allow the State to take the necessary steps to address the impact of such declaration.

116. In **S v Dodo 2001 (3) SA 382 (CC)** a High Court had declared the provisions of Section 51(1) of the **Criminal Law Amendment Act, 1997 (Act 105 of 1997)** (which made it obligatory for a High Court to sentence an accused convicted of offences specified in the

Act, to imprisonment for life unless, under Section 51(3)(e), 'substantial and compelling circumstances' existed which justified the imposition of a lesser sentence) to be constitutionally invalid, because it was inconsistent with the provisions of the Constitution, particularly Section 35(3)(c), which guaranteed every accused person 'a public trial before an ordinary court', and with the separation of powers required by the Constitution. The imposition of a prescribed sentence was a limitation. The Court held that the construction of the phrase 'substantial and compelling circumstances' in Section 51(3)(e) counts to the heart of the issues. The existence of these circumstances permitted the imposition of a lesser sentence than the one prescribed. However, establishing the true meaning of the phrase had led to a series of widely divergent constructions in the High Courts. The Court held further that while the Constitution recognised a separation of powers between the different branches of the state and a system of appropriate checks and balances on the exercise of the respective functions and powers of these branches, such separation did not confer on the courts the sole authority to determine the nature and security of sentences to be imposed on a convicted person. Both the Legislature and the Executive had a legitimate interest, role and duty with regard to the imposition and subsequent administration of penal sentences. The Court held, accordingly, that Section 51(1) of the Act was not inconsistent with the right of an accused under Section 35(3)(4) of the Constitution to a public trial before an ordinary court.

117. In **S v Mohomela and Another (Director-General of Justice Intervening) 2000(3) SA 1 (CC)** appellants had been convicted in a regional magistrate's court of a contravention of Section 37 of the **General Law Amendment Act, 1995 (Act 62 of 1995)** and were sentenced to terms of imprisonment. At the hearing of an appeal in a Local Division against the convictions the Court raised, *mero motu*, the constitutionality of the reverse *onus* in Section 37(1), which had been material to their conviction. The Court held that the reverse *onus* provision, which provided for an accused to prove that she or he had reasonable cause for believing that goods acquired or received were the property of the person from whom they were received or that such person had the authority of the owner to dispose of them, was unconstitutional and the appellants had accordingly not had a fair trial. The convictions and sentences were accordingly set aside. The decision was referred to the Constitutional Court for confirmation in terms of Section 172(2)(a) of the **Constitution of the Republic of South Africa Act, 1996 (Act 108 of 1996)**. The Court held that although there was justification in limiting the accused's right to remain silent by requesting the accused who had been shown to be in possession of stolen goods, acquired otherwise than at a public sale, to produce the requisite evidence, namely that she or he had reasonable cause for believing that the goods were acquired from the owner or from some other person who had

the authority of the owner to dispose of them, the Section 37 offence was broadly formulated to an extent that it infringed the right to remain silent contained in Section 35(3)(i). The Court held, accordingly, that the phrase 'proof of which shall be on such firstmentioned person' in Section 37(1) of the **General Law Amendment Act, 1955 (Act 62 of 1955)** had to be declared inconsistent with the Constitution and invalid and that Section 37(1) should read as follows in the last sentence: "In the absence of evidence to the contrary which raises reasonable doubt, proof of such possession shall be sufficient evidence of the absence of reasonable cause."

118. In **S v Twala (South African Human Rights Commission Intervening) 2001(1) SA 879 (CC)** the applicant challenged the constitutionality of Section 316 read with Section 315(4) of the **Criminal Procedure Act, 1977 (Act 51 of 1977)**, requiring compliance with some conditions before leave to appeal can be granted. The applicant contended that this section runs contrary to the Constitution, in particular Section 35(3)(o) which confers upon all accused persons an unqualified right to a full rehearing before a High Court on a complete record on all issues regardless of the prospects of success— right to appeal without leave of any Court. The Court, relying on the earlier judgment in **S v Rans 1996(1) SA 1218 (CC)**, in particular that the absence of a full oral argument or complete rehearing does not mean that the procedure is unfair and that it cannot be in the interests of justice and fairness to allow meritless and vexatious issues to be heard by the Supreme Court of Appeal and to clog the roll with hopeless cases, held that Section 316 read with Section 315(4) is not inconsistent with the provisions of Section 35(3)(o) of the Constitution.

#### **Article 8 of the African Charter**

***Freedom of conscience, the profession and free practise of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.***

#### **Legislation and Policy**

##### **Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Bill, 2001**

119. Reference to this Bill has already been made under Chapter 2 of this Report.

#### **Case law**

120. In **Christian Education South Africa v Minister of Education 2000(4) SA 757** discussed under article 5, the Court held that the **School Act 1996 (Act 84 of 1996)**, which

prohibits corporal punishment in schools cannot be said to be unconstitutional to an extent that it limits the right to freedom of religion, belief and opinion of a particular religious community, believing in punishment of children. The limitation of such right placed by this Act is justified. The said religious community retains their right outside the borders of schools.

121. **Christian Lawyers Association of SA v Minister of Health 1998(4) SA 1113 (TPD)** discussed under article 6, has reference to the extent that the Court held that to afford the *foetus* the status of a *legal persona* may impinge upon, *inter alia*, the right to freedom of religion, belief and opinion provided for in Section 15 of the Constitution. This right is to be enjoyed by legal persons only.

122. In **Garden Cities Incorporated Association v Northpine Islamic Society 1999(2) SA 268(CPD)** the respondent bought, in terms of a written agreement, the erven designated for religious purposes. The agreement contained certain fundamental provisions, *inter alia*, that the respondents would not conduct any activities which would be the source of nuisance or disturbance to other owners in the township, particularly prohibiting the use of sound amplification equipment, and that the call to prayer would be made by the use of a light on the top of the minaret which would be switched on at the appropriate time. In spite of these provisions, the respondent had installed sound amplification equipment and added a loudspeaker to the mosque that it had built on the property purchased. In response to complaints from the residents of the surrounding properties, the applicant had applied for an order interdicting the respondent from using any sound amplification equipment and obliging it to remove such equipment. Respondent averred, *inter alia*, that the contract was concluded in the pre-constitutional period, but Section 15(1) of the Constitution gave the respondent the opportunity to contend that the relevant clauses offended against the right to freedom of religion. The applicant countered this argument by submitting that it had no objection to calls to prayer by the unassisted human voice, but objected to the electronic amplification thereof. The Court held that the prohibition did not infringe on the right to freedom of religion of the members of the respondent or any other Muslim, as it merely regulated, by consensus, a particular ritual practised at a particular place in the interests of other members of the community. The Court held, further, with regard to the inability to waive such a fundamental precept of the Islamic religion as the call to prayer, that it would be difficult for the other contracting party to an agreement to know whether the right purportedly relinquished was or was not a fundamental one. Although there was evidence that it had become a widespread practice for calls to prayer to be electronically amplified, there was nothing to suggest that such amplification had become a precept of the Islamic

religion after centuries of calls to prayer without sound equipment. In the circumstances therefore the sanctity of the agreement that the applicant had concluded with the respondent, believing that it was sincere in wishing to uphold its bargain, should prevail. Interdict granted as prayed for.

***Article 9 of the African Charter***

- 1. Every individual shall have the right to receive information.***
- 2. Every individual shall have the right to express and disseminate his opinions within the law.***

### Legislation and Policy

123. National legislation was recently enacted to give effect to the right to receive information. The **Promotion of Access to Information Act, 2000 (Act 2 of 2000)** intends to "...give effect to the right of access to information held by the State and any information that is held by another person and that is required for the exercise or protection of any rights ...". However, this right may be limited by, amongst others, reasonable protection of privacy, commercial confidentiality and effective, efficient good governance.

124. Freedom of opinion straddles between the freedom of expression, the right to information and the right to freedom of conscience, thought and belief. Section 15 (1) of the Constitution recognises this fundamental right in providing that: "*Everyone has the right to freedom of conscience, religion, thought, belief and opinion*".

125. The right to have an opinion is protected in the freedom of religion, belief and opinion (section 15), assembly, demonstration, picket and petition (section 17), freedom of association (section 18), political rights (section 19), citizenship (section 20), freedom of movement and residence (section 21), freedom of trade, occupation and profession (section 22), labour relations (section 23), education (section 29), language and culture (section 30), cultural, religious and linguistic communities (section 31), access to information (section 32), access to courts (section 34) and education (section 29) of the Constitution. These rights are only limited under article 36 of the Constitution and in states of emergencies (section 37), only to the extent indicated in the table of non-derogable rights.

126. Access of the media and public to the proceedings in the government are governed by the following sections of the Constitution: Section 59(1) provides that the National Assembly must –

- (a) Facilitate public involvement in the legislative and other processes of the Assembly and its committees; and
- (b) conduct its business in an open manner, and have its sittings, and those of its committees, in public, but reasonable measures may be taken –
  - (i) to regulate public access, including access of the media, to the Assembly and its committees; and
  - (ii) to provide for the searching of any person and, where appropriate, the refusal of entry to, or the removal of, any person.

127. Section 59(2) provides that the National Assembly may not exclude the public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do

so in an open and democratic society.

128. To enhance protection of freedom of expression, the Government has passed the **Independent Broadcasting Authority Act, 1993 (Act 153 of 1993)**. This Act has been amended by the **Electoral Amendment Act, 1994 (Act 1 of 1994)** and the **Independent Broadcasting Authority Amendment Act, 1995 (Act 36 of 1995)**. These Acts established the Independent Broadcasting Authority (IBA), whose main task is to regulate broadcasting activities in South Africa. Some of the functions of the IBA are to -

- (i) promote the provision of a diverse range of sound and television broadcasting services on a national, regional and local level, which, when viewed collectively, cater for all language and cultural groups and provide entertainment, education and information;
- (ii) promote the development of public, private and community broadcasting services which are responsive to the needs of the public;
- (iii) ensure that broadcasting services, viewed collectively-
  - develop and protect a national and regional identity, culture and character;
  - provide for regular:
    - news services;
    - actuality programmes on matters of public interest;
    - programmes on political issues of public interest; and
    - programmes on matters of international, national, regional and local significance.
- (iv) protect the integrity and viability of public broadcasting services;
- (v) ensure that in the provision of public broadcasting services, the needs of the following are duly taken into account :
  - (a) language, cultural and religious groups;
  - (b) constituent regions of the Republic and local communities; and
  - (c) educational programmes.
- (vi) encourage ownership and control of broadcasting services by persons from historically disadvantaged groups;
- (vii) encourage equal opportunity employment practices by all licensees;
- (viii) ensure that broadcasting services are not controlled by foreign persons;
- (ix) ensure that private and community broadcasting licenses, viewed collectively, are controlled by persons or groups of persons from a diverse range of communities in the Republic;
- (x) refrain from undue interference in the commercial activities of licensees, whilst at the same time taking into account the broadcasting needs of the public;

- (xi) promote the stability of the broadcasting industry;
- (xii) ensure equitable treatment of political parties by all broadcasting licensees during any election period;
- (xiii) ensure that broadcasting licensees adhere to the code of conduct acceptable to the IBA; and
- (xiv) encourage the provision of appropriate means of disposing of complaints in relation to broadcasting services and broadcasting signal distribution.

129. Section 10 of the ***Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No 4 of 2000)*** declares that no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that is intended to be hurtful, harmful or inciting harm or intended to promote or propagate hatred. However, this is qualified with a proviso that *bona fide* engagement in artistic creativity, academic and scientific inquiry, fair and accurate reporting in the public interest or publication of any information, advertisement or notice in accordance with the Constitution is not precluded. The Act states, further, that without prejudice to any remedies of a civil nature under this Act, a court may, where appropriate, refer any case dealing with the publication, advocacy, propagation or communication of hate speech to the National Director of Public Prosecutions for the institution of criminal proceedings in terms of the common law or relevant legislation. This Act is likely to come into operation on 10 December to celebrate International Human Rights Day. Officials of the Department of Justice and Constitutional Development have already received training on this Act and officials are also being trained to act as "equality legislation ambassadors", so that departmental offices countrywide can refer members of the public with questions on this issue, to these officials. Draft regulations will be published for comment. Magistrates, judges and court clerks will also receive training.

130. The *Ad Hoc* Joint Committee on Promotion of Equality and Prevention of Unfair Discrimination requested the Minister for Justice and Constitutional Development to give special consideration to the following: Tabling legislation in Parliament which deals with the criminalisation of hate speech. Such measures must be consistent with section 16 of the Constitution. In addition, such legislation, needless to say, will also be required to create offences relating to hate speech.

131. Draft legislation, to wit, the Prohibition of Hate Speech Bill is currently being prepared. It will deal with the criminalisation of hate speech. Any person who publishes, propagates, advocates or communicates words based on race, ethnicity, gender or religion

or any other ground that causes or perpetuates systematic disadvantage or undermines human dignity or adversely affects a person's rights and freedoms in a serious manner and could reasonably be construed to demonstrate a clear intention to be hurtful or harmful, or to intimidate or threaten, promote superiority or hatred or incite violence will be guilty of an offence. The *bona fide* engagement in artistic creativity, academic and scientific inquiry, fair and accurate reporting in the public interest or publication of any information, advertisement or notice that is in accordance with section 16 of the Constitution will be excluded from the ambit of the Bill.

132. The following projects are being implemented by the Government Communications Information Services (GCIS) to ensure that every individual has a right to receive and disseminate information:

***The Media Development and Diversity Agency (MDDA)***

133. The MDDA is being established after research showed that the right of the poor and illiterate people to receive and disseminate information was marginalised. While the mainstream media caters for the wealthy and urban communities that it could deliver to the advertisers, the community radios and newspapers are forced to close because of poor sponsorships and failure to attract advertisers. The collapse of community media means that some people are left out of the information loop and excluded from the national discourse.

134. The GCIS hopes that once this Agency is established, it would be able to break down the language, race and class and gender barriers that deny the right to receive and disseminate information to any citizen. This ideal position would be realised through activities aimed at supporting the community media (radio and print) that is not commercially viable and at the same time providing affordable loan access to small commercial media ventures. Sponsorship packages would be established to help media establishment that are specifically designed to cultivate a reading culture (e.g. easy reading supplements).

***The Multi-Purpose Community Centres (MPCCs)***

135. The GCIS is coordinating the establishment of MPCCs in all provinces. These centres are situated in rural and semi-urban areas with the aim of connecting the less privileged to the information superhighway and satisfying their information needs. Community members can access the Information and Communication Technologies free of charge and download from the Internet, utilise e-mail and get useful documents like birth registration forms etc., online. At least six information officers or representatives of different

departments per MPCC should be available on a permanent basis to assist the communities and oversee the smooth running of these centres.

### Case law

136. In **Dotcom Trading 121 (Pty) Ltd t/a Live Africa Network News v King NO and Others 2000(4) SA 973** the President of South Africa and the Minister of Justice established a Commission of Enquiry into cricket match fixing in terms of the **Commission Act 1947 (Act 8 of 1947) (the Commission Act)**.

Section 4 of the **Commission Act** provides as follows:

*"All the evidence and addresses heard by a commission shall be heard in public: Provided that the chairman of the commission may, in his discretion, exclude from the place where such evidence is to be given or such address to be delivered any class of persons whose presence at the hearing of such evidence or address is, in his opinion not necessary or desirable".*

The Chairperson of the Commission indicated that he would not allow television and radio broadcasts of the proceedings of the Commission. The applicants approached the court on the ground that the ban on their broadcast of the proceedings constituted an infringement on their rights as contained in Section 16(1)(a) and (b) of the Constitution. The Court found that indeed the Chairperson of the Commission infringed on the rights of the applicants and those of the general public as contained in Section 16(1) of the Constitution.

137. In **South African National Defence Union v Minister of Defence and Another 1999(4) SA 469 (CC)**, Section 126 (B) 2, *inter alia*, of the **Defence Act, 1957 (Act 44 of 1957)**, providing that a member of the Defence Force who is subject to the Military Discipline Code shall not strike or perform any act of public protest or conspire with or incite or encourage, instigate or command any other person to strike or to perform such an act or to participate in a strike or such act, was attacked by application on the basis that it is contrary to Section 16 of the Constitution, namely the freedom of expression. The Court held that the definition of act of public protest in Section 126 (B) 4 of the Act was not easy to determine because of its breadth. The scope of the prohibition under challenge suggested that members of the Defence Force were not entitled to form, air and hear opinions on matters of public interest and concern. The Court held, further, that freedom of expression lay at the heart of democracy. It was clearly related to many other rights in chapter 2 of the Constitution, which rights taken together protected the rights of individuals, not only individually to form and express opinions, of whatever nature, but also collectively to establish associations and groups of like-minded people to foster and propagate these

opinions. The Court held, accordingly, that Section 126 (B) 2 read with Section 126 B (4) clearly infringed on the freedom of expression of those members of the Defence Force who were bound by it; and that the limitation placed on the freedom of expression was not justified.

138. In **S v Mamabola (ETV and Others intervening) 2001(3) SA 409 (CC)** the Court had to address, *inter alia*, the question of whether the law relating to a particular form of criticism of contempt of court, more colourfully than definitely referred to as scandalising the court, unjustifiably limited the right to freedom of expression vouchsafed by Section 16(1) of the Constitution. The Court held that the argument that the offence did not survive the advent of the new constitutional dispensation because it places an unconstitutional damper on the freedom of expression guaranteed by Section 16(1) of the Constitution cannot be held: the Constitution itself in Section 165(4) recognises the importance – and commands enforcement, if necessary, by 'legislative or other measures' – of the dignity of the courts, the very feature the Constitution aims to protect. Nor is the minimalist test of a 'clear and present danger' applied by the American Courts in dealing with challenges to the right of freedom of expression appropriate in the South African context. Our Constitution, unlike that of the US, does not rank freedom of expression above all other rights, or declaim it as an unqualified right. When one looks at an allegedly scandalising statement, one has to ask what the likely effect of the statement was. The test, in short, is whether the offending conduct viewed contextually, was likely to damage the administration of justice. The Court held, further, that the category of cases in which the existence of the offence still poses a limitation on the freedom of expression is now narrow, and the kind of language and/or conduct to which it will apply will have to be serious, that the balance of reasonable justification required by Section 36(1) of the Constitution clearly tilts in favour of the limitation. Balancing the importance of the public interest in maintaining the integrity of the Judiciary against the minimal degree of limitation involved also favours saving the sanction.

### **Articles 10 and 11 of the African Charter**

#### **Article 10:**

- 1. Every individual shall have the right to free association provided that he abides by the law.**
- 2. Subject to the obligation of solidarity provided for in Article 29 no one may be compelled to join an association.**

#### **Article 11:**

**Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law in**

***particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.***

## Constitution

139. Two separate but interrelated provisions (sections) in the South African Bill of Rights recognise and guarantee these rights, and they are Sections 17 and 18. It should be highlighted that the right in Section 17 of the Constitution must be exercised peacefully and unarmed. It can be seen from the wording in these sections that the South African Bill of Rights recognises the existence of a bundle of rights in the right to peaceful assembly. Thus political, industrial and other forms of peaceful assembly are constitutionally protected. The internal limitation here is contained in the terms "peaceful" and "unarmed".

## Legislation

140 The ***Regulation of Gatherings Act, 1993 (Act 205 of 1993)***, provides the following:

- A convener must give written notice to the responsible officer of the local authority 7 days, or at the earliest opportunity, before the date of the gathering, but if it is given less than 24 hours before the gathering the responsible officer may prohibit the gatherings. In the absence of a local authority, the magistrate of the district where the gathering is to take place, or begin, will be responsible.
- If no notice has been given, and either the authorised member of the Police or the responsible officer of the local authority receives information in this regard, he/she shall inform the other. The responsible officer shall then take steps to establish the identity of the convener and ask him to comply with this provision.
- After receiving notice or hearing about the gathering, he shall consult with the police regarding the conduct or any condition with regard to the proposed meeting. He can then decide, either that a meeting is necessary between him and the convener or that the gathering may take place as specified in the notice or with the amendments he and the convener agreed upon. He must inform the convener of his decision.
- If he decides that negotiations are necessary, he will call a meeting between the convener, the authorised member and other responsible officers concerned, if any and representatives of other public bodies that the responsible officer/s feel have to be present. This is to discuss any amendment of the contents of the notice and conditions regarding the conduct of the gatherings, as he may deem necessary.
- The gathering may take place if no discussions were called or if the convener has not been called to a meeting within 24 hours after giving notice. The content of the notice and section 8 will rule the gathering subject to sections 5 and 6.

- The gathering may also take place if a consensus has been reached at the meeting called, in accordance with the agreement reached at the meeting, but subject to sections 5 and 6.
- If consensus is not reached at this meeting, the responsible officer may on reasonable grounds of his own accord or at the request of the authorised member, impose conditions to ensure that vehicular or pedestrian traffic, especially in rush hour, is least impeded; or that an appropriate distance is kept between participants in the gathering and rival gatherings, or access to property and workplaces or the prevention of injury to persons or damage to property. He shall furnish written reasons and ensure that the notice, any amendment thereof and any condition imposed and the reasons therefore are given to the convener, the authorised member and every party that attended the meeting. In cases of unknown identity of the convener or of urgency other methods of publication are acceptable. He and the convener shall also ensure that all marshals and police present shall know the contents of the abovementioned.

141. Gatherings can be prevented or prohibited when the responsible officer receives credible information on oath that there is a threat that the gathering will result in serious disruption of vehicular or pedestrian traffic, injury to participants in the gathering or other person, an extensive damage to property, and that the police and traffic officers will not be able to contain this threat. He can then meet or consult with the convener, the authorised member, if possible, and any other person he believes he has to consult with in order to consider prohibition. Only after this, if he is satisfied, on reasonable grounds that nothing would prevent this threat, can he prohibit the gathering. He has the same information duties as stated above.

142. Police have the following powers at gatherings. These powers are in effect, whether or not there is compliance with the Act.

- If a member on reasonable grounds believes that the Police will and be able to provide adequate protection for the participants, he may notify the convener and participants accordingly.
- May prevent people from straying from the rules of the gathering.
- If a responsible officer has not received a notice more than 48 hours before the gathering, he may restrict the gathering to a place or guide the participants along a route to ensure that vehicular or pedestrian traffic, especially during rush hour, is least impeded; or ensure an appropriate distance between participants in the gathering and rival gatherings; or ensure access to property and workplaces, or

ensure the prevention of injury to persons and damage to property.

- May order any person or group of persons interfering or attempting to interfere with a gathering or demonstration to cease and to remain at a distance specified by him.
- If an incident causes or may cause people to gather at any public place, he may by way mentioned above, specify an area considered by him to be necessary for the movement and operation of emergency personnel and vehicles or the passage of a gathering or demonstration; or the movement.

143. Force can only be used if no response has been obtained excluding the use of weapons likely to cause serious bodily injury or death. The degree of force used should be proportionate to the circumstances of the case and the object to be attained and not greater than necessary to disperse the participants. Further restrictions placed on the freedom of assembly are found in sections 7 and 11 regarding, respectively, demonstrations and gatherings in the vicinity of courts, buildings of Parliament and the Union Buildings and liability for damage arising from gatherings and demonstrations.

144. The following Acts also have a bearing on this right:

- ***Control of Access to Public Premises and Vehicles Act, 1985 (Act No 53 of 1985);***
- ***Dangerous Weapons Act, 1968 (Act No 71 of 1968)***
- ***Arms and Ammunition Act, 1969 (Act 75 of 1969)***
- ***Trespass Act 1959 (Act No 6 of 1959)***
- ***Criminal Procedure Act 1977 (Act No 51 of 1977)***

145. ***The Internal Security Act, 1982 (Act No 74 of 1982)***, provides for powers to prohibit gatherings in certain cases or to impose conditions for the holding thereof. It gives the Minister the power to prohibit any gathering in any area or any particular gathering or any gathering of a particular nature, class or kind at a particular place or in a particular area or wheresoever in the Republic if he deems it necessary or expedient in the interest of the security of the State or for the maintenance of the public peace or in order to prevent the causing, encouraging or fragmenting of feelings of hostility between different population groups or parts of population groups in the Republic.

### **Case law**

146. In ***South African National Defence Union v Minister of Defence and Another 1999(4) SA 469***, Section 126 B of the ***Defence Act, 1957 (Act 44 of 1957)***, prohibits members of the South African Defence Force from participating in public protests or from

joining a trade union. The applicants in this case requested the Court to declare article 126 B of the **Defence Act, 1957 (Act 44 of 1957)** to be unconstitutional since it violated their right to form and join a trade union as contained in Section 23(2)(a) of the Constitution. The Court came to the conclusion that Section 126 B of the Defence Act was unconstitutional and invalid. The courts have upheld the constitutionality of limitations placed in Sections 17 and 18 of the Constitution where demonstrations and protests have been violent and resulted in damage to property and injury to individuals in the case of **Acting Superintendent-General of Education of KwaZulu-Natal v Ngubo 1996 (3) BCLR 369 (N)**.

### **Article 12 of the African Charter**

1. ***Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law.***
2. ***Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality.***
3. ***Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the law of those countries and international conventions.***
4. ***A non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law.***
5. ***The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.***

### **Legislation**

147. In terms of section 23 of the **Aliens Control Act, 1991, (Act 96 of 1991)** an alien must be in possession of a temporary residence permit or extension thereof if he/she wants to be in the RSA temporarily. If such an alien wants to remain permanently, an immigration permit is required. Being in the RSA in contravention of these requirements or after the required permit has expired, renders a person to be adjudged illegal and a prohibited person that is to be removed or deported. At all times when this is suspected by the authorities, the person is given the right to be heard and can bring, and in fact is required to bring, such evidence as would prove his legality. Failure renders him/her liable to removal.

148. The position of refugees requires special attention and has now become a matter of

considerable concern to South Africa. Until recently applications for refugee status were dealt with in terms of the **Aliens Control Act, 1991 (Act 96 of 1991)**. South African courts have ordered that international law and the factual consequences of a denial of refugee status be taken into account when such applications are considered.

149. People with refugee status may not be refused entry into the Republic, be expelled, extradited or returned to a country where the refugee will be subjected to persecution on account of his or her race, religion, nationality, political opinion or membership of a particular social group; or his or her life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination or other events seriously disturbing public order in either part or the whole of that country (section 2 of the **Refugee Act, 1998 (Act 135 of 1998)**). Section 4 of this Act lists the grounds for refusing refugee status and includes commission, by applicant, of international crimes and ordinary crimes punishable by imprisonment. A person enjoying the protection of any other country will not qualify as a refugee.

150. To ensure that the detention of an alien is reasonable and justifiable, Section 55 of the **Aliens Control Act, 1991 (Act 96 of 1991)**, was completely redrafted in 1995. It makes provision for the following safeguards:

- In terms of Section 53 arrest and detention and Section 7 investigation must be limited to 48 hours respectively
- Detention after Section 7 investigation but prior to removal may not exceed 30 days
- A judge of the relevant division of the High Court of South Africa must review detention exceeding 30 days.

151. In South Africa the **Extradition Act, 1962 (Act 67 of 1962)**, distinguishes between deportation, expulsion and extradition. Expulsion refers to an instruction of a government to a foreign national or stateless person to leave the territory of the State within a fixed period of time. Deportation is the actual execution of an expulsion order. Extradition is the official surrender of a fugitive from justice to the authorities of another State for the purpose of criminal prosecution or the execution of a sentence.

152. The **Extradition Act**, as amended by **Act 77 of 1996**, serves as enabling legislation governing extradition in South Africa. The Act provides for three categories of persons who may be extradited. First, a person accused or convicted of an offence included in an extradition treaty between South Africa and the foreign state and committed within the jurisdiction of the foreign state. Second, if the President consents to the extradition in

writing, a person accused or convicted of an extraditable offence in the territory of a state with which no extradition treaty exists. Third, any person accused or convicted of an extraditable offence committed within the jurisdiction of a designated state. An extraditable offence is an offence, which, under the law of the Republic and the foreign state is punishable with a sentence of imprisonment or other form of deprivation of liberty of at least six months. The Act contains no prohibition on the extradition of South African nationals to a foreign state or on the extradition of the nationals of a third state from South Africa to another state. Any such limitation must therefore be sought in a treaty and may vary from an absolute prohibition to a discretion accorded to the state either to extradite the individual sought or to punish him or her itself. In the event of a discretionary clause, South Africa has a discretion to refuse to extradite its nationals, although it has never refused to do so.

153. No South African treaty contains a specific clause prohibiting extradition on humanitarian grounds. However, the Minister of Justice and Constitutional Development has a discretion in terms of section 11 of the **Extradition Act** to refuse extradition where it is not required in good faith and it is not in the interests of justice, or where, for any other reason, and having regard to all the circumstances of the case, extradition would be unjust or unreasonable or too severe a punishment. The possibility that a person might be tortured if extradited covers this type of case. The Extradition Act provides a further category in terms of Section 11 based on the potential violation of the extraditee's basic rights. The Minister has a discretion to refuse extradition where the Minister is satisfied that the extraditee will be prosecuted, punished or prejudiced at his or her trial in the foreign state because of gender, race, religion, nationality or political opinion.

154. The **Extradition Act** makes no mention of the death penalty as a ground for refusal of extradition. However, an exclusionary clause occurs in certain of the Republic's bilateral treaties. For e.g., in terms of article 5 (1) of the Extradition Treaty between the Government of the Republic of South Africa and the Government of the United States of America, it is stated that "when the offence for which extradition is sought is punishable by death under the laws of the Requesting State, and is not punishable by death under the laws in the Requested State, the Requested State may refuse extradition unless the Requesting State provides assurances that the death penalty will not be imposed, or if imposed will not be carried out". South Africa will clearly decline surrender of a person to a foreign jurisdiction where the death penalty is a competent form of punishment.

155. If a magistrate, in terms of section 10 of the **Extradition Act**, finds on the consideration of the evidence adduced, that a person is liable to be surrendered to the

foreign State concerned, the magistrate shall commit such person to prison to await the Minister's decision with regard to his or her surrender. At the same time such person is informed that he or she may, within 15 days, appeal against such order to the High Court. Further, in terms of section 13(3), any person who has lodged an appeal may, at any time before such appeal has been disposed of, apply to the magistrate who issued the order in terms of section 10 or 12 to be released on bail.

156. South Africa has not yet ratified the Convention on Migrants. However, the government is committed in respecting and ensuring these rights to all persons.

### **Immigration Bill, 2001**

157. The Immigration Bill provides for the regulation of admission of persons to their residence in, and their departure from the Republic and for matters connected therewith. Sections 3-19 provide for several types of temporary residence, that include permits for general entry, diplomats, students, investors and self-employed persons, crewmen, medical treatment, relatives, work and retired persons. Asylum, and cross-border and transit persons are provided for as well. Sections 20-22 provide for permanent residence, direct residence and grounds for residence; Sections 23-26 provide for exclusions and exemptions. Section 29 provides for objectives and functions of migration control, which include the promotion of a human rights based culture in both government and civil society in respect of migration control, simplifying acquisition of temporary residence permits, regulating the influx of foreigners and residents in the Republic, administering refugee protection and related legislation, and monitoring citizenship by naturalisation and facilitating compliance with the Republic's international obligations. Section 28 provides for the Immigration Advisory Board, complementing the mandate of the Department. The Board is chaired by the Minister of Home Affairs and consists of various departments, including eight persons from bodies represented by the Minister to nominate one representative each and four experts appointed by the Minister. The Board advises the Minister on policy, legislation and regulations, as provided for in Section 32. Sections 37, 39 and 40 provide for the deportation and detention of illegal foreigners, border control and establishment of immigration courts respectively. Section 60 provides for repeal or amendment of laws. ***The Aliens Control Act, 1991 (Act 96 of 1991)*** is repealed as a whole, which the ***Refugee Act, 1998 (Act 130 of 1998)*** has amended to a certain extent.

158. The RSA is inundated with clandestine entrants from all over the world. These persons make their way into the RSA via our neighbouring countries without going through ports of entry or having obtained the required visas or permits. Other aliens arrive in the RSA legally and then stay beyond the limits of their permits. When such illegal aliens are

found, they are arrested and detained pending their removal. In such cases personnel of their missions or embassies are informed of the arrest and detention and their cooperation sought to obtain travel documents for the removal of such persons. No illegal aliens are removed as a rule without a valid travel-document. Any alien that is to be removed has the right to approach the Minister for Home Affairs in terms of Section 52(1) and/or 4(3) of the Aliens Control Act, 1991 with representations against his removal. If the person is not satisfied with the result, he/she may approach the South African High Court for relief.

159. The SAHRC reported in March 1999, after a year of research, that refugees were subjected to a system of immigration enforcement rife with corruption and abuse. The SAHRC found a system in place that, according to them, gives so few guidelines and so much discretion to individual officers that it not only allows but perhaps engenders a system of immigration control which is fundamentally biased against dark-skinned black Africans, refugees or not. Also, approximately one in ten of the people interviewed at Lindela (SA's detention centre for "illegal aliens" awaiting deportation) was a South African, arrested erroneously as an "illegal alien". They found that one in four people awaiting deportation had been asked to pay a bribe for their release. However, the *de facto* position of refugees is still a controversial subject.

160. Another way in which the refugees' lives have been made impossible is by the tough directives issued by the Home Affairs Department. To renew their three-month work permit, refugees have to return to the town where they originally lodged their application to be recognised as refugees. If found without a valid permit, they could be arrested, charged, detained and deported. In terms of the directives, the permit will not be renewed if it is lost, stolen or destroyed. The fact of the matter is that refugees entering SA normally registered in small towns along the border and sought work in the larger centres. It is difficult and costly for them to return to these towns to get their permits renewed.

161. Statistics show that between 1996 and 2000, 51 780 people applied for asylum. Of these 21 400 applications were rejected and 8 397 approved. Applications can take up to two years to be finalised. On realising that Home Affairs did not have the capacity to handle the refugee problem, the UNHCR offered to bring a task team of experts to help expedite the processing of applications. The UNHCR's pledge came in the wake of refugees finding themselves in limbo because they have to wait for about two years before their applications are considered. In the meantime they can neither look for work nor engage in any income generating activity. Perhaps the most frightening aspect is that the government and NGOs do not have a definite idea of how many people live in the country as refugees.

162. The UNHCR opened office in South Africa in 1991 to deal with the repatriation of exiles that fled during apartheid. Some 12 000 people were assisted in returning home. Perhaps it would do all South Africans well to remember how the world opened its doors to our leaders during South Africa's isolation and then treat refugees with the respect that is guaranteed under the Constitution.

163. Research conducted by the Centre for Policy Studies suggests that foreign migrants have a positive impact on the economy. Many are prepared to accept jobs that South Africans shun because of their high wage expectations and their unwillingness to work as hard as foreigners do. Research findings also suggest that migrants, most of whom leave their dependants in their countries of origin, make minimal demands on public service. Migrants constitute a considerable consumer market for goods and services on which they pay value-added tax, thereby contributing to the *fiscus*. Their demand also stimulates supply, thereby indirectly creating job opportunities. Transportation is one example of an industry which has grown considerably as a result of migrants' demands. There also exists considerable evidence to suggest that foreigners are disproportionately victims of crime, rather than the perpetrators. Local criminals take advantage of the often vulnerable and insecure status of migrants and perceive them as soft targets. Many migrants contend that instead of being afforded police protection, they are very often victims of police corruption and collusion with criminal elements.

164. The rights accorded to "everyone" in the Constitution are for the benefit of citizens and non-citizens alike. Both citizens and non-citizens are entitled to the protection of those rights accorded to "every child" (section 28) and to "every worker" and "every employer" (section 23). Alien workers are entitled to the protection of Section 23 of the Constitution as long as they fall within the category of worker. Similarly, a non-citizen under the age of 18 is entitled to the benefits of children's rights. The word "person" used in the equality clause in Section 9 of the Constitution includes aliens and is not restricted to citizens.

### **Case law**

165. In **De Lange v Smuts 1998(7) BCLR (CC)** Ackermann J noted: "In a constitutional democratic State, which is now certainly ours, and under the rule of law citizens as well as non-citizens are entitled to rely upon the State for the protection and enforcement of their rights. The State therefore assumes the obligation of assisting such persons to enforce their rights."

### **Article 13 of the African Charter**

1. ***Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.***
2. ***Every citizen shall have the right of equal access to the public service of his country.***
3. ***Every individual shall have the right of access to public property and services in strict equality of all persons before the law.***

### **Legislation and Policy**

166. Multiparty democracy, based on regular elections, universal adult suffrage and a common voters' roll, is enshrined in the Constitution as one of the founding core values (s 1(c) of the Final Constitution). This should not be surprising, given that the exclusion of the Black majority from equal political participation with the White minority was one of the central features of colonial and apartheid regimes before 1994. The core constitutional value provision is reinforced by another provision (s 236) that enjoins the Government of the day to provide funds for viable political parties to enable them to participate in the elections meaningfully. In line with accepted international norms and best practices, only citizens enjoy political rights of forming or joining political parties. Only citizens have the right to vote in local and national elections (s 19 of the Constitution).

167. The elections are managed by an independent constitutional body, the Independent Electoral Commission (s 190-191 of the Constitution). The ***Electoral Commission Act, 1996 (Act 51 of 1996)*** came into operation in October 1996. Elections and referendums in the country at all three tiers of government (national, provincial and local) are entrusted to a manifestly independent and impartial Electoral Commission, which was appointed in 1997. The Independent Electoral Commission (IEC) oversees the free and fair participation of every registered voter in the election, either to vote or to stand for election. South Africa's second democratic general election was held in May 1999. South Africa is a developing country with a significant number of people who can neither read nor write. This creates an obstacle to the full understanding of the electoral process. The IEC and organs of civil society are addressing this issue through hands-on "voter education" initiatives.

168. The Public Service maintains integrity and accountability in performing its duties at all times and loyally executes policies aimed at advancing the delivery of services to everyone. Public servants are expected to serve the public impartially and are not allowed to discriminate unfairly against any member of the public. After a wide consultation process a Code of Conduct, setting ethical standards for public servants, was launched in June 1997.

Contravention of the Code is dealt with as misconduct.

169. The ***Separate Amenities Act No 49 of 1953***, now repealed, clearly stands out as a monument of shame. It required whites and non-whites to use separate public facilities. As if this was not enough, such facilities, where they existed, were vastly of unequal standards. In the late 1960s the governing National Party needed to arrest over 600 000 people annually to hold on to the pass laws, in spite of the mass protests and defiance campaigns of the 1950s and 1960s, including the Sharpeville revolt of 1960.

170. Since the April 1994 elections and the establishment of constitutional democracy, all South Africans have access to all public places, as well as all public transport, hotels, restaurants, cafes, theatres and parks. The sports area is still problematic, but it is steadily improving. Nonetheless, there are few incidents reported in the media where some white owners of pubs, hotels and restaurants, do not allow access to blacks, in violation of the clear provisions of the law. The non-discrimination and the equality clause in the Bill of Rights (section 9) is the principal legal instrument for combating discrimination based on race in these areas. The enforcement of the new legislation (The ***Promotion of Equality and the Prevention of Unfair Discrimination Act, No. 4 of 2000***) as from 21 March 2001, will be decisive in discouraging direct and indirect forms of unfair discrimination in transport, hotels, restaurants, cafes, theatres and parks.

#### **Case law**

171. The independence of the Electoral Commission was affirmed in a recent Constitutional Court case (***New National Party of South Africa v Government of the Republic of South Africa 1999 (3) SA 191 (CC)***).

172. In ***August and Another v Electoral Commission and Others 1999 (3) SA 1 (CC)*** the applicants were prisoners and appealed to the Constitutional Court to compel the respondent to make it possible for them to exercise the right to vote as contained in Section 19(3)(a) of the Constitution. The Court found that there was no provision in national legislation which precluded prisoners from taking part in elections. The Court ordered that necessary arrangements be made that prisoners who are registered on the national common voters' roll take part in the 1999 general elections.

#### **Article 14 of the African Charter**

***The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in***

<b><i>accordance with the provisions of appropriate laws.</i></b>
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### **Legislation and Policy**

173. The Department of Land Affairs has the responsibility of developing and implementing a policy of land reform in order to effectively address the injustices of forced removals, historical imbalances in access to land and the lack of tenure security. The Policy was developed in 1997 and entails:

- Restitution for those who lost their land as a result of racially discriminatory laws;
- redistribution of productive land to those who were previously disadvantaged, especially poorer people, and women in particular; and
- land tenure reform, which aims to bring all people occupying land under a unitary, legally validated system of landholding.

174. Several pieces of legislation have been enacted to give practical expression and meaning to the above constitutional and policy principles and directives. Among them are the following:

- ***Extension of Security of Tenure Act, 1997 (Act. 62 of 1997); and***
- ***Housing Act, 1997 (Act. 107 of 1997).***

175. Land and property ownership and use are critical in determining social power relations in society. It is no wonder then that the exclusion of the majority Black people from any reasonable ownership, control and use of land was one of the pillars of the colonial and apartheid system of racial domination. It is a central policy of the Government to reverse these injustices of the past.

176. Among the institutions created to speed up the process of transformation and de-racialisation of land and property ownership, control and use, is the Commission on the Restitution of Land Rights. Its task is to investigate and mediate land claim disputes. Various measures have also been taken by the Commission to assist with the more rapid settlement of land claims. Initially, it was the policy to provide direct access to the Land Claims Court for virtually all claimants of land. This has proven to be time-consuming and slow. The current policy, which has sped up the settlement of claims, is for the Commission to settle the claims directly, except where major disputes that require judicial intervention are involved. The Department of Justice and Constitutional Development has an agreement with the United Nations Development Programme (UNDP), which, *inter alia*, is equipped to empower the Commission to deal with the claims.

### Case law

177. In **Janse van Rensburg NO and Another v Minister of Trade and Industry and Another NO 2001(1) SA 29 (CC)** the Constitutional Court was called upon to determine the constitutional validity of Section 8(5)(a) of **the Consumer Affairs (Unfair Business Practices) Act, 1988 (Act 71 of 1988)**. In terms of this Section, the Minister of Trade and Industry may establish a Committee to conduct investigations into "unfair business practices". The Minister may, on the recommendations of the Committee, "attach any money or other property whether movable or immovable which is related to such investigation". The applicants averred that Section 8(5)(a) of the **Consumer Affairs Act** violated their right to property and that it contravened Section 25(1) of the Constitution, which states that "*No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property*". The Court found that the powers conferred upon the Minister were sweeping and drastic since the Minister was not required to give reasons for taking the action referred to above. The action of the Minister was said to be contravening Section 33(1) of the Constitution that entitles everyone to administrative action that is lawful, reasonable and procedurally fair. The Court held that the provisions of Section 8(5)(a) of the **Consumer Affairs Act** were unconstitutional.

178. In **Khuzwayo v Dludla 2000(4) ALL SA 324 (LCC)** the plaintiff brought an action to evict the defendant that was residing on the plaintiff's farm. In the magistrate's court summary judgment was granted when the defendant failed to appear and the case was sent to the Land Claims Court in terms of Section 19(3) of the **Extension of Security of Tenure Act, 1997 (Act No 62 of 1997)**. The question was whether the Land Claims Court had jurisdiction to review the eviction order. It held that it did not have such jurisdiction since nothing *in casu* suggested that the defendant might be an "occupier" as prescribed in the Act.

179. In **Hermanus v The Department of Land Affairs 2000 (4) ALL SA 499 (LCC)** a person divested of property during the apartheid era sought to obtain compensation for his and his family's forced removal from their home. The facts were that the applicant was forced to sell his home, which had sentimental value to him, at a much lower price than its real value. He subsequently had to get two loans to buy an erf and to build a house thereon. He fell into financial difficulties and was forced to sell the erf and house and move to a dangerous and filthy neighbourhood. Here the existing mental problems of his wife escalated, his son also developed mental problems and was killed trying to walk back to the house expropriated. His daughter was gang-raped in the new neighbourhood and was also taken to a mental hospital. He sought financial and emotional redress. The Land Claims

Court held that Section 33 of the **Restitution of Land Rights Act, 1994 (Act No 22 of 1994)**, as well as the provisions of Section 25(3) of the 1996 Constitution, were applicable. The Court held that an amount in respect of the land value, a further amount to compensate the claimant for his direct financial loss in respect of the transfer and bond costs which he had to incur when acquiring another property, as well as *solatium* should be paid.

180. In **Joubert and Others v Van Rensburg and Others 2001(1) SA 753 (W)** a trust was created for the benefit of 1500 homeless people that could move onto land owned by the owners of the trust, against a payment of R1000. The applicants' case was the unlawfulness of the occupation in terms of the zoning of the property and the unlawfulness of the nuisance that was caused. The court stated that it was aware of the volatile nature of the socio-economic issues with regard to land, but that its job was to interpret the law independently of political issues. The occupiers had no rights with regard to the trust property and assumed it was theirs with reference to the trust. The respondents wanted to force the creation of a township in the face of all applicable laws while frustrating an already developed development plan. Furthermore they also violated the zoning ordinance that allowed for only one dwelling occupied by one family head and dependents. The local council gave no admission for additional occupations. The Court held that an interdict had to be given to the applicants and that it had to apply the law of the land in the interest of democracy, the rule of law, equality and precedent. It held that it would not refuse relief against an unlawful situation. With regard to Section 25(5) – (8) of the Constitution of the **Republic of South Africa Act, 1996 (Act No 108 of 1996)**, it held that fostering conditions to promote that citizens gain access to land does not mean a statute may protect an occupier who insists on taking *gratis* - and that one individual (the person on whose land the occupier has landed) must pay the price of wide social policy from his pocket. Section 25(4) – (8) was enacted to clear the way for land reform, but "allowing people to choose to stay on another's property wherever they choose and simply because they so choose, at the expense of lawful rights, is clearly not land reform". (The above remarks was in connection with the **Extension of Security of Tenure Act, 1997 (Act 62 of 1997)**)

181. In **Government of the Republic of South Africa and others v Grootboom and Others, 2001(1) SA 46 (CC)** the court was primarily concerned with the right of access to adequate housing. The case relates obiter to social security as stated in Section 27 of the Constitution. The Court held that the right of access to adequate housing cannot be seen in isolation. There is a close relationship between it and the other socio-economic rights. Their interconnectedness needs to be taken into account in interpreting socio-economic rights, and in particular, in determining whether the State has met its obligations in terms of

them. The Court divides the right of access to adequate housing into two parts: unlocking the system, providing access to housing stock and a legislative framework to facilitate self-built houses through planning laws; and access to finance and those who cannot afford to provide themselves with housing. In the latter case, the issues of development and social welfare are raised. State policy needs to address both these groups. The relationship between Section 26 (the housing section) and Section 27 and other socio-economic rights now becomes apparent. If the State has, under Section 27, programmes in place to provide adequate social assistance to those who are otherwise unable to support themselves and their dependants, that would be relevant to the State's obligation in respect of other socio-economic rights. The Court, in analysing Section 26 and quoting from **S v Soobramoney**, states that the obligations imposed on the State by Sections 26 and 27 are dependent upon the resources available for such purposes, and that the corresponding rights are limited by lack of resources. Given this lack of resources and the significant demands on them, an unqualified obligation to meet these needs would at present not be capable of being fulfilled.

## **ECONOMIC, SOCIAL AND CULTURAL RIGHTS**

### ***Article 15 of the African Charter***

***Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work.***

### **Legislation and Policy**

#### ***The Skills Development Act, 1998 (Act 97 of 1998)***

182. The Skills Development Act, 1998 provides an institutional framework to devise and implement national, sectoral and workplace strategies to develop and improve the skills of the South African workforce; to integrate those strategies within the National Qualifications Framework contemplated in the South African Qualifications Authority Act, 1995; to provide for learnerships that lead to recognised occupational qualifications; to provide for financing of skills development by means of a levy financing scheme and a National Skills Fund; to provide for and regulate employment services; and to provide for matters connected therewith.

#### ***The Skills Development Levies Act, 1999 (Act 9 of 1999)***

183. The Act was promulgated to provide for the imposition of a skills development levy; and for matters connected therewith. Sector Education and Training Authorities (SETAs) receive the bigger part (80%) of the funding collected for utilisation for skills development programmes for the specific SETA. Twenty-five SETAs were demarcated according to

economic sectors.

***The Employment Equity Act, 1998 (Act 55 of 1988)***

184. Section 6(1) of the Employment Equity Act provides that no person may unfairly discriminate against an employee, or an applicant for employment, in any employment policy or practice, on the basis of race, gender, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth. In any legal proceedings in which it is alleged that any employer has discriminated unfairly, the employer must prove that any discrimination or differentiation was fair.

***The Labour Relations Act, 1995 (Act 66 of 1995)***

185. The purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of the Act, which are to provide a framework within which employees and their trade unions, employers and their employers' organisations can collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest to promote the following: 1) orderly collective bargaining, 2) collective bargaining at sectoral level, 3) employee participation in decision-making in the workplace and the effective resolution of labour disputes. This Act does not apply to members of the National Defence Force, the National Intelligence Agency and the South African Secret Service.

***The Unemployment Insurance Act, 1996 (Act 30 of 1966)***

186. This Act mainly deals with benefits payable when a contributor to the Unemployment Insurance Fund becomes incapable of continued employment due to a number of reasons. The Act deals with the process of contributing to and claiming from the fund, including employer obligations and how to claim. Sections 16-17 of the current legislation provide for the establishment of unemployment benefit committees to ensure that claims are dealt with fairly. In terms of Section 22 of the legislation any person aggrieved by a decision of the committee regarding application of benefits or any other matter pertaining to the Act, may appeal to the Unemployment Insurance Board against such a decision.

187. On 2 March 2000 the Minister for Labour launched the new Unemployment Insurance Bill. A negotiating committee comprising representatives from business, government and labour was established to consider the Bill. The negotiating committee first met on 29 March 2000. The release of this Bill marks a new chapter in the history of the Unemployment Insurance Fund in South Africa. It also represents the first steps in fulfilling the commitment

made by the Minister for Labour in his 15-point programme of action, which was announced in June 1999, to restructure the Fund. Both the Administrative and the Unemployment Contributions Bill have been discussed in NEDLAC. Unemployment insurance is an important policy area as it contributes towards the improvement of the social safety net to mitigate the economic hardships of the unemployed. Particular attention has been paid to extending unemployment insurance coverage beyond current levels, to enhancing the sustainability and cost-effectiveness of the Fund and to creating an environment conducive to improved compliance. The Administrative Bill has subsequently been tabled and approved by Cabinet and will be discussed in Parliament.

188. Attention has been paid to extending unemployment insurance coverage beyond current levels, to enhancing the sustainability and cost-effectiveness of the Fund and to creating an environment conducive to improved compliance.

***Compensation of Occupational Injuries and Diseases Act, 1993 (Act 130 of 1993)***

189. This Act deals with benefits payable under the Compensation Fund when an employee is injured at the workplace or contracts an occupational illness. In terms of Section 46 of the Act, every party to a claim for compensation or his representative may appear before the Director-General of Labour at a formal hearing. Section 91 of the Act stipulates that any person affected by a decision of the Director-General or a trade union or employer's organisation to which that person was a member at that time may, within 180 days after such a decision, lodge an objection against the decision with the Compensation Commission in a manner prescribed in the Act.

***Occupational Health and Safety Act, 1993 (Act 85 of 1993)***

190. The Act provides for the health and safety of persons at work and for the health and safety of persons in connection with the use of plant and machinery, protection of persons other than persons at work against hazards to health and safety arising out of or in connection with the activities of persons at work. The Act provides that an employer shall, in respect of each workplace where two or more health and safety representatives have been designated, establish one or more health and safety committees and at every meeting of such a committee as contemplated in Section 19 (4), consult with the committee with a view to initiating, developing, promoting, maintaining and reviewing measures to ensure the health and safety of his employees at work.

***ILO Conventions***

191. Over and above the abovementioned mechanisms to exercising the right to work, the

Department of Labour has ratified, *inter alia*, all seven fundamental Human Rights Conventions of the ILO, based on the fundamental objective to promote and protect basic human rights in the field of its competence. The preamble to the Constitution of the ILO states that universal and lasting peace can be established only if it is based on Social Justice, while the Declaration of Philadelphia states that all human beings irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of dignity, of economic security and equal opportunity.

### ***The Employment and Skills Development Programme***

192. The Employment and Skills Development Programme aims to promote and regulate the National Skills Development Strategy in terms of the ***Skills Development Act, 1998 (Act 97 of 1998)***.

193. The National Skills Development Strategy was launched in February 2001 in order to develop a culture of lifelong learning, foster skills development in the formal economy for productivity and employment growth, stimulate and support skills development in small, micro and medium enterprises, promote opportunities for skills acquisitions in economic development initiatives and assist new entrants with employment in the labour market. The National Skills Development Strategy is aligned to the Human Resource Development Strategy of the Government.

Sub-programmes are the following:

#### ***Sub-programme Skills Development Planning***

194. The functions of this Sub-programme are to:

- research and analyse the labour market in order to determine skills development needs for South Africa as a whole, each sector of the economy and organs of State;
- assist in the formulation of the National Skills Development Strategy and sector skills plans; and
- provide information on skills to the Minister, the National Skills Authority, Sector Education and Training Authorities (SETAs, education and training providers and organs of State).

#### ***Sub-programme Skills Development Funding***

195. The functions of this Sub-programme are:

- The management of the funding mechanisms for training programmes based on a system of entering into training contracts with acceptable training providers delivering training against specific outcomes

- Assisting and facilitating sectors to improve their level and quality of training for skills development in job creation schemes
- Identifying target groups.

196. The National Skills Fund is a fund established by Section 27(1) of the ***Skills Development Act, 1998, (Act 97 of 1998)*** for the purpose of funding:

- Projects identified in the National Skills Development Strategy as national priorities;
- other projects related to the achievement of the purpose of the skills development as the Director-General determines; and
- projects which address Government's Human Resource Development Strategy.

197. In order to achieve the objectives of the NSDS, funds from the National Skills Fund will be disbursed through Department of Labour Provincial Offices, Sector Education and Training Authorities and directly from Head Office for the training of unemployed, under-employed, employed and self-employed.

#### ***Sub-programme Employment Services***

198. This Sub-programme's functions are in accord with the relevant Conventions of the International Labour Organisation (ILO) championing free labour market services to the citizens of countries endorsing the same principles.

199. This programme endeavours to assist the unemployed and employers with active labour market programmes such as recruitment, psychometric assessment, selection, employment counseling, skills development (both technical and life skills) and placement and after-care services. Target groups are the long-term and short-term unemployed, the youth, people with disabilities, women, retrenched and those wishing to enter the informal sector. Special efforts are made to develop employment support programmes for the previously disadvantaged groups (youth, women, people with disabilities). The programme is also looking at forming public-private partnerships in order to outsource its services and in this manner to increase service delivery and improve impact. Regulations will be drafted for private employment agencies rendering these services to the unemployed. In summary, the objectives of the Sub-programme are the following:

- To assist employers to find the best workers for their vacancies through best-match practices;
- to assist the unemployed to find training opportunities and suitable income-generating opportunities;
- to enhance employment and employability through employment support

- programmes;
- to manage the Social Plan Programme of Government agreed to by the Jobs Summit by all stakeholders; to develop provincial skills plans in order to co-ordinate skills development of the unemployed, according to demands in the labour market.

### ***Sub-programme INDLELA***

200. INDLELA's objective is to increase access to work-based qualifications, learning and assessment in different levels and in many fields of learning. Issues covered under this sub-programme are learnership policy development, learnership design, development and implementation, Sector Education and Training Authority (SETAs), Education and Training Quality Assurance (ETQA) body development and support, development of unit standards, delivery of assessments locally and on a decentralised basis for qualifying in a trade.

### ***Sub-programme National Skills Authority***

201. This sub-programme supports the National Skills Authority to establish and support Sector Education and Training Authorities (SETAs), so that they are recognised as responsive, cost-effective and efficient organisations.

### ***Sub-programme Programmes Management Unit***

202. This sub-programme is responsible for ensuring effective financial and resources management and for co-ordinating the implementation of the Labour Market Skills Development Strategy.

### ***Sub-programme Sheltered Employment***

203. This sub-programme is responsible for subsidising workshops for the blind and work centres for people with disabilities.

### ***The Code of Good Practice for dismissals for operational requirement***

204. The Department of Labour has drafted a Code of Good practice for dismissals for operational requirements in consultation with its stakeholders as a soft mechanism to regulate the retrenchment of workers and alleviate the hardship of retrenchment, recognising that in some cases companies would have no option but to retrench its workers.

### ***The Social Plan programme***

205. The Department of Labour, together with business and labour, on request of the National Union of Mineworkers, developed a Social Plan as a safety net for retrenched workers. This Social Plan was deliberated at NEDLAC and eventually approved by Cabinet

and included in the Jobs Summit Declaration. The Social Plan provides for three phases of intervention in retrenchments. Phase 1, the prevention of job loss, looks at the establishment of future forums between employee and employer representatives in order to discuss possible threats to companies, setting up "early warning signals" for companies and sectors, in order to intervene and by providing technical assistance to establish whether it would be possible to improve cost-efficiency and in this manner prevent looming retrenchments. The National Productivity Institute is the custodian of this Phase. Phase 2, ameliorating the emotional and financial hardship of retrenchment for the retrenched, takes effect when the retrenchments could not be prevented. Assistance like retrenchment counseling, skills development, placement, guidance in terms of worker rights such as labour relations and occupational health and safety and Unemployment insurance are provided. The Department of Labour is the custodian of this Phase. Phase 3 entails the revitalising of local economies, providing funding for feasibility studies to be done and job creation projects to be started in areas hit by economical decline. The Department of Provincial Affairs and Local Government is custodian of this Phase. The Department of Labour is responsible for co-ordinating the Social Plan programme.

### ***The Jobs Summit Agreement***

206. In 1998 a National Jobs Summit was convened by Government and relevant role-players. The Government has released an "Employment Strategy Framework" for the Summit. The following was highlighted in the overview:

- **In the short-term**

The creation of a sufficient number of jobs to match net growth in the labour force and to expand the Special Employment Programmes to raise the level of job creation as quickly as possible.

- **In the medium to long-term**

To raise the skills base and move into higher value-added sectors to raise national income, enable a more stable exchange rate and to better reflect the underlying cost structure. This trajectory will require: increase in the labour absorptive capacity of the economy by expanding the creation of sustainable formal sector employment through the identification and promotion of higher value-added sectors, more labour-using industries, with strong employment multiplier potential; and improving access to small business through economic opportunities.

### ***International/Cross-Border Labour Migration Policy Formulation & Implementation***

207. The Department of Labour, through its Employment and Skills Development Services programme, Employment Services Directorate, advises the Department of Home Affairs

about whether or not a particular foreigner or a group of foreign nationals may be granted work permits to participate in the country's labour market. To this end the Department of Labour investigates each case as per application submitted by the Department of Home Affairs and then recommends either positively or negatively as the availability, or otherwise, of the required labour may indicate. The Department, as a lead department in the management of this labour market regime, leads the interdepartmental forum on policy formulation processes and input into the legislative policy framework review processes, for example, the White Paper and Immigration Bill initiated by the Department of Home affairs.

208. The Department of Labour, pursuant to the regional integration and collaboration, manages the implementation of the four labour agreements - the *Bilateral Treaties* – agreed and signed between South Africa and the four SADC member countries namely, *Botswana, Lesotho, Mozambique and Swaziland* between the years 1964 and 1975. To this end, the Department facilitates the regulation of the inflow of semi-and unskilled foreign labour from the SADC countries with which South Africa shares boundaries, however, preference is given to signatories of the *Bilateral Treaties* by forwarding recommendation on each application for a work permit.

209. The level of unemployment in South Africa still remains very high and of a structural nature due to the misallocation of resources in the apartheid economy. The growth in unemployment reflects a long-term challenge since the 1960s, whilst labour supply has continued to increase at a relatively steady rate consistent with the annual population growth rate. In addition, failure to generate significant employment reflects, *inter alia*, the asymmetry of the occupational structure and the unequal access to all levels of education.

210. In 2000 **Statistics South Africa** (formerly known as the Central Statistics Services) introduced a **Labour Force Survey** (LFS), which is a twice-yearly rotating household survey undertaken in February and September. To date the findings of three LFSs have been released. The latest findings of February 2001 estimated 27.1 million people aged between 15 and 65 years, of whom 16.1 million were economically active and 11,8 million were employed. The unemployment rate (expanded) stood at 37,0% in February 2001, having increased from 35,9% in September 2000 and from 35,5% in February 2000. The formal sector has remained steady while the informal sector has shown a considerable growth, as indicated in the table below. On the contrary there has been a decline in employment in both the domestic service and the subsistence or small-scale agricultural sectors. The sharp increase in the trade industry from 2 426 000 in September 2000 to 2 916 000 in February 2001 may be a result of the increase in the informal sector, since the wholesale

and retail trade industry accounts for the largest share in this sector.

Table: Employment in the formal, informal and domestic sectors – February 2000, September 2000 and February 2001 LFSs

Sector	February 2000		September 2000		February 2001	
	Number	%	Number	%	Number	%
Formal	7 434 000	63,2	7 509 000	65,8	7 377 000	63,5
Informal	3 329 000	28,3	2 898 000	25,4	3 319 000	28,6
Domestic	1 001 000	8,5	999 000	8,8	914 000	7,9
<b>Total</b>	<b>11 880 000</b>	<b>100</b>	<b>11 712 000</b>	<b>100</b>	<b>11 837 000</b>	<b>100</b>

Source: Statistics South Africa, 2000 and 2001 Labour Force Surveys.

211. The total employed includes unspecified and people who did not know whether they worked in the formal or informal sector.

212. There still remains the largest difference in unemployment rates among different population groups, with unemployment rates among Africans more than 5% above the national average, while all other racial groups show unemployment rates below the national average. Although unemployment rates among Coloureds are next highest to Africans, they are three times as high as those of Whites. Some provinces in the country show unemployment rates of nearly 50% (the Northern Province).

#### ***Article 16 of the African Charter***

- 1. Every individual shall have the right to enjoy the best attainable state of physical and mental health.***
- 2. State parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.***

#### **Legislation and Policy**

##### ***Sterilisation Act, 1998 (Act 44 of 1998)***

213. It was recognised that the Constitution protects the right to bodily and psychological integrity of persons that includes the right to make decisions concerning reproduction and the right to security in and control over their bodies. A further recognition was that both women and men have the right to be informed of and to have access to safe, effective, affordable and acceptable methods of fertility regulation. A democratically reached conclusion was to the effect that inability to give consent should not automatically entail the

loss of constitutional rights and that it is necessary to ensure that mentally disabled persons are able to exercise these rights as far as possible. Therefore, in order to restore, protect and promote the human dignity of persons, in particular those who are incapable of consenting or who are mentally disabled, decisions about sterilisation must be made in a manner that is responsible and considerate. The abovementioned Act came into operation on 1 February 1999. This Act is aimed at providing for the right to sterilisation. It determines the circumstances under which sterilisation may be performed and in particular, the circumstances under which sterilisation may be performed on persons incapable of consenting or incompetent to consent due to mental disability. The Act further makes provision to matters connected herewith.

***Mental Health Care Act, 2002 (Act 17 of 2002)***

214. The main aims of the Mental Health Care Act are to:

- provide for the care, treatment and rehabilitation of persons who are mentally ill;
- set out different procedures to be followed in the admission of such persons;
- establish Review Boards in respect of every health establishment;
- determine the powers and functions of such Review Boards; and
- provide for the care and administration of the property of mentally ill persons.

***The Patients' Rights Charter***

215. The purpose of the abovementioned Charter is to ensure effective access to all patients to health care as provided for in the Constitution of the Republic of South Africa. The Department of Health has published a Patients' Rights Charter, as a common standard for achieving these rights. Besides the rights of the patients, the Charter also lists some of the obligations to be complied with by the patients.

***Confidentiality enquiry into maternal deaths***

216. In recognition of the need to reduce maternal mortality in South Africa, deaths during pregnancy and childbirth were made notifiable events. The maternal deaths notification process requires that all deaths of women that occur during pregnancy or within 24 days of being pregnant be reported.

***Tuberculosis Treatment Directorate Observation Treatment Short Courses (DOTS)***

217. Inasmuch as there is a high rate of TB in South Africa, urgent steps are required to reduce such rate. With an intention of addressing this epidemic, the Department of Health has adopted the DOTS approach. The said DOTS are advanced by the (WHO) World Health Organisation.

### ***HIV/AIDS Strategic Plan***

218. The aim of the strategic plan is to refocus the HIV/AIDS strategy to ensure that the country's response to the epidemic is appropriate to –

- (1) reduce the number of new HIV infections (especially among youth); and
- (2) reduce the impact of HIV/AIDS on individuals, families and communities.

### ***White Paper for the Transformation of the Health System for South Africa***

219. The objective of the White Paper is to “present to the people of South Africa a set of policy objectives and principles upon which the Unified National Health System of South Africa will be based”. In addition, the document contains a series of implementation strategies designated to meet the needs of South Africans within the constraints of available resources.

### ***National Drug Policy***

220. The document outlines a series of objectives of the NDP, namely to:

- ensure the availability and accessibility of essential drugs to all citizens;
- ensure the safety, efficacy and quality of drugs;
- ensure good dispensing and prescribing practices;
- promote the rational use of drugs by prescribers, dispensers and patients through the provision of the necessary training, education and information; and
- promote the concept of individual responsibility for health, preventive care and informed decision-making.

### ***Syndromic Management of Sexually Transmitted Diseases***

221. The Department of Health has adopted the syndromic management of STDs as the key strategy to improve the management of STDs. The objective of the programmes is to train health workers to provide comprehensive care for the management of STDs, using the syndromic management approach.

### ***Chronic Diseases***

222. This is aimed at finding suitable means and developing user-friendly guidelines to assist health workers to provide the best possible care for chronic diseases, the disabled and the elderly.

### ***Integrated Nutrition Programme (INP)***

223. The Department of Health's Integrated Nutrition programme (INP) has, as its main strategy, to ensure optimal nutrition for all South Africans. The INP follows a co-ordinated

intersectoral approach whereby direct and indirect nutrition interventions are combined to address nutrition problems. The programme targets nutritionally vulnerable communities, groups and provinces and appropriate nutrition education and promotion to all people.

### **SADC Health Sector Policy Framework**

224. The goal of the Health Sector is to attain an acceptable standard for all citizens by promoting, co-ordinating and supporting the individual and collective efforts of member states. Within this goal are two aims;

- To reach specific targets within the objective of 'Health for all' in the 21<sup>st</sup> century by 2002 in all Member States, based on the primary health care strategy; and
- to ensure that health care is accessible to all within each Member State's economic reality.

225. The Health Sector has twenty-three objectives. These include the following (please note that this is not a complete list):

- Identify, promote, co-ordinate and support those activities that have the potential to influence the health of the population within the region.
- Co-ordinate regional efforts on disaster and epidemic preparedness, mapping, prevention and control of diseases such as malaria, measles, dysentery, polio, cholera, tuberculosis, HIV/AIDS and STDs, and to develop common strategies to address non-communicable diseases such as diabetes, hypertension and cancer.
- Ensure effective utilisation of human resources for health in the Region, including the harmonisation of curricula for the training of health personnel, and the accreditation of health professionals trained in Member States.
- Identify the potential and need for postgraduate training and research in each country; identify bilateral and multilateral facilitating mechanisms to be used rationally by Member States, to co-ordinate the placement of undergraduate and postgraduate students in Member States for the training of health, particularly public health professionals, and to organise tertiary health education and training in selected Member States at reasonable cost.
- Facilitation of students and other health professionals to ensure technical co-operation and consultancy services within the Region.
- Facilitate the sharing of information on health and research through, for example, seminars and exchange of reports.
- Facilitate the establishment of mechanisms for the referral of patients for tertiary care, where adequate facilities are not available in a Member State, in a manner that will ensure that capacity is developed in the referring Member State in the

medium to long-term.

- Identify and develop centres of excellence in the Region and organise the delivery of tertiary care and share vertical specialisation in selected Member States for the whole of SADC.
- Adopt and facilitate the implementation of decisions taken by multilateral organisations of which SADC is a member, example WHO and OAU.
- Foster co-operation in the area of health with the other multi-lateral organisations;
- Promote and co-ordinate collaboration of laboratory services in Member States in quality control of food, blood products and drugs imported or produced in the Region.
- Develop and harmonise information, education and communication strategies to prevent mobility and premature mortality.
- Harmonise the control and eventual elimination of illegal drugs, tobacco and alcohol abuse.
- Promote the standardisation of medical equipment management along broad guidelines to ensure that equipment procurement, maintenance and general management can be done in a manner that promotes the principles of cost-effectiveness, efficiency and sustainability.
- Harmonise the legislation and practice regarding pharmaceuticals, including their registration, procurement and associated quality assurance.
- Harmonise the legislation and practice regarding port health.

### ***Other Measures taken by the Government***

226. NAM: South Africa assumed the chairmanship of NAM from 1998-2001. The Minister for Health therefore co-ordinates health activities throughout NAM member countries.

### **Case law**

227. In **Soobramoney v Minister of Health, KwaZulu-Natal 1998(1) SA 765 (CC)** a dying person applied to the Constitutional Court, after he had failed in the High Court, for an order admitting him to the dialysis programme of a hospital. The hospital had refused to admit him to the dialysis programme because he was a diabetic suffering from ischaemic heart disease, cerebral-vascular disease and irreversible chronic renal failure. The hospital, not having enough resources to provide for all patients suffering from chronic renal failure, had a policy to admit patients with treatable renal failure. In case of irreversible chronic renal failure, its policy is to admit those patients eligible for a kidney transplant: thus those patients free from significant vascular or cardiac disease. The

applicant did not meet these criteria. The applicant relied on Sections 27(3) and 11 of the South African Constitution. The Constitutional Court held that Section 27(3) had to be construed in the light of the fact that an unqualified obligation to meet the obligations imposed on the State in terms of Sections 26 and 27 would not at present be capable of being fulfilled. The Court held that Section 27(3) was not applicable, but that Section 27(1) and (2) were – entitling everyone to have access to health care services provided by the State within its available resources. The Court agreed that in the context of budget constraints and cutbacks in hospital services in KwaZulu-Natal, the guidelines about usage of dialysis machines were advisable, and that the case had to be seen in the context of the needs, which the health services had to meet. If treatment were provided for one person, all persons in similar conditions also had this right. The cost hereof would impact too greatly on South Africa's health budget. The Court also said that it would rather not interfere with rational decisions taken in good faith by political organs and medical authorities whose responsibility it was to deal with such matters. It did, however, say that the State had a duty to comply with the obligations imposed on it by Section 27 and it was not shown in this case that the State's failure to provide renal dialysis facilities for all persons suffering from chronic renal failure was a breach of such duty.

#### ***Article 17 of the African Charter***

- 1. Every individual shall have the right to education.***
- 2. Every individual may freely take part in the cultural life of his community.***
- 3. The promotion and protection of morals and traditional values recognized by the community shall be the duty of the state.***

#### **Legislation and Policy**

##### ***Employment of Educators Act, 1998 (Act No 76 of 1998)***

228. The Act commenced on 2 October 1998. The historically divided teaching force is now governed by this Act, which makes provision for the employment of educators by the State and regulates the conditions of service, discipline, retirement and discharge of educators and related matters.

##### ***Further Education and Training Act, 1998 (Act No 98 of 1998)***

229. The Act commenced on 2 November 1998. This Act, in conjunction with the Education White Paper 4 on Further Education and Training (1998) and the National Strategy for Further Education and Training (1999-2001) provides the basis for developing a nationally co-ordinated further education and training system comprising the senior secondary component of schooling and technical colleges. It requires that further

education and training institutions, created in terms of the new legislation, develop institutional plans and provides for programme-based funding and a national curriculum for learning and teaching.

***National Student Financial Aid Scheme Act, 1999 (Act No 56 of 1999)***

230. The Act commenced on 10 November 1999. The purpose of this Act is to establish a financial aid scheme to provide financial aid to eligible students who meet the criteria for admission to a higher education institution. This Act makes provision for the management, governance and administration of the NSFAS, the granting of loans and bursaries to eligible students and the recovery of those loans.

***South African Council for Educators Act, 2000 (Act No 31 of 2000)***

231. The Act commenced on 2 August 2000. The Act regulates the professional, moral and ethical responsibilities and competencies of educators. The objectives of the Act are to provide for the registration of educators; to promote the professional development of educators and to maintain and protect ethical and professional standards for educators by means of the functioning of the South African Council for Educators.

***Adult Basic Education and Training Act, 2000 (Act No 52 of 2000)***

232. The Act commenced on 13 December 2000. This Act provides for the establishment of public and private adult learning centres, funding for ABET provisioning, the governance of public centres, and quality assurance mechanisms for the sector.

***General and Further Education and Training Quality Assurance Act, 2001 (Act 58 of 2001)***

233. This Act commenced on 5 December 2001. The objectives of this Act are to establish a quality assurance body to ensure that continued enhancement of quality education is achieved in the delivery and outcomes of the general and further education and training sectors of the national education and training system; to develop a quality assurance framework for the general and further education bands of the National Qualifications Framework, and to regulate the relationship between the National Department of Education, the South African Qualifications Authority, other Education and Training Assurance Bodies, providers and the Council.

**Policy**

***Education White Paper 4, 1998 (Notice 2188 of 1998)***

**Programme for the Transformation of Further Education and Training (FET)**

234. Further Education and Training will include learning programmes that will be registered on the National Qualifications framework from levels 2 to 4 and that will correspond with the present Grades 10 to 12 in the school system and N1 to N3 in the technical college system. When fully developed, the new FET system will provide access to high-quality education and training within a differentiated system that will offer a wide range of learning options to a diverse range of learners, including school-going young people, out-of-school youth, young adults and the large adult population. A successful FET system will provide diversified programmes offering knowledge, skills, attitudes and values South Africans require as individuals and citizens, as lifelong learners and as economically productive members of the society. It will provide the vital intermediate to higher-level skills and competencies our country needs to chart its own course in the global competitive world of the 21<sup>st</sup> century.

***Education White Paper 5: Early Childhood Development, 2001***

235. The process and implementation plan initiated by this White Paper build on the work that is already being undertaken within and across Government, non-government and community-based organisations, local communities and families. While its main aim is to close the gap in programmes for six-year olds, thus giving effect to our Constitution and the White Paper on Education and Training, it also addresses the challenge pertaining to children younger than five years old.

***Education White Paper 6: Special Needs Education: Building an Inclusive Education and Training System, 2001***

236. This White Paper outlines an inclusive education and training system and provides the framework for establishing such a system, details a funding strategy and lists the key steps to be taken in establishing an inclusive education and training system in South Africa. The principles guiding the board strategies to achieve this vision included: acceptance of principles and values contained in the Constitution and White Paper on Education and Training; human rights and social justice for all learners; participation and social integration; equal access to a single inclusive education system; access to the curriculum, equity and redress; community responsiveness; and cost-effectiveness.

**Other Measures taken by Government**

***Committee on Gender Equity***

237. The Gender Equity Task Team contributed to the development of curriculum 2005 to ensure that gender sensitivity is reflected in the learning outcomes. Equity and

representivity in the employment and training of educators are also addressed.

### ***Curriculum 2005***

238. This new national education curriculum for General Education and Training was phased in from January 1998. It is an outcomes-based approach on skills, values and attributes. Curriculum 2005 envisages a liberated, nation-building and learner-centred outcomes-based model of learning and teaching for general education. In line with training strategies, the re-formulation is intended to allow greater mobility between different levels and institutional sites, and the integration of knowledge and skills through "learning pathways". Its assessment, qualifications, competency and skills-based framework encourage the development of curriculum models aligned to the NQF in theory and practice.

239. Curriculum 2005 makes provision for eight learning areas, i.e:

- Language, literacy and Communication
- Human and Social Science
- Technology
- Mathematical literacy, Mathematics and Mathematical Science
- Arts and Culture
- Economics and Management Sciences
- Human and Social Science
- Life Orientation.

240. Protection of the environment is included in the Human and Social Sciences and Natural Sciences. Life skills Education, including sex education, will be addressed in Life Orientation. The South African Law Commission has developed a policy on HIV/AIDS for schools.

241. The Department of Education has identified HIV/AIDS as a priority area and particularly targets children aged 4 - 14 years for preventive education. A core-learning programme for secondary schools has also been developed. The HIV/AIDS National Policy for Schools and Further Education and Training Institutions aims to prevent discrimination, increase awareness and prevent the spread of the disease. The challenges are daunting, and the government is committed to responding to them in holistic and effective ways. The policy does not advocate compulsory testing or exclusion of learners or educators with HIV/AIDS.

### ***National Primary School Nutrition Programme (PSNP)***

242. The Primary School Nutrition Programme aims to provide a nutritious meal a day for young primary school learners, thereby improving their ability to learn at school. A major concern is that the PSNP does not reach the youngest, most vulnerable children of school - going age. In six (6) provinces, linkages between PSNP and school gardens and bread- making projects have been fostered.

### ***Arts and Culture***

243. These are crucial components of developing human resources. All children are encouraged to participate in arts and culture-oriented subjects in school to help unlock their creativity, allowing for cultural diversity within the process of developing a unifying national culture. Creative expression and participation assists in cultivating knowledge of self and others, expressing and communicating values. The power of performing arts and creative participation as an active celebration of diversity and expression must be harnessed as a tool to cultivate tolerance and compassion. The classroom provides a context in which ways of expressing values, the values expressed and the diversity of values can be discussed and followed with action.

### ***Early Childhood Development (ECD)***

244. Early childhood development is a term for the all-round development - physical, social, emotional, mental, moral and spiritual - of children aged 0 - 9. Exposing children to appropriate early stimulation, nutrition and care can assist a child's transition to schooling and improve efficiency in the education system by reducing costly repetition rates; is the ideal phase for the inculcation of values such as anti-racism, anti-sexism and human rights, and is a critical phase for identification and prevention of being at risk both from learning difficulties and social, behavioural and health problems.

245. The interim policy for early childhood development (1996) covers children 0-9 years old, but the initial focus is on phasing in a reception year for five-year olds to facilitate the transition to formal schooling. As part of the ECD pilot project, the Gauteng Department of Education has begun testing more integrated approaches to meeting the needs of young children through its Impilo project. The experiences of Impilo suggests that it is more effective to fund groups of multi-faceted services, including programmes for HIV/AIDS, teenage mothers, child protection, parent support and activities for children, as well as income generation and poverty alleviation opportunities, than a single service like day care.

246. Good media programmes, especially those which combine entertainment and educational messages, can be an effective way of reaching children, parents and other

care-givers who do not reach ECD services. *Takalani Sesame*, the South African version of *Sesame Street*, an initiative of the SABC, Department of Education and Sesame Workshop, was launched in 2000. It is a multi-media programme with radio, television and community outreach components.

### ***Commission for Further Education***

247. The Commission completed its investigation into the provision of education for learners after the age of 15 years. The ***Further Education and Training Act, 1998 (Act No. 98 of 1998)*** aims at transforming this sector of education to make it more accessible to all learners and provides for qualifications to be recognised by the South African Qualifications Authority within the National Qualification Framework. Further Education and Training, conceptually, administratively and politically is more complex than general education and training. FET must serve the often competing purposes of preparation for higher education, preparation for work, and education for personal and social development. To support the development of outcomes as competencies and enable learner-centred education, assessment for the FET will incorporate classroom-based (continuous) assessment focuses on oral and practical work and achievements not readily accessible through written tests. National examinations will be conducted in the key subjects of mathematics, languages, physical science, biology and accounting, and one other subject.

### ***Education Management Information System (EMIS) and the School Register of Needs Survey***

248. This survey was initiated as one of the foundations of the government's commitment to equity in education and improving the quality of learning and teaching. It provides a comprehensive database of schools and education institutions and is a useful instrument of planning the optimal use of facilities, the allocation of resources, and for addressing the historical backlogs in physical facilities.

### ***The National Arts Council and Provincial Arts Councils***

249. These councils were established to develop all aspects of arts and culture, which also makes provision for children. Community Art Centres are being built and developed with RDP funds in the provinces. The Department of Arts, Culture, Science and Technology is developing a growth strategy for cultural industries to maximise the role of arts and culture in economic and social development and will include the contribution of children.

***The South African National Games and Leisure Activities (SANGALA)***

250. The national Department of Sport and Recreation has designed a recreation programme called street SANGALA, which targets street children. It aims at inculcating life skills and counteracts anti-social activities. By 1999, SANGALA had engaged 11 500 children and had trained 20 as community recreation leaders. The SANGALA programme promotes the effective use of leisure and development of personal skills and includes a number of children and youth programmes.

***The Children's Broadcasting Forum***

251. This forum has been established originally and aims at providing programmes in all the official languages. Access to electronic media is being expedited through RDP funding, which is used for electrification projects in all the provinces. The Independent Broadcasting Association (IBA) makes provision for specific quotas of children's programmes on radio and television. The National Film and Video Foundation supplies schools with audio-visual material to supplement teaching in schools.

***The Refugee Children in South Africa***

252. Access to free basic education for refugee children is guaranteed through the ***Aliens Control Act, 1991 (Act 96 of 1991)***, the ***Refugee Act, 1998 (Act 130 of 1998)*** and the ***South African Schools Act, 1996 (Act 84 of 1996)*** and is further defined in the Constitution. Lack of knowledge of the local languages hampers the process of integration into local societies.

**Group Rights**

***Article 18 of the African Charter***

1. ***The family shall be the natural unit and basis of society. It shall be protected by the State that shall take care of its physical health and moral.***
2. ***The State shall have the duty to assist the family that is the custodian of morals and traditional values recognised by the community.***
3. ***The State shall ensure the elimination of all discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations.***
4. ***The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.***

**Legislation and Policy**

253. The South African Government views the family as a primary institution for the

development of children and develops programmes which focus on families, including the National Programme of Action for Children and Prevention of Child Abuse and Neglect. The family is the natural unit and in the light of the number of orphans and child-headed families, the Department of Health should be broadened to include other settings that are taking care of children. These structures or units should also be protected by the State, which should also take care of their physical health and morale. Their family members and close relatives should direct the special measures of protection specifically towards protecting this category against abuse. The elders are in most circumstances vulnerable to being abused by their own children, who seem to think that they own or control their elderly parents. School health services – policy guidelines are being developed towards comprehensive school health programmes. These encourage community participation and parental involvement in school health promotion.

254. The South African Department of Health –

- Provides free health services to pregnant women and children under five years of age. The policy aims at improving access to health services for improved family health;
- declares maternal mortality a notifiable event to understand the causes, and contributory and avoidable factors responsible for the high maternal mortality that destabilises family health;
- disseminates the reports and information on confidential enquiries into maternal deaths to all relevant stakeholders. including communities, to implement recommendations made by the National Committee on Confidential Enquiries into Maternal Deaths to improve family health in all communities;
- develops policies and management guidelines for common causes of maternal deaths in South Africa, Maternity Care Guidelines and National Maternity Case Record to enable health care providers to provide high-quality maternal health services;
- supports community empowerment programmes, for example pregnancy education aimed at empowering communities with relevant information on safe motherhood, to improve community involvement and participation on strategies to improve maternal and neo-natal outcome to improve family health;
- encourages development of Reproductive Health Committees in all provinces to facilitate, promote and support programmes and strategies that will help improve family health in all provinces;

- developed Domestic Water Quality Guidelines for ensuring uniform quality standards. These standards are compulsory to all providers of domestic water to the public in urban and rural areas. These standards are also used to measure the quality of water derived from sources used for domestic purposes but not processed, to inform the public of their quality status and therefore to take precautionary measures;
- contributed to the development of minimum requirements for low-cost housing. This is to ensure that the accommodation provided for people is sited in appropriate areas, houses are rightly oriented and constructed of suitable materials to ensure health and safety;
- through local authorities, ensures that accommodation is suitable, both as housing and the surroundings;
- conducts environmental impact assessment, to ensure that developments are safe and health promoting. At present environmental impact assessments are conducted on prospective developments, but plans are afoot to assess existing developments to ensure that they are improved to ensure maximum safety and health for the people;
- directs and contributes to decisions regarding the use of highly toxic chemical substances in agriculture and other settings, to ensure that lives and the health of people are not put in danger as a result of their use; and
- introduces community service for the following professions as from 1 January 2003:
  - Dieticians;
  - Clinical psychology;
  - Environmental health;
  - Occupational Therapy;
  - Physiotherapy;
  - Radiography; and
  - Speech, language and hearing therapy.

255. The Department of Health has also reviewed the curriculum for the development of environmental health practitioners to ensure that it is geared towards producing a community- oriented practitioner rather than a law enforcer. The rationale being to ensure engagement of individuals, families and communities in identifying problems, finding solutions and implementing them to ensure sustainability.

**Actions taken or being embarked upon to improve the protection of the rights of the following groups:**

## **Children**

### ***The Child Justice System***

256. The Minister for Justice and Constitutional Development launched the National Interim Protocol for Children Awaiting Trial on 1 June 2001. This document prolonged the investigation of the situation of children in prison, but also provides guidance about how children accused of crimes should be dealt with from now until the Child Justice Bill is enacted and implemented. The idea is that the good practice required by the protocol will ensure that criminal justice personnel are accustomed to what will be expected of them in terms of the new legislation. The Department of Justice and Constitutional Development, together with the other departments, will ensure that copies of the protocol are widely distributed. Plans are under way to attend provincial forums to talk about the protocol.

### ***Prosecutorial Policy on Diversion***

257. On 15 September 2000 the project, together with the Office of the National Director of Public Prosecutions, hosted a workshop on prosecutorial policy for diversion. The workshop raised important questions and considerations that have been factored into the redrafting of the policy by the Office of the Director of Public Prosecutions.

258. The Child Justice Bill empowers the Minister for Justice and Constitutional Development, in consultation with other relevant Ministers, to establish and maintain One-Stop Child Justice Centres. The Department of Justice and Constitutional Development has commenced the process of holding discussions with all the relevant stakeholders in the field regarding the development of a policy on One-Stop Centres. The Department has commissioned an evaluation of the Stepping Stones One-Stop Child Justice Centre in Port Elizabeth during September 2001, which will support the implementation process of the Bill.

### ***Maintenance System***

259. The present maintenance system includes:

- Appointment of Maintenance Investigators
- Policy Directives of the National Prosecuting Authority

### ***National AIDS and Children Task Team***

260. The Department is a member of the National Task Team on HIV/AIDS chaired by the Department of Social Development. The Department plays a very important role in this Task Team in that it renders advice on the role of the courts in children's court enquiries. It has been agreed at these meetings that the Department will facilitate a seminar for Commissioners of Child Welfare on the impact of HIV/AIDS on the Courts. Donor funding will be sought for this Seminar that will be held in March 2002.

### ***National Strategy for Child Abuse and Neglect***

261. The Department continues to participate in the National Committee on Child Abuse and Neglect chaired by the Department of Social Development, whose main objective is to finalise the Child Protection Policy and set up effective and efficient monitoring and evaluation mechanisms at national, provincial and local levels.

### ***South African Law Commission Report on Juvenile Justice***

262. In 1997 a project committee under the auspices of the South African Law Commission began its investigation into Juvenile Justice. The project committee was appointed by the then Minister of Justice to look into the situation in the country regarding juvenile crime and to draft comprehensive legislation to deal with this issue. The process of law reform has been a consultative one, involving discussion with police, prosecutors, magistrates, judges, social workers, correctional officials, NGOs and academics. There was also a specially designed consultation process undertaken with children themselves. The final report of the Commission's committee on juvenile justice was handed to the Minister of Justice in August 2000. The Report comprises a draft Bill, called the ***Child Justice Bill***.

263. A brief description of the proposed new system is as follows:

The draft Bill begins with a set of principles that frame the paradigm in which the new system will operate. The objectives of the legislation are to –

- “(a) promote the procedural rights of children who are subject to the provisions of this Act*
- (b) promote Ubuntu in the child justice system through-*
  - (i) fostering of children's sense of dignity and worth;*
  - (ii) reinforcing children's respect for human rights and the fundamental freedoms of others by holding children accountable for their actions and safe-guarding victims' interests and the interests of the community;*
  - (iii) supporting reconciliation by means of a restorative justice response; and*
  - (iv) involving parents, families, victims and communities in child justice processes in order to encourage the reintegration of children who are subject to the provisions of this Act; and*
- (c) promote co-operation between all government departments, other organisations and agencies involved in implementing an effective child justice system.”*

264. The proposed new system places a great deal of emphasis on the first 48 hours after the child is apprehended. A number of alternatives to arrest are provided (such as

taking a child home and giving a written notice to appear at a subsequent proceeding) and the police officer is enjoined to use one of the alternatives to arrest in all petty offences, unless particular reasons exist for not doing so. Where arrest is used, it is to be done in a manner that promotes the dignity and well-being of the child. Due to the history of policing in South Africa, as well as a current lack of trained personnel, the Commission has decided not to include a provision for a specialised unit with the police force to deal with arrested children. Instead, the system aims to get the children out of police hands as soon as possible, either into the care of their parents or to a probation officer who will undertake an assessment of the child. An individual assessment of each child is an innovation created by the proposed system. The primary purposes of the assessment are to establish the prospects of diversion of the case, and to formulate recommendations regarding release of the child into the care of his or her family or placement of the child into an appropriate residential facility.

265. The probation officer's assessment report must be given to the magistrate presiding over the next step of the system, the preliminary inquiry. Also an innovation, the preliminary inquiry must take place within 48 hours of the child being apprehended. A magistrate chairs it, but it is very much a "roundtable" conference, with everyone, including the child, being encouraged to participate. The main objective of the preliminary inquiry is to establish whether the matter can be diverted. After considering the views of all persons present (including the prosecutor, who can override a consensual decision to divert) the magistrate may make an order of diversion. Other decisions regarding release or placement of the child are also dealt with at the preliminary inquiry, and it is believed that this will help to provide a solution to the current problems relating to children awaiting trial in custody. Diversion is a central feature of the new system, and the draft Bill sets out a range of diversion options, listed in three levels depending on the intensiveness of the programme. Any case may be considered for diversion. One of the diversion options is a family group conference.

266. Those children who are not diverted (either because they indicate that they intend to plead not guilty to the charge, or because the particular circumstances surrounding the child or the case make diversion inappropriate) will proceed to plea and trial in the Child Justice Court. The envisaged Child Justice Court is not a completely specialised or separate court. In urban areas, where there are sufficient cases to warrant it, full-time Child Justice Courts with specially selected and trained personnel will be set aside. In rural areas, the court will simply "constitute" itself as a Child Justice Court, following the procedures set out in the legislation. The aim is that the majority of children will be tried in

the Child Justice Court (which will operate at district level). However, cases involving murder and rape, or other exceptional circumstances, may be referred to the Regional Court or even the High Court. However, it must be stressed that even when this occurs the child is not to be tried as an adult. The special provisions for children set out in the draft Child Justice Bill bind the superior courts.

267. The Bill includes a wide range of sentencing options, including non-residential or community-based sentences, sentencing involving **restorative justice concepts such as restitution and compensation to the victim**, and finally, sentences involving a residential element. The Draft Bill makes it clear that imprisonment should only be used as a measure of last resort and then for the shortest possible period of time. The use of imprisonment is further limited by an age limit and a list of offences for which children may be imprisoned. Legal representation will be provided for at state expense where a child is deprived of his or her liberty or where the alleged offence is such that he or she is likely to get a sentence involving loss of liberty. The expungement of records is provided for in a unique system whereby the magistrate in the Child Justice Court or other court hearing the matter must, at the time of determining the sentence, also make a decision whether or not the criminal record should be expunged, and if he or she so decides, to set the date on which the record will fall away, and the date should not be less than three months and not more than five years from the date on which sentence is passed. Certain very serious offences are, however, excluded from the possibility of expungement. Finally, the Bill provides for a monitoring structure to oversee the efficient running of the new system.

268. Although the draft Bill is largely procedural, it does contain some important substantive law provisions. The most notable of these is the issue of the minimum age of criminal capacity. The current law is based on the old Roman Law concept of *doli incapax*, and rests on two legal rules. Children below the age of seven years are irrebuttably presumed to lack criminal capacity. Children who have attained the age of seven years but have not yet turned 14 years of age are also presumed to lack criminal capacity, but this presumption can be rebutted – if the State can prove that the child appreciates the difference between right and wrong, and can act in accordance with that knowledge. This law has been found not to be an effective protection for children, the presumption being far too easy to rebut, and the courts having focused on the first leg of the inquiry (the child's ability to understand the difference between right and wrong) with scant regard for the importance of the second leg (that the child must be able to act in accordance with that appreciation). After much intensive debate the Commission is proposing that the minimum age should be raised from 7 to 10 years of age. The presumption of lack of criminal

capacity of a child who has attained the age of 10 years but has not yet reached the age of 14 years should remain in place, with increased protection for this group of children. The State will be required to provide proof, beyond a reasonable doubt, that the child understood the difference between right and wrong at the time of the commission of the alleged offence. Evidence may be called for of the intellectual, emotional, psychological and social development of the child in the form of a report from a person qualified in child development or child psychology, and this is to be undertaken at state expense.

## Women

### ***The current position***

269. South Africa has committed itself through the SADC Declaration on Gender and Development, the Beijing Platform of Action, the CEDAW and other International Instruments, to undertake activities to promote the human rights of women and to eliminate all forms of discrimination, to eradicate and prevent violence against women and children and to repeal and reform all laws, amend constitutions and change social practices which will subject women to discrimination and to enact empowering gender-sensitive laws.

270. The provisions of the Constitution had the effect of subjecting all private laws and all private relationships to principles of equal treatment and non-discrimination. To be specific to the rights of South African women, the South African Parliament enacted the Recognition of Customary Marriages Act, which came into operation in November 2000.

271. ***The Recognition of Customary Marriages Act, 1998 (Act 120 of 1998)***, repealed ***in toto*** the provisions of section 11(3) of ***the Black Administration Act, 1927 (Act 38 of 1927)*** which condemned African women to a legal status of perpetual minors. It also had the effect of repealing sections 22 and 27(3) of the KwaZulu Act on the Code of Zulu law of 1985 that entrenched the notion in the Province of KwaZulu-Natal that a man in a marriage is not only the head of the family, but also the holder of the marital power.

272. The salient features of this Act are as follows:

- It provides for the right to equality that engenders a new respect for the African legal tradition and elevates the status of women and children in a marriage by improving their position to be in line with the constitutionally entrenched notion of equality. The South African marital regimes will now exist side by side as equals.
- The wife to a customary marriage has, on the basis of the equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity, including the capacity to acquire assets and to dispose of them. Where the customary marriage is entered into after inauguration of this Act, the

spouses' contractual capacity will depend on the matrimonial property system of their choice, e.g. in or out of community of property or in terms of customary law or any other system.

- All customary marriages entered into before the operation of this Act will continue to be governed by customary law, with the requirement that such marriages have to be registered.
- The proprietary consequences of such marriages are still governed by customary law and both spouses have full status and capacity, and therefore no assistance by either spouse is necessary for the acquisition, disposal or alienation of immovable property to be registered in a deeds registry.
- A customary marriage entered into after the commencement of the Act, in which a spouse is not a partner in any existing customary marriage, is a marriage in community of property and of profit and loss between the spouses.
- Both spouses to the marriage have restricted contractual capacity for the disposal or alienation of immovable property. Where community of property has been excluded in the marriage, no restrictions to the disposal or alienation of immovable property apply to personal property of spouses.
- A customary marriage entered into after the commencement of the Act, in which a spouse is not a partner in any existing customary marriage, may have the proprietary consequences of a marriage out of community of property if the spouses elect to enter into an ante nuptial contract prior to the conclusion of the marriage and have such contract registered in a deeds registry within the prescribed period of 3 months.
- This Act governs customary marriages observed among the indigenous African people of South Africa. The customary marriage of parties who are not citizen(s) of South Africa will be governed by the law of the country where the husband was domiciled at the date on which the marriage was entered into.
- No consent by the spouse needs to be lodged on the alienation or transfer of immovable property registered in the name of such spouse.
- Nothing prohibits a husband to a customary marriage from entering into a further customary marriage with another woman after the commencement of this Act. However, such husband must make an application to the court to approve a written contract that will regulate the future matrimonial property system of his existing marriage and the prospective one. All parties with an interest in the matter, especially the husband, existing spouse or spouses, and his future spouse, must be parties to the proceedings for the contract. Such contract, if approved by the court, will have to be registered.

### ***Change of Marriage System***

273. A man and a woman between whom a customary marriage exists, have the right to contract a marriage with each other under the ***Marriages Act, 1961 (Act 25 of 1961)***, provided that neither of them is a spouse in an existing customary marriage with any other person. If a customary marriage exists, only a further customary marriage may be entered into.

274. Where a man and a woman between whom a customary marriage exists, contract a marriage in terms of the Marriages Act, such marriage will be one in community of property and of profit and loss unless the parties enter into an ante nuptial contract which will regulate their matrimonial property system.

### **Maintenance**

275. The ***Maintenance Act, 1998 (Act 99 of 1998)*** has introduced some fundamental changes to the maintenance system. The monitoring and implementation of the Act also involves:

- The compilation of maintenance statistics received from all the Magistrates' Courts countrywide,
- The handling of complaints received from persons seeking maintenance, who have experienced difficulties with the tracing of maintenance defaulters and the enforcement of maintenance orders, as well as complaints from the respondents on the inability to comply with the maintenance orders and of abuse of the maintenance system.

276. A major challenge facing the Department of Justice and Constitutional Development is the appointment of maintenance investigators as provided for in the Act. This problem is being addressed by facilitating the implementation of this provision, through the development of a National Action Plan on the Re-engineering of the Maintenance Act. The National Action Plan is currently being finalised and a final discussion paper should be submitted to the Office of the Director-General and Ministry for Justice and Constitutional Development, for perusal and approval. The document essentially aims to address all problems (such as the appointment of maintenance officers and investigators, the possible out or co-sourcing of one or more maintenance functions, etc.) presently experienced in respect of the implementation of the Maintenance Act, and seeks to provide practical and effective solutions to these problem areas.

277. The National Action Plan has been developed to align it with the gradual phasing

out of the Family Service Centre Blueprint Project that will form an integral sub-component of the Model Court Blueprint already endorsed by the Department of Justice and Constitutional Development.

### **Older persons**

278. An older person is anyone aged 60 years and older. This population group is showing an unprecedented growth rate, particularly in the 80 years and older range. Policy guidelines addressing specific conditions relevant to older persons have been developed.

#### ***National Strategy on Elder Abuse (Printed 2000)***

279. Elder abuse is a relatively new phenomenon, not only in South Africa but globally, and is emerging as a growing social problem. The Strategy was launched in October 1999. This was an interdepartmental initiative.

#### ***National Guideline on Foot Health (Printed 1999)***

280. According to a survey done during 1991, foot pathology was found to be one of the seven most prominent health conditions in older persons in South Africa. In an era when life expectancy is rising steadily, the need to identify and treat foot problems becomes part of everyday practice. What may be a common foot problem or minor trauma to the middle-aged adult becomes a debilitating disorder in older persons.

#### ***National Guideline on Prevention of Falls of Older Persons (Printed 1999)***

281. Falling is a serious blow to anyone's confidence and represents a potential threat to an older person's independence. It is the leading cause of morbidity and reduced physical activity in those over the age of 60 and the largest single cause of death due to injury in older persons. In older patients who are hospitalised after a fall, only about 50% will still be alive a year later. The onset of instability is often a presenting symptom of disease in the elderly and may herald the beginning of a steady decline in health.

#### ***National Guideline on the Management of Stroke and Transient Ischaemic Attack (TIA) (Printed October 2001)***

282. In South Africa, stroke is the third most frequent cause of all deaths reported in the country. It is estimated that there are about 6 million hypertensive people, 7 million smokers and 3-4 million diabetic patients in South Africa who are at risk of having a stroke. Both physical and mental health is affected by a stroke.

***National Guideline on Community-Based (CBC)/ Home-Based Care (HBC) (Printed November 2001)***

283. Home care is defined as the provision of health services by formal and informal caregivers in the home. Due to the AIDS epidemic, the increase in non-communicable chronic diseases and the complications thereof, as well as the impending impact of an ageing population on communities and South Africa as a whole, it has become necessary to consider how best to provide care and support for the patients and their families. HC and CC is holistic, person-centred, sensitive to culture, religion and value system, and respects privacy and dignity.

***National Guideline on Osteoporosis (Printed December 2001)***

284. Osteoporosis can have a devastating effect on people's lives, causing painful fractures, disability or deformity. Unfortunately, there is no evident warning sign until a fracture occurs. Bone is a living tissue, constantly renewed through a natural process in which new bone replaces old bone. Bone loss (resumption) is an inevitable process of ageing. When bones become severely weakened, simple movements such as bending over to pick up a bag of groceries or sneezing forcefully can lead to fracture.

***Promotion of Active Ageing in Older Adults (Printed 1999)***

285. Physical activity is an important component of health for all individuals. In older persons physical activity is particularly important for maintaining functional independence and mobility. Furthermore, regular activity in older adults has been shown to improve balance and postural stability, thus reducing the risk of falling and associated fractures. Physical activity will slow the loss of muscle tissue and bone mineral density that occurs with aging. Physical activity has been associated with improved psychological functions in older adults, including self-efficacy or one's belief in one's ability to complete a specific task or to control one's situation.

***National Guideline on Management of Psychogeriatrics***

286. Psychogeriatrics encompasses the socio-psychiatric disorders of old age and their management. Ageing is the progressive decline in function and performance that accompanies advancing years; it is multi-factorial in origin, partly inborn and partly environmental due to a "wearing out" by stress and strain. There is a mutual relationship between old age and disease: disease hastens ageing and age renders the old person more vulnerable to diseases, especially of the degenerative kind. Approximately 30% of older persons are psychiatrically impaired, while 80% suffer from some physical illness and many have both afflictions.

### **Programmes and Projects**

287. In an attempt to promote the value of older persons, the National Department of Health hosts the celebration of the International Day of Older Persons on an annual basis. Older persons from various districts within a particular province are invited to attend a special day in their honour. In 2000 the celebration was in Mpumalanga and in 2001 it was in the Free State. Usually all provinces have some function and programme to honour older persons.

### **Disabled Persons**

288. Various policy guidelines that affect the lives of people with disabilities have been developed.

#### ***The National Rehabilitation Policy (Printed 2000)***

289. The National Rehabilitation Policy was published in March 2001 and launched in August of the same year in the Eastern Cape. The document provides a framework within which rehabilitation services can be provided, as well as providing a vehicle to mobilise resources for the establishment and provision of medical rehabilitation services.

#### ***Standardisation of Provision of Assistive Devices (Technology) in South Africa (Printed 2003)***

290. This document will play a significant role in ensuring equitable distribution of assistive devices in the country, as it seeks to standardise the provision of assistive technology in all the provinces.

### ***Disability Prevention***

291. Three booklets on disability prevention are currently being field-tested. The first is an introduction to disability prevention, and provides the definition of disability prevention supported by illustrations. The second and third booklets deal with prevention of disability due to Spinal Cord Injury and Stroke respectively. These booklets should provide much needed information to both health workers and the general public.

### ***Provision and maintenance of assistive devices***

292. The Department has prioritised the provision of assistive devices countrywide, with particular focus on rural areas, children and women. Provinces have been mobilised to prioritise this area of focus. Donor funds have also been used to reduce the backlog. On the maintenance side, wheelchair repair centres have been established in the nine

provinces. These centres are mainly run by people with disabilities and take the repair service to the people.

***Sign language training for primary health care workers***

293. Since 1998 training sessions have been held for health workers to learn sign language. The purpose is to give health workers the opportunity to learn basic sign language so that they can communicate with deaf patients who visit health facilities. It is not intended to make trainees fluent in sign language. To date 72 health workers have been trained.

***Accessibility of Health Facilities***

294. A project has been initiated to encourage health facility managers to make their facilities accessible to people with disabilities. Facilities are then assessed and those who meet the set criteria are awarded certificates in Bronze, Silver or Gold, as appropriate. Gold is the highest grading.

***Audiotapes with HIV/AIDS messages***

295. Audiotapes have been produced carrying selected HIV/AIDS messages to create awareness among blind people. These tapes were launched on 6 September 2001 in Polokwane. To date 20 000 copies have been produced and distributed throughout the country, catering for all 11 official languages.

**Acts administered by the Department of Health and regulations thereunder promulgated since 1998**

296. The Department currently administers the following 21 Acts that aim to promote and protect the health (physical and mental) of the public:

- Academic Health Centres Act, 1993 (Act No. 86 of 1993)
- Allied Health Professions Act, 1982 (Act No. 63 of 1982)
- Choice on Termination of Pregnancy Act, 1993 (Act No. 92 of 1996)
- Dental Technicians Act, 1979 (Act No. 19 of 1979)
- Foodstuffs, Cosmetics and Disinfectants Act, 1972 (Act No. 54 of 1972)
- Hazardous Substances Act, 1973 (Act No. 15 of 1973)
- Health Act, 1977 (Act No. 63 of 1977)
- Health Professions Act, 1974 (Act No. 56 of 1974)
- Human Tissue Act, 1983 (Act No. 65 of 1983)

- International Health Regulations Act, 1974 (Act No. 28 of 1974)
- Medical Schemes Act, 1998 (Act No. 131 of 1998)
- Medicines and Related Substances Control Act, 1965 (Act No. 101 of 1965)
- Mental Health Act, 1973 [*Note: The Mental Health Care Act, 2002 (Act No. 17 of 2002) when coming into operation will replace the Mental Health Act, 1973*]
- National Health Laboratory Service Act, 2000 (Act No. 37 of 2000)
- National Policy for Health Act, 1990 (Act No. 116 of 1990)
- Nursing Act, 1978 (Act No. 50 of 1978)
- Occupational Diseases in Mines and Works Act, 1973 (Act No. 78 of 1973)
- Pharmacy Act, 1974 (Act No. 53 of 1974)
- South African Medical Research Council Act, 1991 (Act No. 58 of 1991)
- Sterilization Act, 1998 (Act No. 44 of 1998)
- Tobacco Products Control Act, 1993 (Act No. 83 of 1993)

#### **Bills submitted to Parliament during 2000/2001**

297. **The Nursing Bill**, which will replace the current Act, will be tabled in Parliament in 2001. The new Bill will provide for –

- The continued existence, objectives and powers of the South African Nursing Council;
- education, training and registration;
- penalties for offences by persons not registered;
- powers of the South African Nursing Council with regard to professional conduct, etc;

298. **The Mental Health Care Bill** was submitted to Parliament. It is now an Act, the Mental Health Care Act, 2002 (Act 17 of 2002). Refer to paragraph 214.

299. **The Traditional Healers Bill** is to be tabled in Parliament. The Bill will provide for –

- A legal framework that will control the practice of Traditional Health Practitioners who were previously marginalised by other health sectors;
- the establishment of a statutory council which will -
  - regulate education and training practices of traditional healers; and
  - set norms and standards and monitor and evaluate the general affairs of the practice for a period of three years.

300. **The National Health Bill** will be tabled in Parliament in 2001. The Bill will provide for –

- the establishment of a national health system which –
  - will encompass public, private and non-governmental providers of health services; and
  - will provide the population of South Africa with the best possible health services that available resources can afford;
- setting out the rights and duties of both health care providers and users; and
- related matters.

**Article 19 of the African Charter**

***All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.***

**Constitution**

301. Section 9 of the Constitution provides for the right to equality, which includes the full and equal enjoyment of all rights and freedoms. Therefore, this right promotes all rights and freedoms provided for in the Constitution. Section 31 of the Constitution provides that persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community to a) enjoy their culture, protect their religion and use their language; b) to form, join or maintain cultural, religious and linguistic associations and other organs of civil society.

**Legislation and Policy**

***Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Bill, 2001 (the Bill)***

302. The Bill gives effect to the provisions of sections 181, 185 and 186 of the Constitution that established, as one of the institutions strengthening constitutional democracy, a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (“the Commission”). The Bill seeks to regulate the composition and functioning of the Commission. It is proposed that the Commission be composed of a chairperson and no fewer than 11 and no more than 17 other members, appointed by the President in accordance with a procedure set out in the Bill, and in such a way that the Commission is broadly representative of the main cultural, religious and linguistic communities in South Africa and broadly reflects the gender composition of South Africa. In terms of the Bill, the Commission must –

- Promote respect for and protect the rights of cultural, religious and linguistic

communities;

- promote and develop peace, friendship, humanity, tolerance and national unity among and within cultural, religious and linguistic communities; and
- recommend the establishment or recognition of cultural or other councils for a community or communities in South Africa.

303. To achieve the above the Commission is empowered –

- to monitor, investigate, research, educate, lobby, advise and report on any issue concerning the rights of cultural, religious and linguistic communities; and
- to bring any relevant matter to the attention of the appropriate authority.

### ***Traditional Leadership***

#### **The Policy Process on Traditional Leadership and Institutions**

304. In 1998 government endorsed the development of a policy process that would finally result in the rationalisation of all legislation pertaining to traditional leaders and which would lead to the adoption of new legislative measures. The policy process was then divided into four phases in the following manner:

#### ***Phase one: Audit on Traditional Leadership***

305. In this phase a national audit on the institution of traditional leadership was conducted. The outcome of this was the production of a *status quo* report on traditional leadership, which contained, among other things, statistical information on traditional leadership, its role, powers and functions as determined by current legislation and the relationship between the institution and other structures of governance.

#### ***Phase Two: The Discussion Document on Traditional Leadership***

306. The second phase saw the launching of the Discussion Document on Traditional Leadership and Institution in April 2000. The Discussion Document identified all the relevant issues that require policy. The views of traditional leaders, organised local government, government departments, statutory bodies, the general public and other relevant stakeholders were obtained on identified policy issues, through a wide-ranging and co-ordinated consultation process. This was followed by a two-day national workshop of all relevant stakeholders in August 2000, the outcome of which was the consolidation of all inputs received. Similarly, the phase also encompassed the investigation of issues relating to the Khoisan communities in South Africa.

#### ***Phase Three: The Green Paper on Traditional Leadership and Institutions***

307. The third phase has culminated in the production of the Green Paper on Traditional Leadership and Institutions. The Green Paper accommodates the consolidated views of stakeholders that were obtained during the Discussion Document phase. These views have been used to formulate policy positions. It also accommodates policy proposals and recommendations relating to the Khoisan communities. Once again all stakeholders and South African citizens are given the opportunity to comment on these proposed policy positions. The Green Paper phase has also seen the completion of an audit of the core legislation (mainly old order legislation pertaining to Traditional Leadership and Institutions).

***Phase Four: White Paper on Traditional Leadership and Institutions***

308. The fourth and final phase will be the production of the White paper on Traditional Leadership and Institutions. This phase will mainly be a consolidation of the comments obtained during the Green Paper Phase. It will also highlight the final, clear and unambiguous policy position of the government on the institution of traditional leadership and the Khoisan communities.

***Progress***

309. A reworked draft of the Green Paper on Traditional Leadership and Institutions was finalised and presented to the Department of Provincial and Local Government. After the approval of the Green Paper, it will be published and all relevant stakeholders will be consulted on it. This will lead to the eventual consolidation of submissions made and the drafting of the White Paper on Traditional Leadership and Institutions.

**The determination of powers and functions of Traditional Leaders in the interim period**

310. A series of meetings between the Minister for Provincial and Local Government, the Special Cabinet Committee and other stakeholders took place on the envisaged draft Bill on the Powers and Functions of Traditional Leaders. A cabinet Memorandum was drafted and tabled before the Special Cabinet Committee. Meetings followed these consultative meetings between the Special Cabinet Committee and the Deputy President. The Department is now currently looking at the powers and functions that can additionally be allocated to traditional leaders. This will possibly lead to the amendment of the said Bill.

**Khoisan group**

***Background***

311. Following the 1994 elections, a number of organisations and individuals approached

the government on the issue of constitutional accommodation and the recognition of a Khoisan identity. The Griqua community in particular petitioned the government to attend to the position of the Khoisan community. The challenge faced in relation to the Khoisan people is to translate our constitutional provision of the promotion and protection of the rights of cultural, religion and language into reality and in the process, reverse the effects of decades of domination and subjugation of other communities by more powerful and dominant groups.

312. The National Griqua Forum, which was established to serve as a single discussion body with all the relevant Griqua interest groups, has since indicated that the discussion process on constitutional issues could not go ahead without taking on board the other Khoisan groupings, i.e. Nama, Korana, San and Cape Khoi. A conference on the constitutional accommodation of the Khoisan community was then facilitated in Upington in conjunction with the International Labour Organization in 1998. The conference culminated in the formation of a national body that became known as the National Khoisan Council (NKC) and the dissolution of the National Griqua Forum. It consists of 21 members and was established on 27 May 1999.

313. With the approval of the NKC and in collaboration with the Khoisan communities, a phased research process was adopted to investigate how best to constitutionally promote and protect the rights of the Khoisan communities. In this regard a number of professionals, the South African Human Rights Commission and the Department of Provincial and Local Government have undertaken studies. The research was conducted on three levels, namely:

- Research by the Human Rights Commission, which focused on the legal accommodation of the indigenous communities at national, regional (African) and international levels;
- Research by professionals, appointed by the Khoisan communities for each of the five main groups, which focused on a historical overview of each of the five main Khoisan communities. It incorporated information pertaining to the origins and subdivisions of each group; leadership development; governance structures of the past and present; geographical spread and migration; and relationships with colonial/republican authorities pre-and post-1994; and
- Research by the Department of Provincial and Local Government in conjunction with Khoisan communities regarding the *status quo* position of their leadership and organisational structures.

### **Progress**

314. The research process undertaken by the Department has reached fruition and a chapter on Khoisan traditional leadership structures has been drafted for the Green Paper on Traditional Leadership and Institutions. Other issues regarding the Khoisan's claims to the promotion and protection of their rights, language, culture and indigenous and first nation status, will be addressed separately to the said policy document. In this regard a comprehensive submission was presented to the Minister for Provincial and Local Government on how the process should be taken forward and recommendations made on strategic initiatives.

### **Article 20 of the African Charter**

- 1. All peoples shall have right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.**
- 2. Colonised or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.**
- 3 All peoples shall have the right to the assistance of the State Parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.**

### **Volkstaat Council**

#### **Background**

315. The inauguration of the Volkstaat Council on 16 June 1994, and the work undertaken by the Council since then, was initiated through a process of negotiation between the African National Congress, the previous National Party Government and the then newly-formed Freedom Front. These negotiations culminated in the signing of an accord between these parties on 23 April 1994.

316. The 1994 accord resulted in important, last minute changes to the draft Interim Constitution, namely through the inclusion of Constitutional Principle 34, and Sections 184 A and 184 B. The Volkstaat Council was empowered to gather and process relevant information on the establishment of such a Volkstaat, and to undertake feasibility studies. The Volkstaat Council completed its initial task on these matters when it submitted a report

to the Commission of Provincial Government in 1995 and to the Constitutional Assembly (CA) in 1996.

317. Sections 184 A and 184 B (a)(a), (b) and (d) were retained in schedule 6 to the 1996 Constitution, primarily to enable the Volkstaat Council to complete its work, which was to be in the form of a final report to the South African Government. During the last stages of its existence, the Volkstaat Council devoted its attention mainly to the identification of possible territories for Afrikaner self-determination. In total, the Volkstaat Council produced 11 official reports, five monographs and various non-official research reports in the execution of its constitutional mandate.

### ***Progress***

318. Minister F S Mufamadi thereafter met with the chairperson and deputy chairperson of the Volkstaat Council in February 2000. At the meeting the final report of the Volkstaat Council was officially handed over to the Minister. As a result of the meeting, the Department of Provincial and Local Government set up a Working Group with the Volkstaat Council, comprising officials from the Department and the Chairperson and Deputy Chairperson of the Council, to discuss the content of the final report, as well as the process of dissolving the Volkstaat Council. A summary of the report and proposals for government action was thereafter drafted by the Volkstaat Council as a result of deliberations of the Working Group. Subsequently, a Cabinet Memorandum was submitted to Cabinet to the Final Report of the Volkstaat Council, proposing a process for handling its recommendations and setting out the legal steps required for the termination of the Council.

319. On 14 March 2001, Cabinet approved that the process of dissolving the Volkstaat Council should be concluded, as the required consultation had taken place and, also, as the Council had concluded its constitutionally mandated tasks. Cabinet noted the contents of the Final Report of the Volkstaat Council and requested the Cabinet committee on Governance and administration to deal with issues relating to self-determination emanating from the Report, and to report progress thereon on a regular basis.

320. The Volkstaat Council lapsed through presidential proclamation on 31 March 2001. The remaining relevant provisions of the Interim Constitution enabling the establishment of the Council were repealed through the adoption of the repeal of the Volkstaat Council Provisions Bill, 2001 by the National Assembly on 11 October 2001. In future, the Government will continue to interact with the proponents of Afrikaner self-determination

utilising the framework created by section 235, and the other relevant provisions, of the Constitution.

**Article 21 of the African Charter**

- 1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.**
- 2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.**
- 3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law.**
- 4. State Parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity.**
- 5. State Parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their natural resources.**

**Constitution**

321. Section 25 of the Constitution guarantees the right to property to the extent provided therein (see provision under article 14 of South Africa's initial report). The Constitution does not take away the common right of individuals or communities to freely dispose of his or their wealth and natural resources. The Constitution restates the common law principle of compensation in case of spoliation or expropriation in the public interest.

**Legislation and policy**

322. *The Restitution of Land Rights Act, 1994 (Act 22 of 1994)* provides for restitution or comparable redress in favour of persons previously dispossessed of land as a result of racially discriminatory laws or practices. Government provides compensation to affected owners (see information under article 14 of South Africa's initial report).

323. The policy of government on property, in particular land, is that restitution and redistribution of land should be exercised in line with international law and practice. South Africa, together with other members of the African Organisation Unity (now African Union) are driving a campaign for debt relief on the African continent, reform of Bretton Woods Organisations such as the International Monetary Fund and the World Bank, and balanced global economy (globalisation) with a view to ending foreign economic exploitation of the African continent.

### **Case law**

324. Reference is made to the following cases discussed under article 14 of this report:

- **Janse van Rensburg No and Another v Minister of Trade and Industry and Another**
- **Khuzwayo v Dlodla**
- **Hermanus v The Department of Land Affairs**
- **Joubert and Others v Van Rensburg and Others**

### ***Article 22 of the African Charter***

1. ***All people shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.***
2. ***States shall have the duty, individually or collectively to ensure the exercise of the right to development.***

### **Constitution**

325. Although the Constitution does not provide for the right to development, this right is implied since the Constitution provides social, economic and cultural rights, including political rights, which are features of the right to development defined in article 1 of the UN Declaration as a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals, in which human rights and fundamental freedoms can be fully realised. The abovementioned rights enshrined in the Constitution provides a framework for comprehensive economic, social, cultural and political process aimed at constant improvement of the well-being of the entire population and all individuals, in which human rights and fundamental freedoms can be fully realised. Implementation of the right to development is an ongoing process.

### **Legislation and Policy**

326. Reference is made to information under articles 15 – 17 of this report regarding social, economic and cultural process; and article 13 regarding the political process.

327. Government has developed the **Peoples Housing Process Policy**, with the object to support the homeless people, especially the poor who cannot afford conventional housing. The policy is not just about building houses through self-help, but also about community development. This includes the **National Savings Programme**, which promotes and encourages housing beneficiaries to serve so as to contribute towards construction of their houses. This measure seeks, *inter alia*, to promote community self-reliance and participation in respect of the development process.

328. The **Policy on Joint Ventures** allows big and emerging contractors to have joint ventures. The target of government is that by 2003, 10% of contracts should be awarded to women contractors and developers from previously disadvantaged communities.

329. **The Housing Consumer Protection Measures Act, 1998 (Act 95 of 1998)** provides for the protection of new home consumers against defined defects.

330. **The Rental Housing Act, 1999 (Act 50 of 1999)** furthers government's constitutional obligation to respect, protect, promote and fulfill the right of access to adequate housing by: promoting access to adequate housing through the function of the housing rental market, the provision of housing rental markets and sound relations between landlords and tenants.

331. **The Local Government: Municipal System Act, 2000 (Act 32 of 2000)** provides for the concept of integrated development planning which forms the basis of transformed municipal governance – public participation, which promotes the social development of communities, also forms an integral part of the new local government dispensation.

332. Government has an integrated policy to reduce poverty and deal with HIV/AIDS, tuberculosis, malaria and related illnesses; and is amongst the drivers of NEPAD aimed, *inter alia*, at dealing with the above problems.

### **Case law**

333. Reference is made to cases discussed under articles 13, 15 – 17 of this report.

### **Article 23 of the African Charter**

- 1. All people shall have the right to national and international peace and security. The principles of solidarity and friendly relations implicitly affirmed by the Charter of the United Nations and affirmed by the Host of the Organisation of the African Unity shall govern relations between States.**
- 2. For the purpose of strengthening peace, solidarity and friendly relations, State Parties to the present Charter shall ensure that:**
  - (a) Any individual enjoying the right of asylum under Article 12 of the present Charter shall not engage in subversive activities against his country of origin or any other State Party to the present Charter.**
  - (b) Their territories shall not be used as bases for subversive or terrorist activities against the people of any other State to the present Charter.**

### **Constitution**

334. Section 198 of the Constitution provides for principles governing national security in the Republic-

*“(a) National Security must reflect the resolve of South Africans, i.e. individually and as a nation, to live as equals, to live in peace and harmony, to be free from fear and want and to seek a better life.*

*(b) The resolve to live in peace and harmony precludes any South African citizen from participating in armed conflict, nationally or internationally, except as provided for in terms of the Constitution or national legislation.*

*(c) National Security must be pursued in accordance with the law, including international law.*

*(d) National Security is subject to the authority of Parliament and the national executive.”*

335. Section 199 of the Constitution requires the Security Services, including Defence, Police and Intelligence, to be structured and regulated by national legislation.

### **Legislation**

#### ***Internal Security Act, 1983 (Act 74 of 1982)***

336. This Act provides for the security of the State and the maintenance of law and order. Section 54 in particular deals with terrorism and related offences and penalties. Section 54 basically states, *inter alia*, that any person who, with intent to overthrow or endanger the State authority in the Republic, commits an act of violence or threatens or attempts to do so shall be

guilty of the offence of terrorism and liable on conviction to the penalties provided for by law for the offence of treason.

A comprehensive Terrorism Bill is being developed.

### ***Article 24 of the African Charter***

***All people shall have the right to a general satisfactory environment favourable to their development***

#### **Legislation and Policy**

337. The legislation hereunder were enacted to make a provision for co-operative environmental governance by establishing principles for decision-making on matters affecting the environment, institutions that will promote co-operative governance and procedures for co-ordinating environmental functions exercised by organs of state; and to provide for matters connected therewith.

#### ***National Environmental Management Act, 1998 (Act 107 of 1998)***

338. This Act came into force on 29 January 1999. It has surfaced that many inhabitants of South Africa live in an environment that is harmful to their health and well-being. It is incumbent upon the state to respect, protect, promote and fulfill the social, economic and environmental rights of everyone and strive to meet the basic needs of previously disadvantaged communities.

339. Inequality in the distribution of wealth resources, and the resultant poverty, are among the important causes, as well as the results of environmentally harmful practices. Sustainable development requires the integration of social, economic and environmental factors in the planning, implementation and evaluation of decisions to ensure that development serves present and future generations. The environment is a functional area of concurrent national and provincial legislative competence, and all spheres of government and all organs of state must co-operate with, consult and support one another.

#### ***A policy on pollution prevention, waste management, impact management and remedies***

340. In line with the international trends and our national objectives of efficient and effective management of our nation's resources, priority is given in this new approach to prevention. Unlike previous policies that focused predominantly on so called "end -f- pipe"

treatment, this policy underscores the importance of preventing pollution and waste and avoiding environmental degradation.

341. Effective mechanisms to deal with unavoidable waste will remain necessary, but much greater attention must be directed to the introduction of preventive strategies aimed at waste minimisation and pollution prevention. Every increasing urban and industrial development throughout the world is leading to levels of pollution that seriously threaten the natural resources upon which humankind depends for its survival. The Reconstruction and Development Programme also highlighted the sub-optimal use of natural resources, and unacceptably high levels of air and water pollution as one of the major problem areas regarding the environment. Although South Africa has extensive environment, pollution and waste management legislation, responsibility for its implementation is scattered over a number of departments and institutions.

342. The fragmented and uncoordinated way pollution and waste is currently being dealt with, as well as the insufficient resources to implement and monitor existing legislation, contributes largely to the unacceptably high levels of pollution and waste in South Africa. The White Paper in this regard will implement co-operative governance as envisaged in the Constitution. The current fragmentation, duplication and lack of co-ordination will be eliminated. The White Paper on Integrated Pollution and Waste Management will result in a review of all existing legislation and the preparation of a single piece of legislation dealing with all waste and pollution matters.

343. Pollution and waste management is not the exclusive preserve of government. The private sector and civil sector have a crucial role to play. The fostering of partnerships between government and private sectors is a prerequisite for sustainable and effective pollution and waste management to take place. Similarly, the spirit of partnerships and co-operative governance between organs of state is equally important, due to the cross-cutting nature of pollution and waste management.

344. Monitoring and collection of information on pollution and waste generation are crucial for the implementation of pollution and waste reduction measures. Moreover, the sharing of such information and creating awareness about the issues will enable all stakeholders, including communities, to gain a better understanding of the relationship between pollution, waste management and the quality of life.

345. The White Paper proposes a number of tools to implement the objectives of the

policy it sets out. The most significant of these is a legislative programme that will culminate in new pollution and waste legislation. This legislation, among other things, will address current legislative gaps, and clarify and allocate responsibilities within government for pollution and waste management. The development of the White Paper was conducted in partnership with the Department of Water Affairs and Forestry.

**Article 26 of the African Charter**

***State Parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of rights and freedoms guaranteed by the present Charter.***

346. Reference is made to information under Chapter 2 of this Report, in particular developments on courts and national human rights institutions (see p 12 – 43 of this Report).

**Articles 27 – 29 of the African Charter**

***Duties of every individual towards others, his family and society, the State and other legally recognised communities and the international community.***

347. Developments since the initial report are around the promotion and achievement of African Unity. South Africa has participated actively in the development of the New Partnership for Africa Development (NEPAD). This African renewal blueprint sets out a framework for, *inter alia*, restoration of African values. The main objective of NEPAD is to eradicate poverty on the African continent and to place African countries, both individually and collectively, on a path of sustainable growth and development, and, at the same time, to participate actively in the world economy and body politics. South Africa is the Secretariat of NEPAD. NEPAD is a process and moves are being made to involve civil society so as to ensure that individuals own and become duty-bound to promote it.

348. South Africa also took an active part in the process of transforming the Organisation of African Unity (OAU) into a stronger and viable organisation capable of competing with other regional organisations for the good of its peoples. This process led to the birth of the AU, which replaces the OAU. The objectives of the AU include the following: promotes peace, security and stability on the continent; promotes democratic principles and

institutions, popular participation and good governance; promotes and protects human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments; establishes the necessary conditions which enables the continent to play its rightful role in the global economy and international negotiations; and promotes sustainable development at economic, social and cultural levels, as well as the integration of African economies. South Africa is to become first chair of the AU and should, as well as other African countries, popularise it to ensure its support by individuals and society in general.

## **MEASURES TAKEN BY SOUTH AFRICA TO PROTECT RIGHTS NOT PROTECTED BY THE CHARTER**

### ***Section 9(2) of the Constitution: affirmative action***

#### **Legislation and Policy**

##### **National Sport and Recreation Act, 1998 (Act 110 of 1998)**

349. Section 4(1) of this Act provides that the Minister for Sport and Recreation may, after consultation with or after consideration of proposals made by, the Sports Commission and NOCSA, in respect of the Olympic Games, from time to time, determine the general policy to be pursued with regard to sport and recreation. Section 4(2) provides that the policy determined by the Minister may, among others, relate to instituting necessary affirmative action controls, which will ensure that national teams reflect all parties involved in the process.

##### **Employment Equity Act, 1998 (Act 55 of 1998)**

350. Section 2 of this Act provides for the purpose of the Act, namely, to achieve equity in the workplace by (a) promoting equal opportunity and fair treatment in employment through elimination of unfair discrimination; and (b) implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workplace.

351. Section 6(2)(a) provides that it is not unfair discrimination to take affirmative action measures consistent with the purpose of this Act. Section 13 provides that every designated employer must, in order to achieve employment equity, implement affirmative action measures for people from designated groups in terms of the Act. "Designated employer" means a person who employs 50 or more employees; a person who employs

fewer than 50 employees but has a total turnover that is equal to or above the applicable annual turnover of a small business in terms of schedule 4 of this Act; a municipality; an organ of State, excluding local spheres of government, the National Defence Force, the National Intelligence Agency and the South African Secret Service; and an employer bound by collective agreement in terms of section 23 or 31 of the Labour Relations Act, which appoints it as a designated employer in terms of this Act, to the extent provided for in the agreement. "Designated Groups" means black people, women and people with disabilities.

352. Section 15 provides for affirmative action measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer. These measures include measures to identify and eliminate employment barriers, including unfair discrimination, which adversely affect people from designated groups; measures to ensure equitable representation of suitably qualified people from designated groups in all occupational categories and levels in the workforce, measures to retain and develop people from designated groups and to implement appropriate training measures, including measures in terms of an Act of Parliament providing for skills development. The last two mentioned include preferential treatment and numerical goals, but exclude quotas. Subject to Section 42, nothing in this section requires a designated employer to take any decision concerning an employment policy or practice that would establish an absolute barrier to the prospective or continued employment or advancement of people who are not from designated groups.

#### **Labour Relations Act, 1995 (Act 66 of 1995)**

353. Section 115(3) of this Act provides that, if asked, the Commission for Conciliation, Mediation and Arbitration (CCMA) may provide employees, employers, registered trade unions, registered employers' organisations, federations of trade unions, federations of employers' organisations or councils, with advice or training relating to primary objects of this Act, **including but not limited to affirmative action** and equal opportunity programmes.

#### **National Empowerment Fund Act, 1998 (Act 105 of 1998)**

354. The main objective of this Act is the establishment of a trust for the promotion and facilitation of ownership of income-generating assets by historically disadvantaged persons and to set out objects of such trust. The establishment of the Trust follows the agreement between government and labour, namely the National Framework Agreement on the Restructuring of State Assets, which provides that the restructuring must distribute wealth,

boost the small and medium enterprise sector, **have sustainable affirmative action implications** and facilitate genuine black economic empowerment.

355. The objects of the Trust are to facilitate the redressing of economic inequality, which resulted from past unfair discrimination against historically disadvantaged persons. In essence the Act aims at uplifting the economic level of historically disadvantaged groups. 'Historically disadvantaged persons' means persons or categories of persons, who prior to the new democratic dispensation marked by the adoption and coming into force of the Constitution of the Republic of South Africa Act, 1996 (Act 108 of 1996), were disadvantaged by unfair discrimination on the basis of their race, and includes juristic persons or associations owned and controlled by such persons. Economic inequality is to be addressed by –

- (a) providing historically disadvantaged persons with the opportunity of, directly or indirectly, acquiring shares or interest in State Owned Commercial Enterprises that are being restructured or in private business enterprises;
- (b) encouraging and promoting savings, investments and meaningful economic participation by historically disadvantaged persons;
- (c) promoting and supporting business ventures pioneered and run by historically disadvantaged persons;
- (d) promoting the universal understanding of equity ownership among historically disadvantaged persons;
- (e) encouraging the development of a competitive and effective equities market inclusive of all persons in the Republic;
- (f) contributing to the creation of employment opportunities; and
- (g) generally employing such schemes, businesses and enterprises as may be necessary to achieve the objects of this Act.

**White Paper on Affirmative Action in the Public Service (General Notice 564 in Government Gazette 18800 of 23 April 1998)**

356. The purpose of this paper is to provide a policy framework that sets out the mandatory requirements and steps that national departments and provincial administration should take to develop and implement their affirmative action programmes. The paper also sketches the accountability, monitoring and reporting responsibilities of various players within affirmative action programmes.

357. This Paper is primarily focused on the field of human resource management and targets the three groups – black people, women and people with disabilities – who are identified in the Employment Equity Bill (now Act) as having suffered most from unfair past discrimination.

358. The objectives of the Public Service affirmative action policy are, within the Framework of the Employment Equity Act and other relevant labour and public service legislation to:

- Enhance the capacities of the historically disadvantaged through the development and introduction of practical measures that support their advancement within the Public Service
- Inculcate in the Public Service a culture which values diversity and supports the affirmation of those who have previously been unfairly disadvantaged
- Speed up the achievement and progressive improvement of the numeric targets set out in the White Paper on the Transformation of the Public Service.

359. To achieve the objectives, affirmative action programmes will need to be developed and implemented in accordance with certain key principles in order to align them with other transformation goals. The core principles for affirmative action are:

- Integration with human resource management and development
- Productivity and improved service delivery
- Cost-effectiveness
- Communication – affirmative action policies and programmes must be fully communicated to all public servants
- Participation – affirmative action programmes must be developed with the active participation of employees at all levels and with representatives of organised labour
- Transparency
- Accountability – delivery of affirmative action must be vested at the highest level of the organisation

- Reasonable accommodation – for all members of the target group regarding physical and organisational environment
- Relative disadvantage – affirmative action must take into account the relative disadvantaged status of groups, their needs within the target group and the needs of the organisation

***Section 9(3) of the Constitution: unfair discrimination and grounds, including, inter alia, sexual orientation***

360. The Constitutional Court confirmed the decision of the High Court in **National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others (1999(1) SA 6 (CC))**. The Court held that the common law offence of sodomy was inconsistent with the 1996 Constitution and invalid. The court held, further, that the inclusion of the offence in section 20 A of the **Sexual Offences Act, 1957 (Act 23 of 1957)**; Schedule 1 to the **Criminal Procedure Act, 1977 (Act 51 of 1977)**; and schedule to the **Security Officers Act, 1987 (Act 92 of 1987)**, is consequently inconsistent with the Constitution.

361. **National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others 2000 (2) SA (CC)** cited under articles 2 and 3 of the African Charter in this report applies in this regard.

***Section 12(2) of the Constitution: right to bodily and psychological integrity, which includes the right to make decisions concerning reproduction***

362. **Christian Lawyers Association of SA and Others v Minister of Health and Others 1998(4) SA 1113 (T)**, wherein an order declaring the choice on **Termination of Pregnancy Act, 1996 (Act 92 of 1996)** was sought, applies in this regard (see this cited case under article 6 of the African Charter in this report).

***Section 14 of the Constitution: right to privacy, which includes the right not to be searched, seize property, or infringe on private communications***

363. **National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others (1999(1) SA 6 (CC))** referred to above, applies in this regard. The Court held that criminalisation of sodomy was a severe limitation of the gay man's rights to privacy, dignity and freedom.

***Section 22 of the Constitution: right of every citizen to choose their trade, occupation or profession freely. The practise of a trade, occupation or profession may be regulated by law***

364. Information contained under article 15 of the African Charter in this report is applicable in this regard, to an extent provided in section 22 of the Constitution.

***Section 23 of the Constitution: right of every worker to form and join a trade union***

365. The **Labour Relations Act, 1995** cited under article 15 of the African Charter in this report, applies in this regard. Furthermore, **South African National Defence Union v Minister of Defence and Another 1999(4) SA 469** cited under articles 10 and 11 of the African Charter in this report, applies in this regard.

***Section 26 of the Constitution: Right to housing***

### **Legislation and Policy**

366. Government's policies are guided by the Housing White Paper published in December 1994. The Department of Housing's National Housing Programme continues to emphasise the following:

- Priority for the needs of the poor
- Meeting the special housing needs of marginalised women and people with disabilities
- Ensuring sustainable housing and human settlements
- Achieving secure housing with secure tenure within a safe and healthy environment

### **Housing Consumer Protection Measures Act, 1998 (Act 95 of 1998)**

367. This Act establishes the National Home Builders Registration Council (NHBRC) with objects including the following:

- To represent the interests of housing consumers by providing warranty protection against defects in new homes
- To ensure an environment that promotes home owner and home builder empowerment

### **Rental Housing Act, 1999 (Act 50 of 1999)**

368. This Act furthers government's constitutional obligation to respect, protect, promote

and fulfill the right to adequate housing by:

- promoting access to adequate housing through the function of the housing rental market
- promoting the provision of housing rental markets
- establishing rental housing tribunals
- providing for the sound relations between landlords and tenants

### **Home Loan and Mortgage Disclosure Act, 2000 (Act 63 of 2000)**

369. This Act promotes fair lending practices, which requires disclosure by financial institutions of information regarding the provision of home loans, and establishes an Office of Disclosure. The Office is, *inter alia*, responsible for –

- making available to the public, information that indicates whether or not financial institutions are serving the housing credit needs of their communities, and rating such financial institutions in accordance with such information;
- assisting in identifying possible discriminatory lending patterns and assisting any statutory regulatory body in enforcing compliance with anti-discriminatory legislation; and
- report and make recommendations to the Minister regarding its scope of responsibility.

### **Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1998 (Act 19 of 1998).**

370. This Act provides for the following:

- Protection from illegal eviction
- Procedures to be followed by landowners to prevent unlawful occupation of land
- Repeal of the Prevention of Illegal Squatting Act, 1951, which was draconian.

371. Administrative steps taken under the National Housing Subsidising Scheme resulted in the completion or continuing construction of approximately 1 219 857 houses. Although the objective of a million houses in five years has not been achieved, delivery indicators demonstrate that considerable progress has been made.

### **Case law**

#### **Grootboom and Others v Government of the Republic of South Africa and Others 2001(1) SA 46 (CC)**

372. The respondents had been evicted from their informal homes situated on private land earmarked for formal low-cost housing. They applied to a High Court for an order requiring the government to provide them with adequate basic shelter or housing until they

obtained permanent accommodation. The High Court held that s 28(1)(c) of the **Constitution of the Republic of South Africa Act, 1996 (Act 108 of 1996)** obliged the State to provide rudimentary shelter to children and their parents on demand if the parents were unable to shelter their children, that this obligation existed independently of and in addition to the obligation to take reasonable legislative and other measures in terms of s 26 of the Constitution and that the State was bound to provide this rudimentary shelter irrespective of the availability of resources. The appellants were accordingly ordered by the High Court to provide the respondents who were children and their parents with shelter. The appellants appealed against this decision.

The Constitutional Court held that the question of how socio-economic rights were to be enforced was, however, a difficult issue which had to be carefully explored on a case-by-case basis considering the terms and context of the relevant constitutional provision and its application to the circumstances of the case. (Par [20] at 60A/B – 61A and 61C/D – E.)

*Held*, further, that interpreting a right in its context required the consideration of two types of context. On the one hand, rights had to be understood in their textual setting, which required a consideration of chapter 2 and the Constitution as a whole. On the other hand, rights also had to be understood in their social and historical context. The right to access to adequate housing could therefore not be seen in isolation but in the light of its close relationship with the other socio-economic rights, all read together in the setting of the Constitution as a whole. (Paragraphs [22] and [24] at 61H – 62/A/B and 62D.)

*Held*, further, that the State was obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing. The interconnectedness of the rights and the Constitution as a whole had to be taken into account in interpreting the socio-economic rights and, in particular, in determining whether the State had met its obligations in terms of them. (Paragraph [24] at 62D – E.)

*Held*, further, that the determination of a minimum obligation in the context of the right to have access to adequate housing presented difficult questions, because the needs were so diverse: some needed land; others, both land and houses; still others, financial assistance. The real question in terms of the Constitution was whether the measures taken by the State to realise the right afforded by s 26 was reasonable. (Paragraph [33] at 66A – B and 66B/C – C/D.)

*Held*, further, that for a person to have access to adequate housing there had to be the

provision of land, services (such as the provision of water, the removal of sewage and the financing of all these) and a dwelling. The right also suggested that it was not only the State who was responsible for the provision of houses, but that other agents within society had to be enabled by legislative and other measures to provide housing. The State therefore had to create the conditions for access to adequate housing for people at all economic levels of society. (Paragraph [35] at 67A – C.)

*Held*, further, that s 26 as a whole placed, at the very least, a negative obligation upon the State and all other entities and persons to desist from preventing or impairing the right of access to adequate housing. The manner in which the eviction in the present circumstances had been carried out had resulted in a breach of this obligation. (Paragraphs [34] and [88] at 66G/H and 841 – 85A.)

*Held*, further, that s 26(2) made it clear that the obligation imposed upon the State was not an absolute or unqualified one. The extent of the State's obligation was defined by three key elements which had to be considered separately: (a) the obligation to take reasonable legislative and other measures; (b) to achieve the progressive realisation of the right; and (c) within available resources. (Paragraph [38] at 67H – 1.)

*Held*, further, that there was an evident overlap between the rights created by ss 26 and 27 and those conferred on children by s 28.

*Held*, accordingly, that a declaratory order should be issued to substitute the High Court order stipulating that s 26(2) of the Constitution required the State to act to meet the obligation imposed upon it by the section to devise and implement a comprehensive and co-ordinated programme to progressively realise the right of access to adequate housing. This included the obligation to devise, fund, implement and supervise measures to provide relief to those in desperate need within its available resources. (Paragraph [96] at 86G/H – H.)

*Held*, further, that the case at hand brought home the harsh reality that the Constitution's promise of dignity and equality for all remained for many a distant dream. People should, however, not be impelled by intolerable living conditions to resort to land invasions. Self-help of this kind could not be tolerated, for the unavailability of land suitable for housing development was a key factor in the fight against the country's housing shortage. The judgment of the Court was not to be understood as approving any practice of land invasion for the purpose of coercing the State into providing housing on a preferential basis to those

who participate in any exercise of this kind. Land invasion was inimical to the systematic provision of adequate housing on a planned basis. (Paragraphs [2] and [92] at 53D/E – E/F and 85J – 86A/B.)

The decision in the Cape Provincial Division in **Grootboom v Oostenberg Municipality and Others 2000 (3) BCLR 277** reversed in part.

***Section 27(1)(b) of the Constitution: right to have access to sufficient food and water***

**Legislation and Policy**

**Agricultural Laws Rationalisation Act, 1998 (Act 72 of 1998)**

373. This Act provides for the rationalisation of certain laws relating to agricultural affairs that remained in force in areas which comprised the former Republics of Transkei, Bophuthatswana, Venda and Ciskei and areas which comprised the self-governing territories within the national territory of the Republic of South Africa. The main purpose of this Act is to have one set of national agricultural laws to ensure focus on delivery by the present national Department of Agriculture.

**Agricultural Debt Management Act, 2001 (Act 45 of 2001)**

374. The Act establishes the Agricultural Debt Account to be used as a mechanism to manage agricultural debt repayment; provides for collection and writing off of debt; and registration of bonds and property. In the main the Act provides for management of agricultural debt mechanisms, which take into account the need to deliver adequate food.

375. **Meat Safety Act, 2000 (Act 40 of 2000)** provides for measures to promote meat safety and safety of animal products.

376. **National Water Amendment Act, 1999 (Act 45 of 1999)** amends the **National Water Act, 1998**, so as to effect textual improvements; and change the procedure for the appointment of members of the Water Tribunal.

377. The Department of Agriculture is doing research with a view to developing an Integrated Food Security Strategy for South Africa, and once completed and approved by Cabinet, it will be translated into government policy.

**Case law**

378. In **Grootboom and Others v Government of the Republic of South Africa and Others** discussed above, the Constitutional Court held that the right to housing under consideration by it, overlaps with rights contained in Section 27, namely the right to food and water. Therefore, the judgment of the Court would apply to a case(s) regarding section 27(1)(b).

***Section 27(1)(c) of the Constitution: right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance***

### **Legislation and Policy**

#### **Social Assistance Act, 1992 (Act 59 of 1992)**

379. This Act provides, with the approval of the Director-General of the National Department of Social Development, grants to the following persons and institutions:

- Aged and disabled persons and war veterans (social grant)
- Primary care-giver of a child who is under the age of seven years or such higher age as the Minister may determine by notice in the Gazette (child-support grant)
- Foster parent (foster child grant)
- Prescribed institutions, including places of safety, capitation grants for the care of persons admitted to such an institution or place of safety in terms of an order of court or with the approval of the Director-General.

### **Case law**

380. The **Grootboom case** would apply to the above section 27(1)(c) right as well.

***Section 33 of the Constitution: right to just administrative action***

### **Legislation and Policy**

#### **Promotion of Administrative Justice Act, 2000 (Act 3 of 2000)**

381. The main purpose of this Act is to give effect to the right to administrative action that is lawful, reasonable and procedurally fair and the right to written reasons for administrative action as contemplated in section 33 of the Constitution.

382. Administrative action means any decision taken, or any failure to take a decision by an organ of State, or a natural or juristic person when exercising a prescribed act. An administrative action, which materially and adversely affects the rights or legitimate expectations of any person, must be procedurally fair. Any person whose rights have been

materially and adversely affected by such action is, upon request within a prescribed period, entitled to be furnished with reasons thereof. Any person may institute proceedings in a court or a tribunal for judicial review of an administrative action.

383. The court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable, including orders –

- directing the administrator –
  - i. to give reasons; or
  - ii. to act in the manner the court or tribunal requires;
- prohibiting the administrator from acting in a particular manner;
- setting aside the administrative action and –
  - i. remitting the matter for reconsideration by the administrator, with or without directions; or
  - ii. in exceptional cases –
    - (aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or
    - (bb) directing the administrator or any other party to the proceedings to pay compensation;
- declaring the rights of the parties in respect of any matter to which the administrative action relates; or
- granting a temporary interdict or other temporary relief.

### **Case Law**

384. **Janse van Rensburg NO v Minister of Trade and Industry 2001(1) SA 29(CC).** The validity of Section 8(5)(a) of the Consumer Affairs (Unfair Business Practices) Act 71 of 1988 (formerly the Harmful Business Practice Act) empowering the Minister of Trade and Industry, on recommendation of the Consumer Affairs Committee, (i) to stay or prevent, for a period not exceeding six months, any unfair business practice which is the subject of an investigation under the Act; and (ii) to attach any money or property relating to such investigation, was an issue before a High Court. The High Court declared that s 8(5)(a) violated ss 22, 25 and 33 of the Constitution.

The Constitutional Court held that the above powers were sweeping and drastic and the Minister was not required to specify reasons for taking action. The Legislature is under constitutional obligation to promote, protect and fulfill rights entrenched in the Bill of Rights. Guidance therefore is to be provided concerning the manner in which such powers are to be exercised when wide powers are conferred upon a functionary.

The Court held, further, that the absence of guidance and the cumulative effect of the features of s 8(5)(2) rendered the procedure provided for in s 8(5)(e) unfair and a violation of any protection afforded by s 33(1) of the Constitution, whichever text was applicable. The order of constitutional invalidity made by the High Court was accordingly confirmed.

385. **Permanent Secretary, Department of Education and Welfare, Eastern Cape and Another v Ed-U-College (PE) (section 21) Inc** 2001 SA (2)1 (CC). This case was an application for leave to appeal against a judgment in the Local Division, in which it was held that the determination of the subsidies allocated to individual independent schools by a provincial MEC for Education in the exercise of his discretion under s 48(2) of the **South African Schools Act, 1996 (Act 84 of 1996)**, does not amount to legislative action but rather to administrative action as intended in s 33 of the Constitution. The Court concluded that the determination of the subsidies to be awarded was a justiciable matter over which the High Court had jurisdiction. An appeal to the Constitutional Court was made, contending that the Court had erred in not finding that the allocation of money to independent schools was a matter of policy in respect of which the Court lacked jurisdiction.

386. The Constitutional Court held that the allocation of the amount of approximately R5,45 billion to education clearly constituted legislative action and not administrative action as contemplated by s 33 of the Constitution. Furthermore, the estimates determined and set out in the memorandum constituted part of the legislative process and as such were mere administrative action as contemplated by s 33 of the Constitution.

## **DIFFICULTIES ENCOUNTERED IN IMPLEMENTING THE AFRICAN CHARTER IN GENERAL OR ANY OF THE RIGHTS GUARANTEED THEREUNDER HAVING REGARD TO THE POLITICAL, ECONOMIC OR SOCIAL CIRCUMSTANCES OF THE STATE**

### ***Articles 2 and 3***

387. The **Promotion of Equality and Prevention of Unfair Discrimination Act, 2000** is the framework for the implementation of the right to equality. Although advances have been made there are still some barriers at various levels of society. In the public sector there is significant transformation with a view to attaining equality. However, areas such as the judiciary still needs more work. While the problem relates to perceptions, government is operating on a thin financial line, especially on the issue of extending the right to equality

to previously disadvantaged groups. The private sector remains a thorny issue regarding the implementation of the right to equality. Despite the promulgation of legislation such as the Employment Equity Act, 1998, which provides for equality at the workplace, including affirmative action, there are still racial disparities. Blacks still occupy, on a large scale, unskilled jobs. The argument of the private sector is that this is as a result of lack of skills on the part of Blacks, and not that there is unwillingness to give Blacks skilled jobs. In the end training becomes a paramount need to address this problem. Financial constraints are yet another problem in this regard.

388. Although courts are addressing issues of inequality at all levels of society, perceptions and stereotypes, both between racial and ethnic groups, remain a barrier for attainment of a united South African nation, with a common vision and allegiance.

#### **Article 5**

389. Section 35(2)(e) of the Constitution provides that everyone who is detained, including every sentenced prisoner, has the right to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at State expense, of adequate accommodation, nutrition, reading material and medical treatment.

390. The **Correctional Services Act, 1998 (Act 111 of 1998)** is a framework for treatment of prisoners and conditions under which they live. Although there are advancements regarding treatment of prisoners pursuant to the above Act, conditions under which they live remain appalling. Partly this is because of overcrowding and lack of financial resources on the part of government. As discussed above, the Integrated Justice System is addressing the issue of overcrowding regarding awaiting-trial and convicted prisoners.

#### **Article 7**

391. Although it is, like in other African States, difficult to align traditional courts with common law courts, the South African Law Commission has developed a discussion paper, with recommendations including the following:

- Traditional courts should continue to exist.
- They should continue to be presided over by chiefs and headmen.
- The traditional element of popular participation, whereby every adult was allowed to question litigants and give his opinion on the case, should be maintained.
- To comply with section 9 of the Constitution (right to equality) the full participation of women members of the community as councilors or presiding adjudicators must be

allowed.

- Traditional courts should be regarded as courts of law and given the status and respect of courts of law.
- Jurisdiction on traditional courts in respect of persons, should no longer be based on race or colour, but on matters such as residence, proximity, nature of transaction or subject matters and the law applicable.
- The application of customary law should no longer be subject to the 'repugnancy clause'. This requirement should be replaced by one requiring consistency with the Constitution, in particular, with the values underlying the Bill of Rights.
- Matters relating to nullity, divorce and separation with regard to civil marriages should continue to be excluded from the jurisdiction of traditional courts. Such cases should be taken to a family court.
- A monetary ceiling on jurisdiction in civil matters should be improved.
- If traditional courts are to continue to exercise criminal jurisdiction, only relatively minor offences should be within their jurisdiction.
- Traditional courts need to be alerted that corporal punishment is unconstitutional and therefore illegal.
- Formal rules of procedure and evidence should not be imposed on traditional courts, as the customary procedure is generally compatible with rules of natural justice.
- Proposed paralegal clerks of traditional courts should make summaries of evidence and judgments that can subsequently be relied upon on appeal or review.

392. Although the above recommendations aim at aligning traditional courts and common law courts and the Constitution to a certain extent, what remains is public support thereof, especially support of traditional leaders who seem to have strong feelings on wide jurisdictional powers.

### **Article 18(3)**

393. Major problems regarding the implementation of the **Maintenance Act, 1998 (Act 99 of 1998)** are as follows:

- Implementation of the sections of the Act relating to the appointment of maintenance investigators. The Department of Justice and Constitutional Development, assisted by the Swiss Agency for Development and Cooperation (SDC), commissioned Cornerstone Economic Research to conduct a study on the demand for maintenance investigators, professed action of maintenance investigators, methods of paying maintenance investigators, developing a policy on the appointment of maintenance investigators and costing the appointments of

maintenance investigators. A report is due during 2002.

- Appointment of properly qualified maintenance officers. This will be done once the report on appointment of maintenance investigators has been completed.
- Training of both maintenance officers and maintenance investigators to be conducted after appointment referred to above.

### **Article 28**

394. Problems regarding the duty to respect fellow human beings, in particular non-violation of one's right to life without discrimination prevalent in the Northern Province (now Limpopo Province), with specific reference to witch-hunting and ritual murders, sparked various responses.

395. Following the appointment and findings of Prof N V Ralushai: Commission of Inquiries into Witchcraft, Violence and Ritual Murders (Ralushai Commission) in the Northern Province, a National and Regional (Limpopo Province) Conference was held. These Conferences were amongst the recommendations of the Commission. Significant recommendations of the Commission include the following:

- Traditional healers should emphasise the curative and preventive aspect of medicine, instead of pointing out so-called 'witches'.
- Ritual murders and senseless witch-hunts should be prosecuted.
- Need for appropriate legislation for the control of Traditional Healers.

396. The National Conference, convened by the Commission on Gender Equality was held from 6 – 10 September 1998. The Conference adopted the Thohoyandou Declaration on Ending Witchcraft Violence, which captures conclusions of the Conference. The Declaration recommends the adoption of a National Action Plan for Eradicating Witchcraft Violence, including the following key components:

- Declaring the Eradication of Witchcraft Violence a National Priority
- Economic empowerment of women
- Strengthening the response by the South African Police Service
- Legislative reform
- Victim Support
- Reintegration and Reconciliation
- Public Education
- Monitoring and Evaluation

397. Conclusions of the Conference on **Legislative Reform of Witchcraft Suppression Act, 1957 (Act 3 of 1957)**, held during November 1999 are as follows:

- A committee should be appointed to co-ordinate research on witchcraft and review the **Witchcraft Suppression Act, 1957**. It is noted that criminalisation of belief in witchcraft by the above legislation is inconsistent with section 9(3) of the Constitution, including section 15, which provides for the right to equality without unfair discrimination on, *inter alia*, ground of belief and right to freedom of belief respectively. Witchcraft exists and there are those who believe in it, what is critical is how to deal with perpetrators. This matter is to be dealt with in an appropriate manner that will not jettison traditional values and beliefs, especially the trade of traditional healers proper.
- Although witchcraft violence mainly occurs in the Limpopo Province, it is not just a regional problem. The other provinces should be invited to participate in the process.

#### **Article 25**

398. Public awareness on the Charter was raised during the preparations of the 31<sup>st</sup> Ordinary Session of the African Commission hosted in South Africa. Channel Africa and other media were used for interviews around the African Charter.

#### **Article 17**

399. The South African Law Commission has developed discussion papers on the harmonisation of common law and customary law, which for the purposes of the Charter will promote and protect morals and traditional values of a community. The discussion papers include the following:

- Customary marriages. The work of the South African Law Commission resulted in the passing of the **Recognition of Customary Marriages Act, 1998**, discussed above.
- Conflicts of law. **Application of Customary Law Bill** was developed in this regard.
- Judicial powers of traditional leaders. This process is still continuing with a view to developing appropriate legislation.
- Administration of estates. This process is still continuing with a view to developing appropriate legislation.

#### **Article 22**

400. Despite all efforts by government to alleviate the level of development of previously disadvantaged groups, as discussed under articles 15 – 17 of this report regarding socio, economic and cultural process, and article 13 regarding the political process, there are still developmental disparities between Whites who benefited from the

previous white government and Blacks who were marginalised. There is an ongoing process to deal with this legacy of the past. Land redistribution, which is seen as a good foundation for dealing with this problem, is a delicate and critical issue in South Africa. While government has the will to deal with this problem of land, it is very cautious, taking into account its primary goal of building a united and non-racial nation. Added to this are financial constraints on the part of government, especially money to compensate white farmers who are willing to offer their farms for sale.

## **CHAPTER 4**

### **MEASURES TAKEN BY SOUTH AFRICA TO PROMOTE AND ENSURE THE RESPECT OF HUMAN RIGHTS THROUGH TEACHING, EDUCATION AND PUBLICATION IN ACCORDANCE WITH ARTICLE 25 OF THE CHARTER**

#### **Department of Education**

##### ***Building a culture of human rights***

401. In order to address this issue, the Department of Education –

- works with the South African Human Rights Commission to promote human rights in schools through a Human Rights Week every year;
- conducts an annual human rights essay competition;
- compiles the document: South African Schools Act Made Easy – which will be published as a supplement in all major newspapers to inform citizens of their right to school education;
- drafts a memorandum on children's right to education;
- publishes a guide for educators to protect the rights of learners;
- addresses violence against women in an educational context;
- promotes gender equity in schools among educators and learners;
- makes every effort to educate people about HIV/AIDS;
- supports the Gender Equity Task Team; and
- draws up a national policy on HIV/AIDS for schools in conjunction with the SA Law Commission.

402. The Department has also developed Curriculum 2005, which provides for eight learning areas, two of which are human and social sciences and life orientation. These two learning areas specifically make provision for human rights education.

#### **Government Communications Information Services (GCIS)**

### **The Multi-Purpose Community Centres (MPCCs)**

403. The GCIS is co-ordinating the establishment of MPCCs in all provinces. These centres are situated in rural and semi-urban areas with the aim of connecting the less privileged to the information superhighway and satisfying their information needs. Community members can access the Information and Communication Technologies free of charge and download from the Internet, utilise e-mail and get useful documents like birth registration forms, etc., online. At least six information officers or representatives of different departments per MPCC should be available on a permanent basis to assist the communities and oversee the smooth running of these centres.

### **The Employment and Skills Development Programme**

404. The Employment and Skills Development Programme aims to promote and regulate the National Skills Development Strategy in terms of the **Skills Development Act, 1998 (Act 97 of 1998)**. The National Skills Development Strategy was launched in February 2001 in order to develop a culture of lifelong learning, foster skills development in the formal economy for productivity and employment growth, stimulate and support skills development in small, micro and medium enterprises, promote opportunities for skills acquisitions in economic development initiatives and assist new entrants with employment in the labour market. The National Skills Development Strategy is aligned to the Human Resource Development Strategy of the Government.

#### **Sub-programme Skills Development Planning**

405. The functions of this Sub-programme are to:

- research and analyse the labour market in order to determine skills development needs for South Africa as a whole, each sector of the economy and organs of State;
- assist in the formulation of the National Skills Development Strategy and sector skills plans; and
- provide information on skills to the Minister, the National Skills Authority, Sector Education and Training Authorities (SETAs, education and training providers and organs of State).

#### **Sub-programme Skills Development Funding**

406. The functions of this Sub-programme are:

- The management of the funding mechanisms for training programmes based on a system of entering into training contracts with acceptable training providers delivering training against specific outcomes
- Assisting and facilitating sectors to improve their level and quality of training for

skills development in job creation schemes

- Identifying target groups.

407. The National Skills Fund is a fund established by Section 27(1) of the Skills Development Act, 1998, for the purpose of funding:

- Projects identified in the National Skills Development Strategy as national priorities
- Other projects related to the achievement of the purpose of the skills
- Development as the Director-General determines
- Projects that address Government's Human Resource Development Strategy.

### ***Department of Labour***

408. In order to address unemployment in the country, the Department of Labour has instituted various instruments, strategies and programmes.

### ***The National Skills Development Strategy***

409. This strategy was launched in February 2001 in order to develop a culture of lifelong learning, foster skills development in the formal economy for productivity and employment growth, stimulate and support skills development in small, micro and medium enterprises, promote opportunities for skills acquisitions in economic development initiatives and assist new entrants with employment in the labour market. The National Skills Development Strategy is aligned to the Human Resource Development Strategy of the Government.

### ***Sub-programme Skills Developing Planning***

410. The functions of this Sub-programme are to:

- research and analyse the labour market in order to determine skills development needs for South Africa as a whole, each sector of the economy and organs of State;
- assist in the formulation of the National Skills Development Strategy and sector skills plans; and
- provide information on skills to the Minister, the National Skills Authority, Sector Education and Training Authorities (SETAs, education and training providers and organs of State).

### ***Sub-programme Skills Development Funding***

411. The functions of this Sub-programme are:

- The management of the funding mechanisms for training programmes based on a system of entering into training contracts with acceptable training providers delivering training against specific outcomes

- Assisting and facilitating sectors to improve their level and quality of training for skills development in job creation schemes
- Identifying target groups.

412. The National Skills Fund is a fund established by Section 27(1) of the Skills Development Act, 1998, for the purpose of funding:

- Projects identified in the National Skills Development Strategy as national priorities
- Other projects related to the achievement of the purpose of the skills development as the Director-General determines
- Projects that address Government's Human Resource Development Strategy.

413. In order to achieve the objectives of the NSDS, funds from the National Skills Fund will be disbursed through Department of Labour Provincial Offices, Sector Education and Training Authorities and directly from Head Office for the training of unemployed, under-employed, employed and self-employed.

#### ***Sub-programme Employment Services***

414. This Sub-programme's functions are in accord with the relevant Conventions of the International Labour Organisation (ILO) championing free labour market services to the citizens of countries endorsing the same principles.

415. This programme endeavours to assist the unemployed and employers with active labour market programmes such as recruitment, psychometric assessment, selection, employment counseling, skills development (both technical and life skills) and placement and after-care services. Target groups are the long-term and short-term unemployed, the youth, people with disabilities and women, as well as retrenched and those wishing to enter the informal sector. Special efforts are made to develop employment support programmes for the previously disadvantaged groups (youth, women, people with disabilities). The programme is also looking at forming public-private partnerships in order to outsource its services and in this manner to increase service delivery and improve impact. Regulations will be drafted for private employment agencies rendering these services to the unemployed. In summary, the objectives of the Sub-programme are the following:

- To assist employers to find the best workers for their vacancies through best-match practices
- To assist the unemployed to find training opportunities and suitable income-generating opportunities

- To enhance employment and employability through employment support programmes
- To manage the Social Plan Programme of Government agreed to by the Jobs Summit by all stakeholders; to develop provincial skills plans in order to co-ordinate skills development of the unemployed, according to demands in the labour market.

## **CHAPTER 5**

### **AS A SIGNATORY PARTY, HOW FAR THE STATE USES THE CHARTER IN ITS RELATIONS WITH OTHER STATE PARTIES OR OTHER SUBJECTS OF INTERNATIONAL LAW**

#### **Southern African Development COMMUNITY (SADC)**

416. Although there is no SADC human rights instrument(s), the Charter remains the blueprint of human and peoples' rights for SADC States.

417. The Legal Sector of SADC, at which South Africa is represented, is guided by the Charter in negotiating instruments, which have bearing on human rights. This is the case regarding instruments of other sectors, which are to be edited by the Legal Sector.

418. SADC, at a political level, has been vocal on various human rights issues, which are a plight for SADC, such as poverty, peace, stability and security. To mention but a few, SADC Heads of State have condemned violations of human rights in Angola, the DRC and Burundi; and have made efforts to broker peace and respect for human rights in these States. Lately, Heads of State expressed their grave concerns against violations of human rights, especially rights to property and life in Zimbabwe during the build-up to the general elections. President Mbeki has added his voice separately on the Zimbabwe conflict.

#### **African Unity (AU)**

419. South Africa participated in the first Organisation of African Unity (OAU) Ministerial Conference on Human Rights held in Grand Bay, Mauritius in April 1999. The Grand Bay (Mauritius) Declaration and Plan of Action was adopted.

420. South Africa, as a member of the OAU, has contributed immensely to the establishment of the African Union (AU), which replaces the OAU. South Africa is to become the first chair of the AU subsequent to the inauguration of the AU scheduled to take place in South Africa during 2002.

421. The OAU/AU Heads of States have expressed their concerns, at various fora, on poverty, conflict and violation of human rights on the African continent. These concerns are underscored by the restructuring of the OAU and birth of the AU in Loma, Togo on 12 June 2000. The objectives of the AU have been indicated above.

### **New Partnership for Africa Development (NEPAD)**

422. South Africa has played a major role in the development of NEPAD (discussed above) and is Secretariat of NEPAD. NEPAD is the blueprint of the AU aimed at addressing human rights issues provided for in the African Charter, especially the implementation of socio-economic and cultural rights. Conditions for accessing financial and other resources from strategic donor countries and organisations touch on the implementation of political rights, which include democracy and good governance.

### **African Court on Human and Peoples' Rights**

423. South Africa as major role-player regarding the elaboration and adoption of the Protocol establishing the African Court on Human and Peoples' Rights, is considering ratification of the said Protocol.

### **Non-aligned movement (NAM)**

424. South Africa as chair of the NAM used the African Charter as guiding instrument regarding meetings and instruments of NAM.

### **United Nations (UN)**

425. South Africa hosted its first National Conference against Racism in August/September 2000. To underscore the importance of the African Charter, the South African Millennium Statement on Racism and Programme of Action was adopted, which includes the taking of immediate steps to ratify the Protocol to the African Charter on the establishment of the African Court on Human and Peoples' Rights.

426. The objectives of the above Conference were, *inter alia*, preparations for the UN Third World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance held in South Africa in August/September 2001. During the preparatory meetings and regional meetings, in particular the African regional seminar, the African Charter was used to negotiate positions on some issues, which have African value content. The African Group had a common position on reparations/compensation for slavery and colonialism, which resulted in the plunder of land, resources and values of Africa. Although the expected outcome was not attained, the plight of Africa has been recorded, including a need for multi-pronged strategy to deal with the poverty caused by slavery and colonialism. NEPAD is used as one of the strategies.

### **National Action Plan**

427. The National Action Plan (NAP) was presented to the UN on 10 December 1998, which marked the 50<sup>th</sup> anniversary of the Universal Declaration of Human Rights. Subsequently, a National Consultative Forum on Human Rights (NCFHR) was established by Cabinet. The NCFHR is a body responsible for coordinating all human rights issues in South Africa, including those pertaining to the African Charter. The Ministry for Justice and Constitutional Development, as leader on human rights, is the convener of the NCFHR. A Secretariat led by a project manager at the level of a Director is the technical arm of the NCFHR.

428. Terms of reference of the Secretariat include coordination of ratification of outstanding human rights instruments, report writing and implementation of human rights. Public awareness campaigns are another important term of reference. The Finland government has donated money towards the work of the Secretariat, in particular the development of a first national report on the NAP. The Department of Justice and Constitutional Development, in which the Secretariat is located, is to create posts of the Secretariat and budget for that as a permanent arrangement.

## CONCLUSION

429. The presentation, to the African Commission on Human and Peoples' Rights, of the first Periodic Report of the South African Government marks the consolidation of our democracy since the dismantling of the oppressive apartheid regime on 27 April 1994. We owe this to the founding fathers of the Organisation of African Unity, now known as the African Union, as well as peoples of the African continent. We also pay homage to the United Nations, which has played a significant role in our struggle for democracy, including our allies.

430. The South African government has delivered three pieces of legislation which underscore the consolidation of our democracy, namely the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act 4 of 2000); Promotion of Access to Information Act, 2000 (Act 2 of 2000); and Promotion of Administrative Justice Act, 2000 (Act 3 of 2000). These pieces of legislation serve as frameworks for building a democratic non-racial nation; and an accountable and transparent government. Apart from government, accountability and transparency permeate all levels of society to an extent provided by relevant legislation.

431. South Africa has sound legislative frameworks and policies, which are the basis for promotion and protection of civil and political rights; social, economic and cultural rights; and right to development. Of importance, these legislative frameworks and policies seek to improve social and economic conditions of the past disadvantaged groups, namely Blacks, women and disabled persons. These groups have lived and continue to live under conditions of abject poverty, while the majority of Whites are well off.

432. The South African government is also faced with other challenges, such as the high level of crime, in particular sexual violence crimes against women, children and elderly persons. However, this does not suggest that South Africa is the world capital of crime as perceived by the media. Statistics have shown that there is even a higher level of crime in some developed countries than is the case in South Africa. South Africa has an Integrated Justice System (IJS), which is constantly addressing this scourge. HIV/AIDS, tuberculosis and malaria are other social ills that are being dealt with despite the limited human and financial resources.

433. South Africa has played a meaningful role regarding the promotion and protection of human rights on the African continent through, *inter alia*, the guidance of the African Charter on Human and Peoples' Rights. Without peace and stability on the African

continent, there cannot be justice, in particular full enjoyment of fundamental human and peoples' rights. South Africa has been party to the regional effort to end the conflict in the Great Lakes region and other parts of Africa. We also participated actively in the transformation of the Organisation of African Unity. The birth of the African Union in Lome, Togo on 12 June 2000 marks a turning point on the African continent, in particular it marks the social and economic renewal of Africa. The New Partnership for Africa Development (NEPAD), in which South Africa serves as Secretariat, is the vehicle of such social and economic renewal of Africa. South Africa has made tremendous contributions in marketing NEPAD in the United Nations, European Union and other developed countries.

434. In conclusion, South Africa views its success in the promotion and protection of human and peoples' rights as dependent on the success of the African continent and the world in general. However, South Africa is committed to making its individual effort to better the lives of its peoples so that they can have meaningful enjoyment of these rights.