



**REPUBLIC OF SOUTH AFRICA**

**COMBINED**

**SECOND PERIODIC REPORT UNDER THE AFRICAN CHARTER ON HUMAN AND PEOPLE'S RIGHTS**

**and**

**INITIAL REPORT UNDER THE PROTOCOL TO THE AFRICAN CHARTER ON THE RIGHTS OF WOMEN IN  
AFRICA**

**August 2015**

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## ABBREVIATIONS AND ACRONYMS

<b>ACHPR</b>	African Charter on Human and Peoples' Rights
<b>ACTT</b>	Anti-Corruption Task Team
<b>ACIMC</b>	Anti-Corruption Inter-Ministerial Committee
<b>AFU</b>	Asset Forfeiture Unit
<b>ACIMC</b>	Anti-Corruption Inter-Ministerial Committee
<b>ARVs</b>	Anti-retrovirals
<b>BRICS</b>	The association of five major emerging national economies: Brazil, Russia, India, China and South Africa.
<b>CJS</b>	Criminal Justice System
<b>DAC</b>	Department of Arts and Culture
<b>DAFF</b>	Department of Agriculture, Forestry and Fisheries
<b>DCS</b>	Department of Correctional Services
<b>DG</b>	Director-General
<b>DIRCO</b>	Department of International Relations and Cooperation
<b>DOH</b>	Department of Health
<b>DoJ&amp;CD</b>	Department of Justice and Constitutional Development
<b>DPCI</b>	Directorate for Priority Crime Investigation (also known as the Hawks)
<b>DSD</b>	Department of Social Development
<b>JCPS</b>	Justice Crime Prevention and Security Cluster
<b>IJS</b>	Integrated Justice System
<b>IMC</b>	Inter-Ministerial Committee
<b>LGBTI</b>	Lesbian, Gay, Bisexual, Transgender and Intersex persons
<b>MMR</b>	Maternal mortality rate
<b>MOU</b>	Memorandum of Understanding
<b>NDP</b>	National Development Plan
<b>NPA</b>	National Prosecuting Authority
<b>OECD</b>	Organisation for Economic Co-operation and Development
<b>ORP</b>	Offender Rehabilitation Path

<b>PAIA</b>	Promotion of Access to Information Act, 2000 (Act No.2 of 2000)
<b>PCJF</b>	Provincial Child Justice Forums
<b>POCA</b>	Prevention of Organised Crime Act, 1998, (Act No. 129 of 1998)
<b>RDs</b>	Remand Detainees (also known as persons incarcerated while awaiting trial)
<b>SAHRC</b>	South African Human Rights Commission
<b>SAPS</b>	South African Police Service
<b>SADC</b>	The Southern African Development Community
<b>TTC</b>	Thuthuzela Care Centre
<b>TOC</b>	Transnational Organised Crime
<b>WCAR</b>	World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance

## DEFINITIONS

**Green Paper** This is the government's initial draft document on a specific policy area, circulated among interested parties who are invited to join in a process of consultation and debate. The objective of a Green Paper is to arrive at a general consensus before drafting the official policy document, the white paper.

**Imbizo/Lekgotla** Traditionally this would refer to a public meeting, community council or traditional law court, usually referred to as a customary court. It is usually headed by the village chief or headman, and community decisions are always arrived at by consensus. Currently it refers to any public meeting, called by government, to discuss strategy planning and/or information sharing.

**White Paper** White Papers aim to enhance public participation and are used as a means of presenting government policy preferences, prior to the introduction of legislation, and as such, the publication of a White Paper serves to test the climate of public opinion regarding a particular controversial policy issue and enables the government to gauge its probable impact.



## **PART A: THE CHARTER**

### **INTRODUCTION**

1. South Africa signed and ratified the African Charter on Human and Peoples' Rights on 9 July 1996. Pursuant to article 62 of the Charter, South Africa presented its initial report<sup>1</sup> in 1999 during the 25<sup>th</sup> Ordinary Session of the African Commission on Human and Peoples' Rights in Bujumbura, Burundi.
2. South Africa presented its first periodic report<sup>2</sup> in 2005 during the Commission's 38<sup>th</sup> Ordinary Session in Banjul, Gambia.
3. The present report is the second periodic report, combining its third, fourth, fifth and sixth reports. It captures developments within South Africa on the realization of the rights guaranteed by the Charter from 2002 to the end of 2013, and responses to the Concluding Observations adopted by the African Commission in December 2005.
4. In preparing this merged report, the views of national institutions on human rights and civil society organisations have been solicited and incorporated where appropriate.
5. It is recognized that this report is overdue. The dawn of our democracy and the advent of a constitutional dispensation have brought with it many demands in terms of re-building our country, establishing new institutions to support democracy and passing new legislation. It also brought about significant international treaty and reporting obligations.
6. South Africa acceded to and/or ratified many basic human rights instruments after the advent of democracy in 1994 and subsequently this resulted in various accompanying obligations to be complied with, such as putting in place laws and administrative measures in order to comply with such instruments and to enable the writing of country reports in particular. This happened at the time when our government was setting up various institutions.
7. While acknowledging the delay in preparing and submitting the current report, Government has committed itself to deal with the backlog of reports under the United Nations Human Rights Charter and Treaty Systems and African Human Rights Systems and has put in place various reporting and monitoring mechanisms. An Inter-departmental Committee has been established to ensure enhanced compliance with treaty and reporting obligations.
8. Because of our history South Africa has a firm commitment towards the protection and promotion of human rights, not only within the country, but also on our continent and the world over. It is of particular importance to South Africa that it plays an active role in the promotion of global human rights. This is confirmed by the central objective of our foreign policy which is aimed at creating a better South Africa in a better Africa and a better and safer

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<sup>1</sup> 1996 - 1998

<sup>2</sup> 1999 - 2001

world. Our dedication to the promotion of human rights is entrenched in our Constitution, in the Bill of Rights, and informs our commitment to promoting peace, justice, human rights and the rule of law.

9. Government is committed to the advancement of the rule of law in order to ensure the realisation of the rights enshrined in the Constitution. Our courts ensure the nurturing of South Africa's founding values such as human dignity, equality and supremacy of the Constitution.
10. South Africa has made significant progress in the protection and promotion of civil and political rights as well as economic and social rights over the years since the presentation of our first periodic country report on African Charter.
11. Various legislative, policy and other measures have been implemented to ensure the substantive realisation of civil and political rights as well as socio-economic and cultural rights. In addition, our courts continue to deliver judgments and develop case law to enhance and protect these rights and to provide guidance on the interpretation of these rights.
12. Since the first periodic report, the population of South Africa has increased from 45,8 million in 2002 to 53 million in 2013<sup>3</sup> and 53,7 million in 2014.<sup>4</sup>

Province	Total population (Thousands)											
	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
WC	4 851	4 951	5 051	5 153	5 256	5 360	5 466	5 573	5 682	5 792	5 904	6 017
EC	6 290	6 316	6 343	6 371	6 400	6 431	6 460	6 491	6 522	6 554	6 586	6 620
NC	1 056	1 066	1 075	1 085	1 095	1 105	1 114	1 124	1 134	1 143	1 153	1 163
FS	2 724	2 725	2 726	2 728	2 729	2 732	2 735	2 737	2 740	2 744	2 749	2 753
KZN	9 326	9 420	9 517	9 616	9 715	9 816	9 918	10 023	10 129	10 237	10 346	10 457
NW	3 101	3 141	3 182	3 223	3 266	3 310	3 355	3 401	3 448	3 497	3 547	3 598
GP	10 048	10 273	10 501	10 731	10 965	11 202	11 446	11 694	11 946	12 202	12 464	12 728
MP	3 560	3 610	3 661	3 711	3 762	3 814	3 866	3 917	3 970	4 022	4 075	4 128
LP	4 852	4 907	4 964	5 022	5 081	5 141	5 201	5 262	5 325	5 388	5 452	5 518
RSA	45 809	46 409	47 020	47 640	48 270	48 910	49 561	50 223	50 896	51 580	52 275	52 982

## SPECIFIC ASPECTS OF THE REPORT PURSUANT TO THE REPORTING GUIDELINES

### CHAPTER 1: CIVIL AND POLITICAL RIGHTS

#### Articles 2 and 3: Prohibition of discrimination and the Right to Equality

<sup>3</sup> General Household Survey 2013

<sup>4</sup> General Household Survey 2013

13. The right to equality and to be protected from discrimination features prominently in our Constitution.<sup>5</sup> South Africa has enacted various pieces of legislation to rule out discrimination and ensure equality across a variety of areas, e.g. with regards to combating employment discrimination, there is the Employment Equity Act, 1998.<sup>6</sup> During the period under review, the Civil Unions Act, 2006<sup>7</sup> was enacted to legalise same-sex marriage and prevent discrimination on the basis of sexual orientation. The objectives of this Act are to regulate the solemnisation and registration of civil unions, by way of either a marriage or a civil partnership and to provide for the legal consequences of the solemnisation and registration of civil unions.
14. Discrimination is a particular form of differentiation - it is differentiation on illegitimate grounds. Section 9 of the Constitution is an equality clause, which prohibits unfair discrimination on certain "listed grounds". This means that discrimination on the basis of one of the grounds listed in s 9(3) is presumed to be unfair discrimination, until the contrary is proved. There is accordingly a presumption that differentiation on the listed grounds will impose burdens on those who have been victims of past patterns of discrimination or will impair the fundamental dignity of those affected. The listed grounds are race, colour, ethnic origin, gender, sex, pregnancy, sexual orientation, marital status, age, disability, religion, conscience and belief, culture and language, birth and social origin.

### Equality Courts

15. The Promotion of Equality and Prevention of Unfair Discrimination Act, 2000<sup>8</sup> provides for the framework for the implementation of section 9 of the Constitution. In this regard, the Act provides for the designation of Equality Courts. The purpose of Equality Courts is to adjudicate matters specifically relating to infringements of the right to equality, unfair discrimination and hate speech, with a view toward eradicating the ever present post-apartheid spectre which essentially divided the country along racial, gender and monetary related lines. The Act stipulates that all High Courts are automatically designated as Equality Courts, but more importantly affords the bulk of adjudicative powers relating to equality matters to the Magistrates' Courts. The Department of Justice and Constitutional Development designates Magistrates' Courts as having jurisdiction to entertain equality matters, once presiding officers and staff of such Courts receive the appropriate training.

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<sup>5</sup> S 9(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

<sup>6</sup> Act 55 of 1998

<sup>7</sup> Act 17 of 2006

<sup>8</sup> Act No. 4 of 2000

16. During the period under review, Regulations for Equality Courts were promulgated<sup>9</sup> and, in 2009, all Magistrates' Courts were designated as Equality Courts. All High Courts also sit as Equality Courts. This has improved access to justice as the public can now lodge complaints of unfair discrimination at the Magistrates' Court nearest to their community.
17. Persons needing assistance when approaching the Equality Court are usually assisted by the clerk of the Equality Court or the South African Human Rights Commission or the Commission for Gender Equality, as the need may be. Although the Equality Court is a formal court sitting, the rules and procedures are more relaxed than in normal courts. In order to institute proceedings in the Equality Court it is not a requirement that one must have legal representation. The Equality Courts are free of charge, so the complainant does not have to pay any court fees.
18. In 2013/14 there was a total of 638 cases before the Equality Courts. This is an increase of 3,24% from 2012/13. Although an increase in cases enrolled at these courts has been witnessed, it is nonetheless a matter of concern to government that the Equality Courts are underutilized. Of the 638 cases, hate speech and unfair discrimination were the leading complaints in 2013/14 with 255 and 217 cases respectively. While there was a 4% decrease in hate speech complaints, unfair discrimination cases increased by 40%.
19. The Department of Justice and Constitutional Development has made significant progress on the issue of combating hate crimes, hate speech and unfair discrimination in a policy framework. A Bill, which deals with hate crimes, is in the first stages of drafting. The Bill is based on the recommendations contained in the policy framework. There are, however, some policy choices that need to be made. Once the draft Bill is ready it will be submitted to Cabinet for approval to subject the Bill to a public consultation process.

### **National Action Plan**

20. A significant development in relation to strengthening South Africa's commitment to deal with discrimination is the development of policy on the Prevention and Combating of Hate Speech, Racial Discrimination, Xenophobia and Related Intolerance. As required by the Declaration and Programme of Action (DDPA) adopted by the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (WCAR), held in Durban in 2001, South Africa is developing a National Plan of Action to address the above forms of discrimination (NAP). The NAP is being developed by government, in consultation with national human rights institutions and civil society organizations.

### **Case law**

21. Our courts have also handed down cases which focus on clamping down on discriminatory laws and practices. In *MEC for Education: Kwazulu-Natal v Pillay*<sup>10</sup> the Constitutional Court

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<sup>9</sup> Government Notice No R764 of 13 June 2003 (Government Gazette 25065)

<sup>10</sup> 2008 (1) SA 474 (CC)

held that a school policy that forbids the wearing of a small nose stud, worn as a religious and cultural expression, is discriminatory and unconstitutional. The evidence before the Court showed that the wearing of a nose stud was a voluntary practice that formed part of the learner's South Indian Tamil Hindu culture, which was part of her Hindu religion. The school and its policy had therefore interfered with her right to religion and culture. As that burden was not imposed on others, the school's interference amounted to discrimination against her.

22. In *Bhe v Magistrate, Khayelitsha*<sup>11</sup> the Constitutional Court declared unconstitutional and invalid the African customary rule of male primogeniture which only allows an oldest male descendant or relative to succeed the estate of a deceased man. Other cases of note include *Minister of Finance v Van Heerden*<sup>12</sup> which dealt with discrimination within the area of pension fund benefits. The Court held that the Constitution recognises the incontrovertible fact that all are not equal in our country. If legal rules and policies deny this reality, it will simply lead to an entrenchment of existing inequalities:

*"The jurisprudence of this Court makes plain that the proper reach of the equality right must be determined by reference to our history and the underlying values of the Constitution.<sup>13</sup> As we have seen a major constitutional object is the creation of a non-racial and non-sexist egalitarian society underpinned by human dignity, the rule of law, a democratic ethos and human rights.<sup>14</sup> From there emerges a conception of equality that goes beyond mere formal equality and mere non-discrimination which requires identical treatment, whatever the starting point or impact"<sup>15</sup>*

23. In the case of *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Tourism*<sup>16</sup> Ngcobo J observed that:

*"In this fundamental way, our Constitution differs from other constitutions which assume that all are equal and in so doing simply entrench existing inequalities. Our Constitution recognises that decades of systematic racial discrimination entrenched by the apartheid legal order cannot be eliminated without positive action being taken to achieve that result. We are required to do more than that. The effects of discrimination may continue indefinitely unless there is a commitment to end it."<sup>17</sup>*

24. In *Minister of Home Affairs v Fourie* Sachs J held that

*"A democratic, universalistic, caring and aspirationally egalitarian society embraces everyone and accepts people for who they are. To penalise people for being who and what they are is profoundly disrespectful of the human personality and violatory of equality. **Equality means***

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<sup>11</sup> 2005 (1) SA 563 (CC)

<sup>12</sup> 2004 (11) BCLR 1125 (CC)

<sup>13</sup> *Brink v Kitshoff NO* 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC) at para 40; *Hugo* above n 26 at para 41; *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at para 31; *Pretoria City Council v Walker* 1998 (2) SA 363 (CC); 1998 (3) BCLR 257 (CC) at para 26; *Satchwell* above n 26 at para 17.

<sup>14</sup> See, for example, sections 1(a), 7(1) and 39(1)(a).

<sup>15</sup> Para 26.

<sup>16</sup> 2004 (7) BCLR 687 (CC).

<sup>17</sup> Para 74

*equal concern and respect across difference. It does not presuppose the elimination or suppression of difference. Respect for human rights requires the Affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour or extolling one form as supreme, and another as inferior, but an acknowledgement and acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalisation and stigma. At best, it celebrates the vitality that difference brings to any society".<sup>18</sup>*

25. In essence, the judgments of our courts are continuously being factored into the policies of Government to ensure the strengthening of a human rights culture in the country.

**Constitutional rights awareness:**

26. In order to further combat unfair discrimination it is imperative that people and communities are made aware of their constitutional rights. In this regard, various programmes have been undertaken by government to raise human rights awareness, provide constitutional education and advance social cohesion.

**Article 4: The right to life and personal integrity**

27. Section 11 of the Constitution entrenches the right to life. It is important to note that in South Africa the right to life is unqualified and right to life vests in every person, regardless of their actions.<sup>19</sup>
28. As reported in the first periodic report, the death penalty was abolished in South Africa. The Constitutional Court ordered that the provisions of s 277(1) of the Criminal Procedure Act, 1977<sup>20</sup> and all corresponding legislation and provisions were declared to be unconstitutional and therefore invalid. It was further ordered that the state and all its organs were forbidden from executing any person already sentenced to death. Official records indicate that there were 430 people who had been under sentence of death at the time of the *Makwanyane* judgment. As a result of that judgment, legislation was passed to provide for the procedure to be followed in setting aside the death sentences and the substitution of such sentences with an appropriate sentence.<sup>21</sup> Two years after the decision in *Makwanyane* had been given, Parliament passed a law prescribing the procedure for the replacement of any death sentence with an appropriate alternative sentence.<sup>22</sup>

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<sup>18</sup> Para 60

<sup>19</sup> *S v Makwanyane* 1995 (3) SA 391 (CC)

<sup>20</sup> Act No. 51 of 1977

<sup>21</sup> South African Human Rights Commission, Report on the Substitution of the Death Penalty, October 2002

<sup>22</sup> Section 1 of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997).

29. Eight years later, in other words within the period under review, part of that legislation<sup>23</sup> was declared inconsistent with the Constitution by the Witwatersrand High Court.<sup>24</sup> The order of constitutional invalidity was referred to the Constitutional Court for confirmation.<sup>25</sup>
30. In July 2006, the Constitutional Court completed its supervision of the process of substituting death sentences with alternative sentences.<sup>26</sup>

### Legislation and policy measures

31. Our Courts have emphasised the State's duty to protect life, this translates into both positive and negative duties on the state. Positively phrased it means placing a duty on the state to protect the lives of people, or at the very least, that the state is under a constitutional duty to protect people from life-threatening attacks.<sup>27</sup> The right to life is not absolute and may be limited in terms of the limitations clause in section 36 of the Constitution. However, the justification for a limitation would have to be exceptionally compelling, such as in the case of self-defence.
32. The right to life and a possible limitation thereof may also arise in the use of force when making an arrest. *In S v Walters*<sup>28</sup> the court declared that potentially fatal force is allowed to be used to arrest a fleeing suspect when they are alleged to have committed a crime involving infliction of serious bodily harm. However, the Court found that the relevant sections in the legislation were too broad and needed to be brought in line with the Constitution, in particular, the right to life.
33. In light of the judgment, Parliament passed the Criminal Procedure Amendment Act<sup>29</sup> in 2012. The Act amends section 49 and aligns the provisions relating to the use of force in effecting arrest of a suspect with the judgment of the Constitutional Court in the *Walters* case. It also defines "deadly force" as meaning force that is likely to cause serious bodily harm or death and includes, but is not limited to, shooting at a suspect with a firearm. It further provides that in addition to the requirement that the force must be reasonably necessary and proportional in the circumstances, the arrestor may use deadly force only if the suspect poses a threat of serious violence to the arrestor or any other person; or the suspect is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of effecting the arrest, whether at that time or later.

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<sup>23</sup> Id at subsections (1) to (5).

<sup>24</sup> In *Sibiya and Others v Director of Public Prosecutions and Others* [2005] 1 All SA 105 (W).

<sup>25</sup> In terms of section 172(2)(a) of the Constitution.

<sup>26</sup> *Sibiya v Director Public Prosecutions: Johannesburg High Court* 2007 (1) SACR 347 (CC)

<sup>27</sup> In this regard, see *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC)

<sup>28</sup> (2002) 2 SACR 105 (CC)

<sup>29</sup> Act No. 9 of 2012

34. Another important piece of legislation is the Independent Police Investigative Directorate Act, 2011<sup>30</sup> which establishes the Independent Police and Investigative Directorate ("IPID"). The IPID replaces the Independent Complaints Directorate ("ICD"). The IPID is a government department established to investigate all deaths as a result of police action or that occur in police custody, and complaints of brutality, criminality and misconduct against members of the South African Police Service (SAPS) and the Municipal Police Service (MPS). It is established in terms of Section 206(6) of the Constitution which makes provision for the establishment of an independent police complaints body. It operates independently from the SAPS.

### **Marikana Commission of Inquiry**

35. The incident of labour unrest which arose at the Marikana-Lonmin mine during August 2012 is well-known. Subsequent to this occurrence, the Marikana Commission of Inquiry was appointed by the President of the Republic of South Africa, Mr Jacob Zuma, in terms of section 84(2)(f) of the Constitution of the Republic of South Africa of 1996, on 23 August 2012.
36. Its mandate, arising from the Terms of Reference promulgated on 12 September 2012, was to investigate matters of public, national and international concern arising out of the incidents at the Lonmin Mine in Marikana, in the North West Province which took place on Saturday 11 August to Thursday 16 August, 2012 which led to the deaths of approximately 44 people, more than 70 persons being injured and approximately 250 people being arrested.
37. A high level government team engaged with all stakeholders to ensure that the situation was contained and also to ensure that there was no risk of it spreading to other mines. Evidently the important role that crime prevention and criminal justice play in promoting development and the realisation of human rights in South Africa cannot be overstated. Furthermore the establishment of mine safety forums has assisted in targeting and curtailing mine crime and unrest.

### **Non-refoulement**

38. With regards to the right to life in relation to international law, South Africa recognises the international principle of *non-refoulement*. *Refoulement* means the expulsion of persons who have the right to be recognised as refugees. The principle of *non-refoulement* has first been laid out in 1954 in the UN Convention relating to the Status of Refugees.<sup>31</sup> This principle is a key facet of refugee law and concerns the protection of refugees from being returned or expelled to places where their lives or freedoms could be threatened. It is important to note that the principle of *non-refoulement* does not only forbid the expulsion of refugees to their

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<sup>30</sup> Act No 1 of 2011

<sup>31</sup> Article 33(1): "No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."



country of origin, but to any country in which they might be subject to persecution. The only possible exception provided for is the case that the person to be expelled constitutes a danger to national security. The protection of refugees and the principle of *non-refoulement* in South Africa are enshrined under the Refugees Act, 1998.<sup>32</sup>

39. This Act gives effect to the relevant international legal instruments, principles and standards relating to refugees. In practice, vulnerable persons residing in South Africa are safe from secondary persecution as a result of forced expulsion. Although the principle of non-refoulement is universally accepted, problems with refoulement frequently arise due to the fact that its application requires a recognised refugee status. Furthermore, not all countries are members to the UN Convention relating to the Status of Refugees or may not have established formal procedures for determining refugee status. It is worth noting that the South African courts have upheld the principle of *non-refoulement*.
40. With respect to South Africa's existing extradition framework, the Extradition Act<sup>33</sup> provides, amongst others, for extradition for dual criminality offences, punishable by a sentence of six months imprisonment or more. South Africa can also extradite its own nationals, but all extraditions must be consistent with the Constitution. Some extradition agreements provide for the application of human rights norms, but even those countries that do not provide for such extradition agreements' application, may refuse extradition on the grounds of human rights considerations. The two main human rights norms are the non-imposition of the death penalty and non-discrimination.

#### **Case law pertaining to the right to life**

41. South Africa will not extradite foreign nationals suspected of crimes that may lead to them facing the death penalty in those countries that seek to try them.
42. During the period under review, the matter of *Minister of Home Affairs v Tsebe*<sup>34</sup> was handed down by the Constitutional Court. The Court clarified some aspects of extradition, as well as some relating to deportation and sojourn in South Africa. In this case, two Botswana nationals were charged with committing murder in Botswana. They fled to South Africa where they were apprehended and processed for deportation. The Court made it clear that such foreign nationals may only be extradited (or deported) if the country to which they are being deported has provided an undertaking or guarantee to South Africa that the death penalty will not be imposed and executed in the case of the said foreign national being found guilty of the alleged crime that he or she has been charged with in his or her country of origin.

43. In the Constitutional Court, Zondo AJ noted that –

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<sup>32</sup> Act No. 130 of 1998

<sup>33</sup> Act No. 67 of 1962

<sup>34</sup> 2012 (5) SA 476 (CC)

*“We as a nation have chosen to walk the path of the advancement of human rights. By adopting the Constitution we committed ourselves not to do certain things. One of those things is that no matter who the person is and no matter what the crime is that he is alleged to have committed, we shall not in any way be party to his killing as a punishment and we will not hand such person over to another country where to do so will expose him to the real risk of the imposition and execution of the death penalty upon him. This path that we, as a country, have chosen for ourselves is not an easy one. Some of the consequences that may result from our choice are part of the price that we must be prepared to pay as a nation for the advancement of human rights and the creation of the kind of society and world that we may ultimately achieve if we abide by the constitutional values that now underpin our new society since the end of apartheid.*

*If we as a society or the State hand somebody over to another State where he will face the real risk of the death penalty, we fail to protect, respect and promote the right to life, the right to human dignity and the right not to be subjected to cruel, inhuman or degrading treatment or punishment of that person, all of which are rights our Constitution confers on everyone.”<sup>35</sup>*

44. The Tsebe judgment reinforced an earlier precedent-setting judgment handed down by the Constitutional Court in the matter of *Mohamed v President of the Republic of South Africa*.<sup>36</sup> The case involved Khalfan Mohamed, who was wanted by the United States in connection with the bombing of its embassy in Tanzania in 1998. The Constitutional Court ruled in the Mohamed case, that even if there was an extradition agreement between South Africa and the USA, he could not be handed over without an assurance that he would not face the death penalty. In the *Tsebe* judgment, the Court went further than in Mohamed to require not only that the South African Government **seek** the assurance that an extradited person will not face the death penalty, but also **obtain** that assurance, failing which extradition could not be granted.

## **Article 5: Right to dignity, prohibition of torture and slavery**

45. Human dignity is a core value of our Constitution. It is central to the founding provisions of section 1 and section 10 of the Bill of Rights.<sup>37</sup> The right to dignity is at the heart of the right not to be tortured or to be treated or punished in a cruel, inhuman or degrading way.<sup>38</sup> Section 12(1) of our Constitution further states that everyone has the right to freedom and security of person which includes the right to be free from all forms of violence, not to be tortured in any way and not to be treated or punished in a cruel, inhuman or degrading way.

### **Legislative and policy measures to prevent and combat torture and cruel, inhuman and degrading punishment**

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<sup>35</sup> Para 67, 68

<sup>36</sup> 2001 (3) SA 893 (CC)

<sup>37</sup> S 10. “Everyone has inherent dignity and the right to have their dignity respected and protected.”

<sup>38</sup> S v *Makwanyane* 1995 (3) SA 391 (CC)

46. In this regard, the passing of the Prevention and Combating of Torture of Persons Act, 2013<sup>39</sup> is a milestone in our country's strive towards universal human rights. The Prevention and Combating of Torture of Persons Act, 2013 aims to give effect to South Africa's obligations arising from the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. It aims to provide for the offence of torture of persons, to prevent and combat the torture of persons within or across the borders of South Africa and to impose a maximum penalty of R100 million or life imprisonment, or both, in the case of a conviction.
47. The Act, in its Preamble, provides that, mindful of a shameful history of gross human rights abuses including torture, the Republic of South Africa is committed, since 1994, to prevent and combat torture of persons. Furthermore, the Act gives recognition to the equal and inalienable rights of all persons as the foundation of freedom, dignity, justice and peace in the world. It recognises that the promotion of universal respect for human rights and the protection of human dignity are paramount; and seeks to ensure that no one is subjected to acts of torture.<sup>40</sup> The Act provides for the prosecution of persons who commit offences of torture as well as setting out the appropriate penalties, which include life imprisonment. The Act further provides for the prohibition and the combating of torture; measures aimed at the prevention of torture; and also for the training of persons, who may be involved in the custody, interrogation or treatment of a person subjected to any form of arrest, detention or imprisonment. Another preventative measure is the development of programmes to promote public awareness about torture and the measures to combat it.
48. It should be stressed that **prior** to the promulgation of the Prevention and Combating of Torture of Persons Act, a number of legislative and other measures were put in place to deal with other forms of cruel, inhumane or degrading treatment or punishment of persons. These include measures such as provided for in the Correctional Services Amendment Act, 2008.<sup>41</sup>
49. In 2008, the Correctional Services Act, 1998<sup>42</sup> was amended through the Correctional Services Amendment Act, 2008.<sup>43</sup> The amendments introduced in 2008 had far reaching positive implications in relation to South Africa's commitment and efforts to prevent and combat acts of torture and cruel, inhuman and degrading punishment. The Correctional Services

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<sup>39</sup> Act No. 13 of 2013

<sup>40</sup> The Act defines "torture" as any act "by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person—

(a) for such purposes as to—

(i) obtain information or a confession from him or her or any other person;

(ii) punish him or her for an act he or she or any other person has committed, is suspected of having committed or is planning to commit; or

(iii) intimidate or coerce him or her or any other person to do, or to refrain from doing, anything; or

(b) for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of, or with the consent or acquiescence of a public official or other person acting in an official capacity, but does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

<sup>41</sup> Act No. 25 of 2008

<sup>42</sup> Act No. 111 of 1998

<sup>43</sup> Act No. 25 of 2008

Amendment Act, 2008<sup>44</sup> abolished the concept and practice of solitary confinement in terms of which inmates were detained in total isolation for long periods of time, which is one form of inhumane or degrading treatment of offenders. The most severe penalty that may be imposed on an inmate in the case of serious and repeated infringements would be "segregation in order to undergo specific programmes aimed at correcting his or her behaviour, with a loss of gratuity and restriction of amenities." Inmates subjected to segregation may appeal to the Inspecting Judge of Correctional Services against the decision to segregate them.

50. The Act also allowed for changes of terminology from 'prison' to 'correctional centre', and from 'prisoner' to 'inmate' (referring to persons sentenced and those awaiting trial), and 'offender' when referring to convicted and/or sentenced incarcerated inmates, as well as to those serving their sentences in the community outside a correctional centre. These were not superficial distinctions, as it reinforced the Department of Correctional Services' vision of viewing prisoners as human beings capable of change and rehabilitation. The Act also included 'care', 'correctional' and 'development' services to sentenced offenders. Care refers to the provision of services and programmes aimed at the social, mental, spiritual, health and physical wellbeing of inmates. Correction services and programmes are aimed at correcting the offending behaviour of sentenced offenders in order to rehabilitate them; and 'development' refers to those programmes and services aimed at developing and enhancing competencies and skills that will enable to sentenced offenders to reintegrate into society.
51. The Act requires that all cases of mechanical restraint (e.g. by handcuffs and leg-irons) of an inmate be immediately reported to the Inspecting Judge. An inmate so restrained may appeal against the decision to restrain him to the Inspecting Judge who must decide the appeal within 72 hours of the receipt of the appeal. The Act provides that all cases of use of force against an inmate must immediately be reported to the Inspecting Judge. The effect of these amendments is that there is now a robust monitoring mechanism of ensuring that acts of torture in correctional centres are prevented and/or detected as soon they occur.
52. The mandate of the new IPID is to conduct independent and impartial investigations of alleged specified criminality committed by members of the South African Police Service and the Municipal Police Services. The IPID must, amongst others, investigate the following matters: any deaths in **police custody**; deaths as a result of police actions; any complaint relating to the discharge of an official firearm by any police officer; rape by a police officer, whether the police officer is on or off duty; rape of any person while that person is in **police custody**; any complaint of torture or assault against a police officer in the execution of his or her duties.
53. A set of mechanisms have been put in place to prevent torture and afford redress to victims. The South African Police Service developed a Policy on the Prevention of Torture and Treatment of Persons in Custody of the South African Police Service. It sets out a system of checks and balances to protect persons in **police custody** from acts of torture, cruel, inhuman

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<sup>44</sup> Act No. 25 of 2008

or degrading treatment by members of the Service and also includes guidelines that must be followed when a person in custody is being interviewed.

54. The SAPS is also in the process of developing a system providing for the video and audio recording of interviews with suspects or arrested persons. To ensure the effective implementation of this policy, a number of Standing Orders of the Service were promulgated in terms of which no member of the Police Service may torture any person, permit anyone else to do so or tolerate the torture of another by anyone. The same applies to an attempt to commit torture and to an act by any person that constitutes complicity or participation in torture.
55. In the Standing Orders it is clearly evident that no exception, such as a state of war, or threat of war, state of emergency, internal political instability or any other public emergency will serve as justification of torture and any contravention thereof constitutes misconduct and disciplinary proceedings have to be implemented in respect thereof.
56. In view of the implementation of the policy, all police stations were issued with the necessary registers, including a Custody Register<sup>45</sup> and Notice of Rights in terms of the Constitution<sup>46</sup> to ensure the proper treatment of persons and to monitor police activities.
57. The investigation of deaths and allegations of torture or cruel, inhuman or degrading punishment in **correctional centres** is conducted by the Judicial Inspectorate of Correctional Services. The Judicial Inspectorate for Correctional Services is an independent office under the control of the Inspecting Judge. The object of the Judicial Inspectorate is to facilitate the inspection of correctional centres in order that the Inspecting Judge may report on the treatment of inmates in correctional centres and on conditions in correctional centres. As an independent monitoring body, the Judicial Inspectorate has improved the situation of prisoners significantly. The Judicial Inspectorate for Correctional Services as established in South Africa had become a model of how an independent monitoring body can help to improve the situation of prisoners.
58. As mentioned, the Correctional Services Act, 1998<sup>47</sup> establishes a mandatory reporting system under which all heads of correctional centres are required to submit reports to the Inspecting Judge concerning incidents of death, segregation, and the use of mechanical restraints in correctional centres.
59. The Judicial Inspectorate has intensified its efforts to establish and investigate the circumstances under which such deaths occur. In this regard, the Judicial Inspectorate has resuscitated the Legal Services Unit which is staffed by well-qualified and experienced lawyers. The Inspectorate has also created a Case Administration Unit, which has as its primary objective, the effective monitoring and recording of death reports. The Judicial

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<sup>45</sup> SAPS 14

<sup>46</sup> SAPS 14(a)

<sup>47</sup> Act No. 111 of 1998

Inspectorate has consistently paid particular attention to deaths caused by alleged assaults on inmates by correctional officials. In June 2009, three correctional officials were convicted of murder arising from their involvement in the deaths of three inmates at the Krugersdorp Correctional Centre during April 2007. The officials were each sentenced to 20 years' imprisonment.

60. In order to bolster its capacity to deal with complaints received from inmates, the Judicial Inspectorate has developed a system of Independent Correctional Centre Visitors (Independent Visitors), being community members appointed by the Inspecting Judge after a process of publicly calling for nominations and consulting with community organizations.
61. The work of the Independent Visitors is supported by an electronic system which allows them to record complaints, to submit reports to the Inspecting Judge and to enquire about the progress made in the internal resolution, where applicable, of such complaints. The electronic system also provides a data base of all visits to correctional centres, the time spent on such visits and the number and nature of complaints received at each correctional centre, over a specific period of time. The data collected in this fashion has been used to good effect to identify systemic problems that may exist at a particular correctional centre, and has been made freely available, for purposes of research, to universities, NGOs, the media and various other stakeholders. This constitutes a collective effort to inform public opinion on the conditions prevailing in correctional centres and on the treatment of inmates being detained there.
62. In relation to return and extradition, South African has a number of extradition agreements with other countries. South Africa has also ratified the Southern African Development Community (SADC) Protocol on Extradition. The Protocol entered into force during the period under review, on 1 September 2006. In accordance with the right not to be tortured as enshrined in our Constitution, South Africa will not extradite a person to another state when there are substantial grounds for believing that he or she would be in danger of being subjected to torture.

### **Legislative measures to prevent slavery and trafficking in persons**

63. With regards to the prevention and combating of slavery, South Africa has passed the Prevention and Combating of Trafficking in Persons Act, 2013.<sup>48</sup> The Act is a comprehensive law dealing with the issue of trafficking, which was previously dealt with in various pieces of legislation, in a fragmented manner.<sup>49</sup>

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<sup>48</sup> Act 7 of 2013

<sup>49</sup> For instance, the Sexual Offences and Related Matters Amendment Act, 2007 (Act No. 32 of 2007) addresses the trafficking of persons for purposes of sexual exploitation only, while the Children's Act, addresses the trafficking of children. In this regard, the new trafficking legislation amends Prescription, 1969 (Act No. 68 of 1969), the Criminal Procedure, 1977 (Act No. 51 of 1977), the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997), the Witness Protection, 1998 (Act No. 112 of 1998), the Prevention of Organised Crime Act, 1998 (Act No. 121 of 1998), the Private Security Industry Regulation Act, 2001 (Act No. 56 of 2001), the Immigration Act, 2002 (Act No.13 of 2002), the Children's Act, 2005 (Act No. 38 of 2005), the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007) and the Child Justice Act, 2008 (Act No. 75 of 2008).

64. In addition to creating very specific offences criminalising trafficking in persons, the Act also focus on the plight of victims, by allowing for those convicted of trafficking to be forced to pay compensation to a victim for damages, injuries, both physical and psychological harm suffered and loss of income, amongst others.
65. In this regard, the Prevention and Combating of Trafficking in Persons Act<sup>50</sup> is forward-looking in that it satisfies modern developments in terms of human rights law, such as that the law should not only serve to prosecute offenders and prevent re-offending, but it should also look at the reparative needs of the victim. The Act was put into operation in August 2015.

## Article 6: Right to liberty and security of person

66. In essence, section 12(1) of the Constitution embodies the substantive component of the right to freedom and is concerned with the reasons for which the state may deprive someone of their freedom.<sup>51</sup> In this regard, the state may only deprive the liberty of an individual when there is a rational connection between the deprivation and some objectively determinable purpose.
67. The majority of persons who are deprived of their liberty in South Africa are those who are awaiting trial for alleged criminal offences or those who are already serving their sentences in correctional centres. Inmates are housed in correctional centres which comprise of two general categories of inmates, namely sentenced offenders and remand or awaiting-trial detainees whose cases have yet to be finalised.
68. As at 31 March 2013, South Africa's inmate population was 150,608, of which 45,730 (30.4%) were remand detainees, and 104,878 were sentenced offenders. According to the National Offender Population Profile many offenders were detained for the following crime categories: economic, aggressive, sexual and narcotics. Due to the high levels of violent crimes, prison sentences had become longer and minimum sentences had been introduced. There is diversity in terms of size, minimum standards and facilities across the South African correctional centres, given the time periods over which they were built, the purposes for which they were built and the political landscape that prevailed when they were built.
69. DCS must manage this legacy to enable a set of minimum norms and standards to prevail across all centres and to ensure cost-effective and delivery efficient centres. In 2012/2013, of the 243 correctional centres, there were:

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<sup>50</sup> Act No. 7 of 2013

<sup>51</sup> S 12 "(1) Everyone has the right to freedom and security of the person, which includes the right –

- (a) not to be deprived of freedom arbitrarily or without just cause;
- (b) not to be detained without trial;
- (c) to be free from all forms of violence from either public or private sources;
- (d) not to be tortured in any way; and
- (e) not to be treated or punished in a cruel, inhuman or degrading way."

- 156 centres with a bed capacity of 0 – 500 beds with a combined capacity of 27 837 beds.
- Of these 112 correctional centres have a bed capacity less than 250, which represents 13 214 approved bed spaces; and
- 44 centres have a bed capacity of 250 < 500 beds that represent 14 626 approved bed spaces.
- 61 centres in the capacity group 500 < 1000 beds with a combined capacity of 42 502 beds.
- 11 centres which have a capacity of 1000 < 1500 accounting for approved bed space of 13 705, and
- 15 centres (13 plus the two private prisons) who have a capacity of >1500, which represents 34 397 approved bed spaces.<sup>52</sup>

### **Policy and administrative measures to reduce overcrowding in correctional centres**

70. The White Paper on Corrections (2005) addresses the challenge of overcrowding. Furthermore, there has been an increased focus on addressing overcrowding by reducing the number of awaiting trial detainees. A Remand Detention Branch was created in the Department of Correctional Services and Cabinet approved the White Paper on Remand Detention in October 2010 which focuses on reducing the number of remand detainees and offender rehabilitation.<sup>53</sup>
71. The decrease in overcrowding is regarded as key in creating a correctional services facility environment that is conducive for rehabilitation and contributes towards crime prevention. The collaborative implementation of strategy by the DCS and its partners within the criminal justice system and in society contributes to the fact that the DCS is steadily but surely winning the war against overcrowding and high incarceration rates in correctional centres. This strategy enabled the DCS, working together with all other partners in the Criminal Justice System (CJS) value chain, to significantly decrease the inmate population and also contributed towards the reduced per capita incarceration rate in South Africa. This strategy enabled the DCS to significantly reduce the per capita incarceration rate in South Africa from 403 to 290 inmates per 100 000 population between 2004 and 2014.
72. Another measure implemented to decrease overcrowding is the implementation of Unit Management in all correctional centres in order to enhance rehabilitation in the prison system. This is designed to improve control and relationships by dividing the larger correctional centre population into smaller, more manageable groups and to improve the delivery of correctional services pertaining to care, corrections, development, security and after-care. These measures were introduced through the amendment of the Correctional Services Act, 1998, to formalise the unit management regime that, amongst others, provides for good communication between correctional officials and inmates, and principles that are understood by everyone, team work, direct, interactive supervision of inmates; and

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<sup>52</sup> DCS Annual Performance Plan 2014/2015

<sup>53</sup> 20 Year Review



assessment of sentenced offenders. Rehabilitation is facilitated from the point of entry/admission to release and integration back into the community. During this process the focus is on correcting of offending behaviour, needs-based interventions and the development of each offender. To facilitate these processes, a comprehensive Offender Rehabilitation Path (ORP) was developed.

### **Legislative and policy measures to strengthen the parole system**

73. The Correctional Matters Amendment Act, 2011<sup>54</sup> was put in place with the aim of improving the DCS administration in key business areas, resulting in a strengthened parole system, a new medical parole system; and improved management of remand detainees.
74. As part of transforming our parole and social reintegration systems, the Electronic Monitoring of Parolees system was implemented in February 2012. This system alleviates the challenges of parolees absconding from the system of community corrections while also reducing the risk of recidivism. On 24 February 2012, the first Halfway House for parolees was launched in Naturena (Gauteng Region). This event introduced a whole new era in the DCS with regard to assisting offenders with their social reintegration. Halfway Houses assist offenders who do not have a fixed and monitorable address to have a stable home environment.<sup>55</sup>
75. The Electronic Monitoring Pilot Project has proven to be effective, efficient and relevant to the broader goals of DCS and the JCPS cluster. It costs the taxpayer R9 876, 35 per month to keep an inmate in custody, whilst electronic monitoring costs R3 379 per month. Electronic monitoring enables officials to monitor offenders throughout 24 hours a day. Alerts are immediately generated, and transmitted, should an offender commit any violation. Interference with the equipment, including tampering or failing to charge the receiver, is electronically relayed to the control room.<sup>56</sup>

### **Measures to improve health care services to inmates**

76. Other challenges to be addressed in correctional services include corruption, maintaining safe custody, strengthening rehabilitation programmes and high levels of gang-related violent crimes in prison. Importantly, concerted efforts have been channelled towards the provision of health care services to inmates. Care services are aimed at the well-being of the inmates. In addition -
  - All inmates undergo a general health assessment on admission;
  - Awareness sessions, training for officials and isolation facilities are in place to manage and prevent the spread of communicable diseases;
  - Inmates are provided with nutritionally balanced meals, and therapeutic diets are available for those who require them;
  - The number of natural deaths in detention has declined, and

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<sup>54</sup> Act No 5 of 2011

<sup>55</sup> DCS Annual Report 2011/2012

<sup>56</sup> DCS Annual Report 2012/2013

- There have been improvements in the management of HIV/Aids and TB.

77. Inmates suffering from, particularly, HIV/AIDS and tuberculosis, have received special attention. In 2012/2013, 50% of inmates (76 202/151 905) were tested for HIV. The percentage of HIV positive inmates who were eligible to be placed on antiretroviral treatment was 65% (5 066/7 738). The percentage of inmates with a CD4 count below 350, who are on ARV treatment is 96% (11 814/12 321). Furthermore, 96.79% of inmates (2 565/2 650) who have been diagnosed with mental illness were placed under treatment.<sup>57</sup>

78. In 2013, the Department of Health issued Guidelines for the Management of Tuberculosis, HIV and Sexually Transmitted Infections in Correctional Centres. The Guidelines provide the general principles for the management and control of TB, HIV, AIDS and STIs in Correctional facilities. The primary audience is health and administrative staff in the Departments of Correctional Services (DCS) and Health (DOH). It is meant to provide guidance on prevention of new infections, early detection through routine testing and early treatment of those with tuberculosis and human immunodeficiency virus infection and disease.

79. The Guidelines provide that -

- Voluntary HIV counselling and testing must be offered to all inmates at entry, during incarceration, as per request by inmate, as part of routine screening campaigns, as part of integrated primary health care services, and on release. A rapid test is conducted if positive subject to a confirmatory rapid test. In cases of indeterminate or discordant results a blood sample must be sent to the laboratory for an (Enzyme- Linked Immunosorbent Assay) ELIZA test. Inmates whose CD4 count is <350 cells/ $\mu$ L must be started on Antiretroviral Therapy (ART) and all inmates with newly diagnosed HIV must be assessed for TB infection.
- Symptom-based TB screening must be conducted on all inmates at entry, during TB screening campaigns, self-reported or peer referred, TB contacts, as part of integrated primary health care services, at least bi- annually and on release. Chest X-ray and GeneXpert<sup>®</sup> MTB/RIF are complementary. An outbreak is defined as more than two inmates from one cell having TB, requiring investigation in collaboration with the DoH.
- Universal screening for anal, oral and genital STIs must be conducted on- all inmates at entry, upon self-presentation and as part of integrated primary health care services, using specific algorithms based on symptoms.
- TB diagnosis, all adult inmates with suspected TB must provide sputum samples. If smear or GeneXpert<sup>®</sup> MTB/RIF positive, TB treatment is commenced. If both specimens are negative in either test, HIV-negative inmates receive antibiotics treatment for 5 days and are then reassessed after completion of treatment. HIV-positive inmates are referred for assessment, X-ray and TB culture.

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<sup>57</sup> DCS Annual Report 2012/2013

- TB treatment: Smear- or culture-positive and GeneXpert® MTB/RIF-positive, rifampicinsensitive patients must be treated according to the National Tuberculosis Management Guidelines, the latter patients further need a second specimen sent for microscopy. GeneXpert® MTB/RIF-positive, rifampicin-resistant patients need to be referred to a multidrug-resistant TB unit for further management. Inmates with pulmonary TB must be admitted in the health facility and isolated for two weeks. Hospitalisation must be considered for diabetes, liver disease, respiratory insufficiency, haemoptysis, serious adverse events of therapy and severe extra pulmonary disease.
- HIV-positive inmates who are not on ART require repeat CD4 testing every 6 months, TB symptom and STI screening during every encounter with a health care provider. These inmates must receive cotrimoxazole, TB prophylaxis and ART as per eligibility criteria. If inmates have TB, ART must be started immediately. They must be screened for cryptococcal disease if  $CD4 < 100 \text{ cells/mm}^3$ .
- STIs treatment must be initiated immediately in all inmates with a confirmed diagnosis. The syndromic management flow charts for management of symptomatic STIs outlined in the DoH guidelines must be followed. In addition, HCT must be offered (if not recently tested), condom promotion, adherence counselling and education about the importance of partner notification and treatment must be shared with the inmate. All patients must be reviewed on completion of treatment and referred if not responding to treatment.
- Adherence support must consist of information on the regimen and the reason for long-term treatment including side effects of therapy. Education must emphasise the importance of taking treatment exactly as prescribed. Support provided by nurses, care workers, treatment buddies and support groups must be complemented by pill counts.
- Inmates and correctional centre staff must be informed about TB, HIV and STIs including prevention in their increased risk environment. Peer education as an effective means involves dissemination of correct information by both centre staff and inmates.
- TB prevention: Isoniazid preventive therapy (IPT) must be given to all HIV-infected adults who are not on TB treatment; are asymptomatic for TB; have no active liver disease and no history of alcohol abuse, psychosis, convulsions or neuropathy. Isoniazid 300 mg plus Vitamin B6 25 mg daily must be given for the duration of incarceration. Inmates must be monitored for side effects and indications for interruption of IPT. Special considerations apply for infants.
- TB infection control consists of environmental and administrative controls and personal protection. These involve an Infection Prevention and Control Committee and Plan, risk assessments, education of staff and inmates, regular screening, isolation of TB patients, coughing etiquette, face masks, safe environments for sputum provision, natural ventilation where possible and ultraviolet germicidal radiation.

- HIV prevention requires a comprehensive approach including access to condoms and water-based lubricants; reducing vulnerability to sexual assault; post-exposure prophylaxis with established drug regimens including monitoring of drug safety and potential seroconversion; harm reduction programmes to reduce the risk of HIV-transmission related to substance abuse; education on risk behaviour and preventive measures with a focus on men having sex with men; and Male Medical Circumcision (MMC) with adequate counselling on risk reduction after the intervention.
  - HIV- and TB-related stigma and discrimination must be minimised through peer education, support groups and information campaigns.
  - All pregnant women must be referred to the DoH health facilities for prevention of mother to child transmission of HIV and follow up.
  - To prevent TB in pregnancy, TB symptom screening must be conducted on admission and at every visit to the health facility, regardless of their HIV status. All HIV-positive pregnant women without TB symptoms must receive IPT.
  - TB treatment must be given to all women if indicated.
  - All HIV-positive pregnant women must receive ART regardless of their CD4 count.
  - All women irrespective of HIV and TB status must be encouraged to breastfeed. If active TB has been excluded, all infants living with their mothers in correctional centres must be started on IPT.
  - Treatment for prevention of mother-to-child transmission must be completed.
80. The Department of Correctional Services is committed to providing need based care programmes aimed at maintaining the well-being of all incarcerated persons. These services provided by the Department largely fall within two streams, firstly, it includes all activities related to the management of psychological, spiritual, health, social work and HIV/AIDS for all inmates. These include, among others, the provision of therapy for inmates, life skills and HIV/AIDS counselling.

### **Measures to ensure skills development of inmates**

81. The DCS focuses on skills development for inmates. Currently the focus is on entrepreneurial training, computer skills training, vocational training, engineering studies and business studies. The Department also facilitates the participation of inmates in formal education at different levels from adult basic education to higher education. Pre-literacy and adult education programmes are offered up to the Grade 12 level. These costs are all carried by the Department of Correctional Services. Tertiary education is encouraged at the cost of the detainee, although the establishment of funding schemes have commenced.

82. In 2012/2013, 1 762 offenders were studying towards post-matric/higher education and training qualifications, 3 525 towards further education and training college programmes (including electrical engineering, civil engineering, mechanical engineering and marketing), and 4 188 participated in skills development programmes (including basic business skills training and entrepreneurship). During 2012, R66,424 million was allocated from National Skills Funds on training 5 837 offenders, including training in scarce skills such as welding, plumbing, bricklaying, plastering, electrical, carpentry, and agricultural skills programmes. In May 2012, 416 youth offenders graduated with International Computer Driver Licence (ICDL) certificates.<sup>58</sup> Within two months of launching the Reading for Redemption campaign in September 2012, more than a million rand worth of books were donated. Various models of Reading for Redemption programmes exist globally. In South Africa, partnerships have been established with universities including the University of Zululand, University of KwaZulu-Natal, Unisa, Walter Sisulu University, and Nelson Mandela Metropolitan University.

### **Measures relating to female inmates**

83. With regards to female inmates, the DCS forms part of the international community that continues to implement the UN Standard Minimum Rules for the Treatment of Women Prisoners. Key to the frameworks being implemented by the DCS was the White Paper on Corrections which is viewed as a blue print for ensuring humane, just and safe correctional facilities that focus on the rehabilitation of offenders. The DCS has further adopted an approach that is focused on improving the conditions of female inmates in correctional facilities. DCS is committed to taking special care of the female offender population. This means that the DCS has had to increase resources allocated to female correctional centres. A very significant achievement during the 2011/12 financial year was the establishment of Mother and Baby Units for women offenders who are serving time and have their babies with them in correctional centres.<sup>59</sup>

### **Measures to assist with rehabilitation and reintegration**

84. DCS is ensuring that the sentences of the courts are carried out, but that offenders are incarcerated and rehabilitated in such a manner that they can be successfully re-integrated back into the community and there is minimum recidivism. The DCS also aims to achieve the following:

- Regular review of all standard operating procedures and policies to ensure that issues of women are favourably addressed in the implementation of incarceration and corrections;
- Ensuring that national special commemorative days, such as Women's Day, are made available to the Offender Population;

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<sup>58</sup> DCS Annual Report 2012/2013

<sup>59</sup> DCS Annual Report 2011/2012

- Providing women placed on parole with opportunities to develop themselves as part of the development possibilities available to sentenced offenders;
- Partnering with external stakeholders such as non-governmental organisations, faith based organisations and other government departments to enhance support provided to women in the form of corrective and rehabilitation initiatives;
- Development and implementation of mother and child units in correctional facilities to ensure that mothers take care of their children and those children born in incarceration are afforded a normal life as much as possible through early childhood development programmes and interaction with other children of mothers in incarceration.

### Children in detention

85. The number of children in remand detention has also decreased substantially with most such RDs incarcerated for less than 6 months.
86. Children whose cases are still to be finalised are a focus area and their cases are prioritised. They are also brought back to court every 14 days so that their circumstances and trials can be monitored. Initially the DCS was reporting on children from age 14 to 17, but since the implementation of the Child Justice Act, 2005 the age range captured in the statistics is from 14 to below 18 years, as in accordance with the Act. **Table 1** below shows the number of children detained in correctional facilities from 2002 to 2013.

**Table 1: Number of children detained (remand detained and sentenced) in correctional facilities**

	14 to 17 years		
Year	RD	Sentenced	Total
Average for 2002	2255	1796	4051
Average for 2003	2324	1802	4126
Average for 2004	1912	1698	3610
Average for 2005	1332	1233	2564
Average for 2006	1144	1095	2239

Average for 2007	1196	892	2087
Average for 2008	928	870	1799
Average for 2009	696	854	1550
<b>Child Justice Act (14 to below 18 years)</b>			
Average for 2010	346	658	1004
Average for 2011	366	552	918
Average for 2012	367	417	784
Average for 2013	241	296	537

87. Section 28(g) of the Constitution stipulates that a child should not be detained except as a measure of last resort and only for the shortest appropriate period of time. Upon detention the child is entitled, in addition to the rights that generally accrue to detained persons, the right to be kept separately from detained persons over the age of 18 years and the right to be treated in a manner, and kept in conditions that take account of the child's age. Our courts have held that – *"All our courts are obliged when imposing sentence to ensure that a sentence of imprisonment must be imposed on any child, who by definition is any person under the age of 18 years, only as a matter of last resort and only for the shortest appropriate period."*<sup>60</sup>

#### **Legislation and Policy measures for children in conflict with the law**

88. The Child Justice Act, 2008<sup>61</sup> was put into operation in April 2010. Its main focus is to create a child related procedure to deal with children in conflict with the law, both within and outside the criminal justice system, by establishing a constitutional approach, based on assessment and the notion of restorative justice. It has to date been used to institute diversions and bring about a child sensitive criminal justice system. The Child Justice Act puts in place a criminal justice system which provides for children under the age of 18 years. One of the aspects in the Child Justice Act is the issue of the criminal capacity of children. The CJA states as follows:
- That children up to 10 years of age, lack criminal capacity and may not be arrested for committing an offence. Such children will be referred to the Children's Courts or to the Department of Social Development.

<sup>60</sup> *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 (11) BCLR 1105 at para 86

<sup>61</sup> Act No 75 of 2008

- Children from 11 years of age and up to 14 years of age have criminal capacity and the onus to prove criminal capacity on the part of the child accused of having committed a crime, rests with the State.
- Children above 14 years of age have criminal capacity unless otherwise proven by the accused child.

89. The Constitution and the Child Justice Act, 2008 set out provisions which seek to protect the child under the age of 18 in all interactions in the criminal justice system when such children are in conflict with the law. The dignity and well-being of the child must be protected at all times during an arrest, during the preliminary stages before the matter is referred to court, as well as during the period when the matter is at court and during trial. It entrenches the notion of restorative justice in the criminal justice system. In this regard, the Act provides that where a child is charged with a minor offence, the matter may be diverted away from the criminal justice system. For example, if a child has committed a petty offence the child could be diverted by the prosecutor at court. Diversion options include options such as releasing the child into the care of a parent or appropriate adult or guardian or attendance of certain programs, and so forth.
90. The Act also provides, in exceptional circumstances, for the diversion of children who have committed more serious offences, however, in such instances authorization must be obtained from the relevant Director of Public Prosecutions. In circumstances where a matter is inappropriate for diversion, the Act provides for such a case to be tried in a Child Justice Court.
91. The Child Justice Policy Framework was adopted in May 2010. The Policy Framework provides the blueprint for the coordination and holistic implementation of the Child Justice Act by all Government Departments and civil society. The Policy Framework was drafted by an Inter-sectoral Committee on Child Justice ("ISCCJ") in consultation with civil society. The National Prosecuting Authority of South Africa ("NPA") also developed and issued directives in line with the Child Justice Act for prosecutors to effectively and efficiently deal with child justice matters, investigations, preliminary inquiries, diversions and prosecutions. The South African Police Service issued the SAPS National Instruction on Children in Conflict with the Law.<sup>62</sup>
92. The Regulations on the Child Justice Act, 2008<sup>63</sup> require that state officials treat children in conflict with the law in a manner conducive to their participation without intimidating or humiliating them during their handling. At all stages of the process the child must be allowed to ask questions and be afforded an opportunity to express themselves. Officials must treat the child with care and understanding, and the officials must be sensitive to the needs of the child.

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<sup>62</sup> National Instruction 2/2010

<sup>63</sup> Act No. 75 of 2008



93. The Child Justice Act, 2008<sup>64</sup> and the Regulations issued in pursuance thereof, both underpin the principle of the best interests of the child and therefore singles children out for special protection. It thus affords children in conflict with the law specific safeguards, among others, the right not to be detained, except as a measure of last resort, and if detained, only for the shortest appropriate period of time and the right to be treated in a manner and kept in conditions that take account of the child's age. Children must be kept separately from adults, and boys from girls, while in detention. It further acknowledges that children have the right to family, parental or appropriate alternative care. They have the right to be protected from maltreatment, neglect, abuse or degradation and the right not to be subjected to practices that could endanger the child's well-being, education, physical or mental health or spiritual, moral or social development. Based on these protective principles, the Regulations issued in terms of the Child Justice Act contain specific provisions in Chapter 4 which pertain to the detention and placement of a child prior to sentencing. These protective guidelines and procedures aim to guarantee the best interests of the child.
94. In terms of Chapter 4, any complaint or observation about an injury sustained or psychological trauma suffered by a child in detention must be recorded in writing in the form of a comprehensive report. In addition, a register regarding the detention of children in police cells or lock-ups referred to in section 28(3) of the Act must contain a comprehensive list of information pertaining to the child, such as, for example, the full names of the child and any alias or nickname; the nature of the offence alleged to have been committed; the age of the child; the date and time of arrest; the reasons why the child cannot be released; the physical and psychological condition of the child, as observed by a police official, at the time of arrest; and the names, addresses and telephone numbers of the parents or next of kin, if known.
95. This register may be examined in terms of section 28(4) of the Act by a member of the South African Police Service in the performance of his or her functions; a social worker, health care practitioner or probation officer in the performance of his or her functions; the prosecutor involved in the case; a member of the Inter-sectoral Committee for Child Justice established in terms of section 94 of the Act; an independent observer appointed in terms of section 65(6) of the Act; a person who is by law empowered or mandated to take care of the interests of a child; a parent of the child or the appropriate adult or guardian; a staff member of the child and youth care centre where the child is placed; the presiding officer involved in the case; and the legal representative of the child.
96. Following the enactment of the Child Justice Act, a system of preliminary inquiry had been developed and monitoring systems had been developed. Child and Youth Care Facilities ("CYCFs") has been established for awaiting trial and sentenced children. The Department of Social Development had finalised norms and standards for these institutions. The Department of Basic Education was handing over Reform Schools and Schools of Industry

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<sup>64</sup> Act No. 75 of 2008

to the DSD and the DSD was building or refurbishing separate wings in at least one CYCF in each province for sentenced children.

97. It is furthermore noteworthy that in the period running up to the promulgation of the Child Justice Act, 2008<sup>65</sup> the South African government had already initiated a co-ordinated and sustained focus on the prioritisation of matters involving children in conflict with the law. Three “one-stop” child-justice centres have been established in the country; in Port Elizabeth, Bloemfontein and Klerksdorp.
98. Diversion programmes are a critically successful and effective part of restorative justice. There are many benefits to diversion, including decreased crime amongst young people and lower numbers of young people who need to be institutionalised, as through assessment it is ensured that young people who do not belong in prison are not sent there. The responsibility of child rearing is given back to the parents and where parents are absent, communities are encouraged to take responsibility for some of these children. It also means that the rights of the child are protected.
99. Legal Aid South Africa has also appointed children’s units to provide legal representation to children in conflict with the law. In addition, time frames for concluding cases involving children in conflict with the law have been set: three to six months for cases in district courts; six to nine months for cases in regional courts, and nine to 12 months for cases in high courts. As a consequence, the number of children awaiting trial has significantly reduced over the years.
100. In addition, the SAPS have also developed National Instructions for Children in Need of Care and Protection<sup>66</sup> in order to provide clear directives to police officials on the implementation of the Children’s Act, 2005.<sup>67</sup> The police have powers to remove a child in need of care and protection and in need of immediate emergency protection from a suspected abusive environment and must arrange for the placement of the child in alternative care. “Alternative care” includes a Child and Youth Care Centre and the care of a responsible adult.
101. The matter of *C v Department of Health and Social Development, Gauteng*<sup>68</sup> concerned the confirmation of a declaration of constitutional invalidity of sections 151 and 152 of the Children’s Act. The Constitutional Court held that the removal and placement of a child must always be subject to automatic judicial review or confirmation by a court.

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<sup>65</sup> Act No. 75 of 2008

<sup>66</sup> National Instruction 3/2010

<sup>67</sup> Act No. 38 of 2005

<sup>68</sup> 2012 (2) SA 208 (CC)

### **Institutional measures to strengthen the right to be free from violence**

102. With regards to the right to security of person and to be free from all forms of violence, government noted that even though serious crime levels had decreased and substantial resources had been made available, performance in the criminal justice system is something that requires continuous improvement.
103. In response to this challenge, government adopted an outcomes-based system and renewed its commitment to ensuring that citizens are and feel safe. This meant paying particular attention to those types of crimes that induced feelings of insecurity among citizens, particularly trio (vehicle hijackings, residential and business robberies) and contact crimes (assault, murder and rape). Targets were set for lowering these categories of crime. Government committed itself to improving capacity in the criminal justice system, increasing the number of finalised cases, reducing case backlogs, strengthening rehabilitation and victim support programmes, and addressing cyber-security and cyber-crime threats.<sup>69</sup>
104. Several surveys have shown that citizens and communities are beginning to feel safer. The Victims of Crime Survey found that, during the period 2008 to 2010, about 60% of households surveyed were satisfied with the way the police and courts were doing their work.<sup>70</sup> In a further Victims of Crime Survey, for the period April 2012 to February 2014, more than 60% of households were satisfied with the way in which police and courts were doing their work. This view may have been influenced by factors such as the time it took for police to respond to a crime, visible policing, conviction rates, and sentencing of perpetrators. Households who were satisfied with the police in their area felt that the police come to the scene of the crime (78,0%) and were committed (73,7%).<sup>71</sup>
105. Reduced crime levels after 2003/04 could be attributed to an increase in visible policing and improved crime-combating initiatives, which were part of the National Crime Prevention Strategy. Improvements in conviction rates and the imposition of harsher sentences could also have acted as disincentives.

### **Measures to address gender-based violence:**

106. Contact crimes (a category of serious crimes) induce the most fear, as the victim comes into contact with the perpetrator, usually resulting in bodily harm or death. Government pays particular attention to these types of crimes. Several interventions were introduced or strengthened to address gender-based violence and sexual offences against vulnerable groups, in particular women and children. These interventions included the following:
- Specialised courts dedicated to sexual offences
  - Thuthuzela Care Centres to help prevent secondary trauma for victims of these crimes

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<sup>69</sup> 20 Year Review, p. 137

<sup>70</sup> 20 Year Review, p.138

<sup>71</sup> Victims of Crime Survey 2013/14, p.2

- Introducing specialised police units (such as family violence, child protection and sexual offences units)
  - Resourcing and establishing victim-friendly rooms at police service points
  - Empowering prosecutors, police officers, magistrates and doctors with specialised skills
  - Keeping dangerous sexual offenders under long-term supervision on release from prison.
107. The Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007<sup>72</sup> was passed in 2007. This Act provides for expanded definitions of crimes, such as rape, and provides greater protection for children. A number of new policy frameworks were also introduced and implemented, including the Child Justice National Policy Framework, the Restorative Justice National Policy Framework (including forming linkages with traditional justice), the Social Crime Prevention Strategy and the Diversion Accreditation Framework. Government has also adopted a Plan of Action to combat violence against women and children. Furthermore, the Criminal Law (Sentencing) Amendment Act, 2007<sup>73</sup> aims to regulate the imposition of discretionary minimum sentences for certain serious offences and also to provide that certain circumstances shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence when a sentence must be imposed in respect of the offence of rape.
108. Several interventions were introduced to address gender-based violence and sexual offences against vulnerable groups. We have re-introduced the specialised Family Violence Child Protection and Sexual Offences (FCS) Units and nationally there are 176 established FCS units attached to all police clusters within SAPS. This has resulted in lengthy convictions, achieved through the dedicated work of detectives and prosecutors. In 2013, since the re-establishment of the FCS units, there were 1 194 life sentences secured over a three-year period: 306 in 2010/2011; 389 in 2011/2012 and 499 in 2012/2013. Sentences past over this period led to a combined 36 225 years of imprisonment.
109. Resourcing and establishing victim-friendly rooms at police service points are on-going. There are currently more than 900 Victim Friendly Facilities rendering victim support services in place and it is envisaged that this will be rolled out to all police stations.
110. A major component of our fight against sexual violence really are the Thuthuzela Care Centers ("TCCs"), which embody a coordinated approach in the way we effectively manage sexual offences. In 2013, at the 51 TCCs providing services, a total number of 30 706 matters were reported of which 2769 are either trafficking, domestic violence or Children's Act matters; the remaining number of 27 947 are sexual offences related. For the same year, the National Prosecuting Authority produced an average conviction rate for TCC-cases of 65.9%, which was the best conviction rate over a period of 5 years. Of

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<sup>72</sup> Act No. 32 of 2007

<sup>73</sup> Act No. 38 of 2007

the 2357 cases finalised with a verdict, 1554 (65.9%) resulted in a conviction. This is also an improvement of 13.3% compared to the 2012/13 financial year. During the 2013/14 financial year the TCC-cases per accused and per offence, which resulted in convictions included amongst others 151 sentences of life imprisonment, 132 sentences of 20-25 years imprisonment and 455 sentences of between 10 and less than 20 years imprisonment.

111. Thuthuzela's integrated approach to rape care is one of respect, comfort, restoring dignity and ensuring justice for victims of sexual violence. The management of TCC-model and roll-out falls within the responsibility of the NPA. The success of it is based upon effective and efficient stakeholder cooperation such as between the Departments of Justice, Health, Education, Treasury, Correctional Services, Social Development, the SAPS and designated civil society organisations. The TCC-model is specifically focussed on being victim-friendly and court directed with prosecutor-guided investigations and stakeholder cooperation. The ultimate goal is to minimise secondary victimization, reduce the cycle period for the finalisation of cases and to increase the conviction rates of these cases. When reporting a crime, the victim is removed from an environment such as a police station, to a more victim-friendly environment before being transported by police or an ambulance to the Thuthuzela Care Centre at the hospital. The person also receives counseling. If the medical examination happens within 72 hours of the incident, post-exposure prophylaxis is given. The investigating officer on call at the center will take the person's statement. The person will receive appropriate medication and is given a follow-up date for further medical treatment, before being transported home or a place of safety. A referral letter will be given or an appointment made for long-term counseling.
112. Before the trial, as part of the TCC-model, a case manager will oversee the prosecutor-guided investigation and will ensure that the case is trial and court ready. The case manager is a legally qualified official with specific additional expertise in dealing with gender-based violence matters.
113. With regards to the trial, consultations with a specialist prosecutor will take place before the case goes to court and court preparation by a victim-assistant officer will be undertaken. The person must also be given an explanation of the possible outcome and regular updates of the trial process by the case manager. The Thuthuzela model is an outstanding example of interdepartmental cooperation.
114. South Africa established Sexual Offences Courts as an innovative measure to improve the prosecution and adjudication of sexual offences and ensure that vulnerable groups get the care, respect and support they need. By March 2003, twenty (20) Sexual Offences Courts had been established, and by March 2004, a year later, the number had increased to forty-seven (47) courts. At the end of 2005, there were seventy-four (74) such courts in the country.
115. We have recently re-established the sexual offences courts. These dedicated services use intermediaries, audio-visual equipment and specialised training, among other measures.

The NPA's Sexual Offences and Community Affairs (SOCA) Unit developed comprehensive training manuals which are updated annually to be in line with the latest developments in law for specialist prosecutors and also an integrated training manual for stakeholders at our TCCs.

116. In December 2014 Government finalized a National Strategy for Intersectoral Management of Sexual Offences<sup>74</sup> which encourages the inter-sectoral approach to all matters relating to sexual offences courts. It sets out clear duties and responsibilities of all stakeholders in the establishment and management of these courts. The National Strategic Plan also provides for the minimum uniform personnel required at each sexual offence court to include: (i) 1 presiding officer; (ii) 2 prosecutors; (iii) 1 intermediary; (iv) 1 designated clerk; (v) 1 designated social worker; (vi) 1 legal aid practitioner; and (vii) 1 court preparation / victim support officer. All victims should have access to services such as court preparation programme; information material in form of text, visuals and Braille; allocation of food for children, vicarious trauma programmes for personnel working with victims of sexual violence as well as a case-flow management system and screening policy to direct sexual offences cases to sexual offences courts where they are established.
117. Intermediaries deployed to all Sexual Offences Courts and other regional courts dealing with sexual offences cases. There is a pool of ad hoc intermediaries to close the gap whenever the need arises. Social workers employed by Government continue to augment these services. These dedicated services use intermediaries, audio-visual equipment and specialised training, among others. Government has a very clear and well-coordinated strategy and we are beginning to see the results thereof – the drop in the number of cases of reported sexual offences being a case in point.
118. Based on the MATTSO report recommendation that all court personnel must undergo Trauma Debriefing Programme to minimize and eliminate the vicarious trauma that they often suffer from dealing with cases of sexual offences on a daily basis. Government developed the Debriefing Programme for the intermediaries and all front line staff servicing victims of sexual assault.
119. Through sexual offences courts, we are able to provide specialised victim-support services, improve the effectiveness of witnesses in court, reduce the turnaround time in the finalisation of sexual offences matters, and improve conviction rates. The courts aim to minimise secondary trauma for victims.
120. The Court Preparation Programme is a realistic and practical programme aimed at preparing witnesses to effectively testify in court. In order to attain this aim, Court Preparation Officers have to be equipped to identify and address the individual needs of witnesses. Witnesses are informed of the court environment, legal processes and legal terms. The fears and concerns of witnesses about testifying are addressed and the programme aims to reduce secondary victimisation. The witness is provided with skills

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<sup>74</sup> JCPS Working Group (Devcom) input: January 2015

and information to cope with the stress of giving evidence through the use of a specific model. Furthermore, the merits of the case are not discussed during the court preparation process.

121. Ke Bona Lesedi, which means “I see the light”, is a court preparation programme designed to address fears and concerns of child witnesses going to court. It is intended to contribute towards the effective implementation of the Criminal Law (Sexual Offences and Related Matters) Amendment Act<sup>75</sup> and to assist prosecutors to have effective, non-traumatised and credible witnesses. The programme contributes towards successful convictions and a reduction in the withdrawal of cases.
122. The National Register for Sex Offenders came into operation on the 30<sup>th</sup> of June 2009 in terms of Chapter 6 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act No 32 of 2007. The objects of the Register are to protect children and persons who are mentally disabled against sex offenders by establishing and maintaining a record of persons who have been convicted of a sexual offence against a child or a person who is mentally disabled; or are alleged to have committed a sexual offence against a child or person who is mentally disabled.
123. The registration progression in the past three financial years is as follows:

2011/2012	2012/2013	2013/2014
2 340	3 526	15 545

124. The latter figure clearly indicates a steep progressive increase from 2012/2013 to 2013/2014 resulting from the robust intervention actions since 2012 to populate and update the Register. However, while the national register is not open to the public, employers in the public or private sectors, such as schools, crèches and hospitals, are accorded the right to check whether a job applicant is fit to work with children or mentally disabled people.
125. A strategy to address gender-based and sexual orientation-based violence against lesbian, gay, bisexual, transgender and intersex people is being developed. A National Task Team (NTT) was re-established in May 2013, with government together with representatives from Chapter 9 institutions and civil society organisations working in partnership to achieve a number of formidable tasks. These included, amongst others, to develop a National Intervention Strategy to respond to, and prevent, gender and sexual orientation-based violent crimes perpetrated against LGBTI persons and to develop an Inter-sectoral Implementation Plan which would link parallel and complementary initiatives.
126. The NTT also undertook to strengthen government’s ability to respond to LGBTI needs and to strengthen the capacity of civil society organisations to deliver related services. It set out to improve linkages with other government departments, to undertake

<sup>75</sup> Act No. 32 of 2007

programmes within the DoJ&CD, such as the Access to Justice and the Promotion of Constitutional Rights Programme and the National Action Plan (NAP), as well as working closely with relevant Chapter 9 institutions - such as the Human Rights Commission and the Commission for Gender Equality – to combat racism, xenophobia and related intolerance and in that manner address the impact of different forms of discrimination targeting LGBTI persons. It seeks to improve the management of cases by relevant role-players in the criminal justice system, including the South African Police Service, the National Prosecuting Authority, the Department of Social Development, the Department of Health and the Department of Correctional Services.

#### **Legislative and policy measures to fight transnational crime and corruption:**

127. A number of statutes have been adopted to fight national and transnational crime and corruption.<sup>76</sup> In the last five years a cyber-crime policy has been developed and is being implemented. During 2011/12 and 2012/13, the courts finalised 216 cyber-crime cases with a conviction rate of 87.5% and 136 cyber-crime cases with a conviction rate of 97.8% respectively.

#### **Applicable case law:**

128. Several court decisions have affirmed the state's duty to ensure the security of individuals within South Africa. In *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others*<sup>77</sup> the Constitutional Court held that commuters enjoy a constitutional right to life, freedom and security of person, including the right to be free from all forms of violence from either public or private sources. In *Minister of Safety and Security v Madyibi*<sup>78</sup> the Supreme Court of Appeal upheld a claim for loss of support by dependants after finding that the police negligently failed to dispossess a sergeant, who took his own life with the firearm, of the official firearm. In *Minister of Safety and Security and Others v WH*<sup>79</sup> it was held that the Minister of Safety and Security and police officers who failed to arrest the plaintiff's rapist in terms of a warrant of arrest issued together with a protection order prior to her rape, were jointly and severally liable to the plaintiff. In *Zealand v Minister of Justice and Constitutional Development and Another*<sup>80</sup> the Court held that interference with a person's liberty can take place only under restrained conditions because in a constitutional democracy personal freedom is highly prized.

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<sup>76</sup> The Prevention of Organised Crime Act, 1998 (Act No 121 of 1998); Combating of Corrupt Activities Act, 2004 (Act No 12 of 2004); Firearms Control Act, 2000 (Act No 60 of 2000); National Convention Arms Control Act, 2002 (Act No 41 of 2002); and Financial Intelligence Act, 2001 (Act No 38 of 2001) serve as legal frameworks to fight transnational crime corruption, illegal arms and money laundering. The Criminal Procedure Act, 1977 (Act No 51 of 1977) provides for rules of procedure in dealing with criminality from the investigation and trial stages.

<sup>77</sup> 2005 (2) SA 359 (CC)

<sup>78</sup> [2009] ZASCA 95

<sup>79</sup> 2009 (4) SA 213 (E)

<sup>80</sup> 2008 (2) SACR 1 (CC)



**Measures to enhance private – public sector cooperation:**

129. Government has led initiatives which enhance co-operation between the private and public sector and also ensure that the strategies adopted are complementary. In August 2010, the SAPS and Business against Crime South Africa signed a Memorandum of Understanding (MOU). This was an initiative focused on improving operational capacity and performance across the board. The scope of this has been expended to include requests from the JCPS Cluster which has the responsibility for finalising policy and the identification of priority areas. This has included the secondment of key individuals with specialised skills and the provision of support. These efforts have enhanced the relationship between the private and public sector and have been incorporated into other departments.
130. In addition, the Civilian Secretariat of Police during 2011 developed a policy framework in relation to Community Safety Forums (CSF). The concept of a CSF is based on the premise that increased co-operation and interaction would improve the functioning and deliberations within the local criminal justice system and the delivery of crime prevention projects. The framework resulted in the CSF concept evolving as a replicable structure that can be established in the various cities and towns countrywide. The CSF structure acts as an integrated problem solving mechanism at local level; provides a further means for sharing information between government (and in particular the police and the local authorities) and civil society; and also leads to an inter-disciplinary approach to crime prevention. The model has been rolled out country-wide and has had a positive impact at local level.
131. Community Safety Forums (CSF's) are meant to facilitate the delivery of a multi-sectoral governmental approach on safety in local communities and is distinguished from the CPF through its jurisdiction and tasks. In addition to this model, there are also Community Police Forums (CPF's). The CPF is a legal community structure established in terms of the South African Police Service Act and is mandated to facilitate community-police relations within a specific police station precinct and serves as the mouthpiece of the community with the police and vice versa on policing matters and other relevant safety issues. Members of this forum are elected during formal election processes and get its mandate from the community to execute the legal powers and functions. The jurisdiction of a CSF is aligned to the municipal and/or district municipal jurisdiction/boundary. Once a CPF is formalized and established, it facilitates and enhances co-operation, ensures integrated planning and coordinates implementation of safety programmes and projects in the local sphere. It consists of representatives formally nominated and endorsed by the respective department, institution or community based organisation. In this regard, the CPF is one of the stakeholders represented in the CSF structure.

### Measures to protect the right to bodily integrity

132. The Constitution guarantees the right to bodily and psychological integrity.<sup>81</sup> The right to make decisions concerning reproduction is a crucial aspect of control over one's body.
133. The Policy on Universal Access to Primary Health Care, introduced in 1994, paved the way for effective health care delivery programmes. This policy provides for free health care to pregnant and lactating women and children under the age of six. One outcome of the implementation of universal access has been a marked increase in access to health facilities and high levels of utilization of primary health care (PHC) services.
134. The Gender Policy Guidelines for the Public Health Sector, 2002 were developed to ensure that an effective framework is in place to develop, implement and monitor laws, policies, programmes, procedures and practices for women's health. Further the policy ensures that in all spheres of life, equitable attention and sensitivity is given to the health needs of women and girls in relation to men and boys. Implementation of this policy allows for a gender-focused approach to health planning and programming. It has provided the impetus for numerous innovative initiatives. The National Health Act, 2003<sup>82</sup> further entrenches principles for promotion of women's health.
135. A large percentage of the women live in isolated areas, and struggle to gain physical access to the hospitals or clinics. The State has attempted to address this problem by rolling out mobile clinics to visit the larger rural areas. The second problem facing rural women is that they are not informed of the healthcare options open to them, and therefore do not seek treatment for treatable problems. This receives on-going attention by mobile clinics and extensive information campaigns.
136. There has been a demonstrable increase in women's access to reproductive health care services in South Africa. Improved reproductive health services have resulted in a reduction in illness and death amongst women. Family planning is a broad term that encompasses the provision of contraception methods to sexually active women and includes fertility planning, for example spacing and management of infertility, and termination of pregnancies. The provision of appropriate and adequate family planning services in South Africa is critical in a context of high rates of teenage pregnancies, as well as high rates of mother and child mortality and HIV.
137. In South Africa, according to Statistics South Africa in its estimates of the 2013 population of just less than 53-million people, the total fertility rate<sup>83</sup> had dropped from 2.7 children

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<sup>81</sup> S 12(2) "Everyone has the right to bodily and psychological integrity, which includes the right –  
(a) to make decisions concerning reproduction;  
(b) to security in and control over their body; and  
(c) not to be subjected to medical or scientific experiments without their informed consent."

<sup>82</sup> Act 61 of 2003

<sup>83</sup> The total fertility rate of a population is the average number of children that would be born to a woman over her lifetime.

per woman in 2002 to 2.3 children per woman in 2013. Many factors influence the fertility rate, including urbanisation, female educational levels, infant mortality, costs of raising children, cultural and religious beliefs as well as the use of contraception. In South Africa, estimates show that about two thirds of sexually active 15- to 49-year-old women use a modern contraceptive method. This usage contributes to the decline in the total fertility rate.

138. Access to and use of contraceptives by women is improving. Contraceptive use is an important element in the promotion of sexual and reproductive health. The strategic objective set for improving women's health was to improve access to sexual and reproductive health services. All public sector health facilities are providing family planning services with a varying mix of contraceptives. A protection rate of 37.8% was recorded, exceeding the 35% national target set for 2012/13.
139. During 2012/13 the updated National Contraception and Fertility Planning Policy and Service Delivery Guidelines were approved by the National Health Council. The National Contraception and Fertility Planning Policy and Service Delivery Guidelines and National Contraception Clinical Guidelines are extremely important documents aimed at reprioritising contraception and fertility planning in South Africa, with an emphasis on dual protection.
140. Contraception is one of the most powerful public health tools for any country. Providing women with access to safe and effective contraception is a critical element of women's health. Enabling women to make choices about their fertility is empowering and offers women better economic and social opportunities. Birth spacing also improves the opportunities for children to thrive physically and emotionally. Engaging men in sexual and reproductive health encourages shared responsibility in their roles as partners and parents.
141. The adoption of the revised Contraception Policy takes place within the context of renewed international focus. One of the key changes in the policy is to increase the range of contraceptive commodities available in the public sector thereby increasing the contraceptive method mix. The most notable additions are sub-dermal contraceptive implants and a greater variety of intra-uterine devices. These increases to the method mix should give more choice and security of contraceptive protection to women, thus improving family planning.<sup>84</sup>
142. In 1997, South Africa enacted the Choice on Termination of Pregnancy Act, 1996<sup>85</sup> that allows for the termination of pregnancy. The Act was amended during the period under review, in 2008, through the Choice on Termination of Pregnancy Amendment Act, 2008<sup>86</sup>

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<sup>84</sup> DoH Annual Report 2012/2013

<sup>85</sup> Act No. 92 of 1996

<sup>86</sup> Act No. 1 of 2008

to, amongst others, empower a provincial Member of the Executive Council to approve facilities where a termination of pregnancy may take place.

## Article 7: Right to a fair trial

143. The right of access to our courts is set out in section 34 of the Constitution.<sup>87</sup> Section 35(3) enshrines the right to a fair trial.<sup>88</sup> It is well established in our courts that presiding officers have a duty to ensure that the accused is informed of his or her rights, including the right to legal representation and that this should be done prior to the commencement of a trial.<sup>89</sup>

### Measures to affirm the independence of the judiciary

144. Our independent judiciary, as one of the three branches of government, has been instrumental in upholding South Africa's constitutional values such as human dignity, equality and the supremacy of the Constitution. The Constitution 17<sup>th</sup> Amendment Act and Superior Courts Act, 2013<sup>90</sup> affirm the independence of the judiciary and acknowledges that the Chief Justice, as the head of the Judiciary, exercises responsibility over the establishment and monitoring of the norms and standards for the exercise of judicial functions and the performance of all courts. Whilst significant progress has been

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<sup>87</sup> S 34 "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

<sup>88</sup> S 35(3) "Every accused person has a right to a fair trial, which includes the right-

- (a) to be informed of the charge with sufficient detail to answer it;
- (b) to have adequate time and facilities to prepare a defence;
- (c) to a public trial before an ordinary court;
- (d) to have their trial begin and conclude without unreasonable delay;
- (e) to be present when being tried;
- (f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;
- (g) to have a legal practitioner assigned to the accused person by the state and at state expense, substantial injustice would otherwise result, and to be informed of this right promptly;
- (h) to be presumed innocent, to remain silent, and not to testify during the proceedings;
- (i) to adduce and challenge evidence;
- (j) not to be compelled to give self-incriminating evidence;
- (k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;
- (l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;
- (m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;
- (n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
- (o) of appeal to, or review by, a higher court."

<sup>89</sup> *S V Thusi* 2002 (12) BCLR 1274 (N)

<sup>90</sup> Act No. 10 of 2013

made in respect of the transformation of the judiciary, further measures need to be taken to, amongst others, ensure that more women are appointed to the bench.

145. Very often the right to fair trial is inexplicably linked to a speedy trial. Case Flow management now resorts under the Chief Justice. To improve the efficiency in the courts, the Chief Justice has developed norms and standards for courts that have been gazetted and apply to all judicial officers.
146. More cases are been dealt with through Alternative Dispute Resolution Mechanisms (ADRM) and Diversion, in particular. Settling matters through ADRM before they reach courts, means freeing up much needed resources – both financial and human. However, informal mediation must be regulated to prevent abuse.

### **Measures to ensure a more efficient justice system**

147. Government aims to make the criminal justice system more efficient and up to date in line with modern global developments in technology and file administration. In line with this the integrated proposals that emanated from very detailed and robust research, analysis and inspections of all components of the Criminal Justice System (CJS), resulted in approval by Cabinet of the CJS Seven Point Reform Implementation Plan during 2008.
148. The implementation of the Seven Point Plan is coordinated by the Office for the Criminal Justice System Review (OCJSR) located within the DoJ&CD. The elements of the seven point plan are as follows:
  - Alignment through a single vision and mission for the CJS leading to a single set of objectives, plans, priorities and performance measurement targets for the CJS;
  - Establish through legislation or by protocol a new and realigned single CJS coordinating and management structure that flows in a seamless manner from the Cabinet to each Court to improve the end-to-end coordination of the CJS in conjunction with the current National and Provincial JCPS structures;
  - Practical short and medium term proposals to improve the all-round performance of courts;
  - Improved component parts of the CJS with a focus on areas with serious shortcomings;
  - Provision of an integrated and seamless National CJS Information System to facilitate more informed strategies, plans and decision making as well as to facilitate better day-to-day operational management;
  - Provision of technology solutions aimed at modernising operations, reducing costs and eliminating waste; and
  - Involvement of the population at large in the fight against crime.
149. In this regard, the Criminal Justice System Review (CJS Review), initiated by the Cabinet is well underway across the whole value chain of the CJS and aims to transform the CJS from a fragmented, unfocussed and broken system into a fully effective and efficient

integrated system that deals with the end-to-end CJS value chain. Various Protocols to guide interactions between the CJS role players have been developed and implemented and have led to improved communication and co-ordination within the CJS.

150. The National Development Plan has placed renewed focus on the reform of the Criminal Justice System. The work to be done on the seven focus areas to ensure that South Africa has an efficient justice system and that people are and feel safe by 2030 is receiving ongoing attention. These initiatives are essential because the more effective the criminal justice system is, the more victims of crime can be assisted.
151. In line with the seven point plan, government has also embarked on the modernisation of the CJS through the development of an Integrated Justice System (IJS) Programme. The primary objective of the IJS Programme is to automate and integrate the end-to-end criminal justice business processes (that is, from the reporting of a crime incident, through to the prosecution and adjudication of the alleged perpetrator, to the release of a convicted person), and manage the related inter-departmental information exchanges.
152. The IJS Programme has made considerable progress in the sharing of information between departments and the development and rollout of the Person Identification and Verification Application (PIVA). Other person-related integrations for 10-fingerprint searches and fast criminal record checks are in progress. This verification service will also assist with the capability to provide clearance certificates for the National Register of Sexual Offenders (NRSO), the Child Protection (CPR) and the Old Persons Abuse Registers (OPAR).

#### **Legislation to allow for forensic procedures**

153. Through the promulgation of the Criminal Law (Forensic Procedures) Amendment Act, 2013<sup>91</sup> South Africa became the 57<sup>th</sup> country to assent to legislation that provides a framework to obtain DNA samples from arrested persons and offenders and store their DNA profiles in a National Forensic DNA Database (NFDD). The Act allows for DNA sampling to assist in the investigations of missing and unidentified persons. This forensic DNA capability is a significant step towards the more effective and quicker exoneration of the innocent and detection and conviction of perpetrators. This legislation requires that detectives take DNA buccal samples from sentenced and remanded persons in the facilities of the Department of Correctional Services from the date the Act becomes operational. The finalisation of the regulations to support the DNA Act is at an advanced stage and will support the Act, which (with the exception of section 2 thereof) came into operation in January 2015.
154. Through the use of this technology, it has been possible to link numerous serial and multiple offenders by means of DNA searches and matches, enabled by the DNA database. In addition, in various cases unknown offenders could be linked to an offence

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<sup>91</sup> Act No. 37 of 2013

with a common DNA on exhibits submitted to the Forensic Science Laboratory (FSL). Further enhancement of the SAPS systems has been completed to capture records of DNA buccal samples and link it with the fingerprints of all persons arrested. The investigation diary of the SAPS electronic (CAS/ICDMS) system will now receive attention to facilitate the follow-up investigation of forensic investigative leads made through the comparison searches on the forensic DNA, fingerprint and IBIS Biosciences databases.

### **Measures to ensure legal representation**

155. In order to ensure that indigent people receive competent and adequate legal representation in court, Legal Aid South Africa, an autonomous statutory body, renders or makes available legal representation to indigent persons at state expense. Legal Aid South Africa has done sterling work in advancing access to justice for indigent persons in need of legal representation, though there are still challenges in the sense that demand outweighs supply and Legal Aid South Africa is unable to assist all the persons currently in need of their services.
156. In 2012/2013 Legal Aid assisted 438,844 clients assisted in legal matters with an additional 297,835 clients assisted with legal advice. This meant that they were able to assist 736,679 people. Some 297,835 advice matters were handled by Legal Aid SA's paralegals as well as by its call centre, the Legal Aid Advice Line, which assisted with 15% of the advice matters. The Legal Aid Advice Line provides legal advice via a toll-free number in five official languages.<sup>92</sup>
157. Legal Aid South Africa has been recognized internationally as having developed a sustainable legal aid system which has been studied and learnt from by many countries intending to develop their legal aid systems. Many international country delegations are hosted annually by Legal Aid South Africa of countries wishing to study the Legal Aid South Africa model as an example of best practice. Legal Aid South Africa has also been asked to send its representatives as experts to many international conferences and workshops. It can also be noted that South Africa was a sponsor in promoting the adoption of the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems by the United Nations General Assembly in December 2012.
158. International information-sharing plays a vital role. Legal Aid South Africa frequently receives invitations to participate in regional and international events for the purpose of sharing its experiences on various aspects relating to the delivery of legal aid and increasing access to justice and to share their experiences and lessons, in particular around the implementation of the UN Principles and Guidelines.

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<sup>92</sup> Legal Aid, Annual Report, 2012/2013

### Ensuring access to justice through new courts

159. Since 1994, 45 new courts have been built and the finalisation of the construction of the two remaining High Courts in Limpopo and Mpumalanga is underway. There will be a seat for a Division of the High Court in each of the nine provinces so as to ensure that communities are able to access services of a High Court in the province of their residence. In addition to building new courts, over R2 billion has been spent on the improvement and maintenance of existing infrastructure in the last 20 years. Branch courts have been transformed into full-service courts so as to reverse the effect of the spatial legacy of the past, which deprived the majority of citizens equal access to justice.

### Case law pertaining to the right to a fair trial

160. Case law in South Africa is continuously developing and/or clarifying various aspects relating to the right to a fair trial, e.g. in the matter of *Levack v Regional Magistrate, Wynberg*<sup>93</sup> the Court held that compelling an accused to submit a voice sample did not infringe the person's right to remain silent or the right against self-incrimination. In *Minister of Safety and Security v Gaqa*<sup>94</sup> the Court held that granting the relief sought by the State would involve a limitation of rights and required that the limitation of rights test that section 36(1) of the Constitution provides, be applied. It held that a refusal to assist the applicant would result in serious crimes remaining unsolved, law enforcement being stymied and justice diminished in the eyes of the public who have a direct and substantial interest in the resolution of such crimes. It goes without saying that these factors also carry considerable weight in the balancing exercise which section 36 requires in relation to the matter at hand. In *Gaqa's* case the Court found that the respondent's interests were of lesser significance and allowed the relief sought. However, in the case of *Minister of Safety and Security and Another v Xaba*,<sup>95</sup> in very similar circumstances, the court reached the opposite conclusion.

## Article 8: Freedom of conscience and religion

161. South Africa has created a wide space for individuals to practice their faith and exercise their freedom of conscience. As indicated in the previous report, the religions that are practised in South Africa include amongst others Christianity, Hinduism, Islam, and Judaism. Compared to the apartheid era, all citizens have the right to freedom of conscience, religion, thought, belief and opinion. Marriages concluded under any tradition, or a system of religious, person or family law are now recognised.<sup>96</sup>

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<sup>93</sup> 2003 (1) SACR 187 (SCA)

<sup>94</sup> 2002 (1) SACR 654 (C)

<sup>95</sup> 2003 (2) SA 703 (D)

<sup>96</sup> 20 Year Review



162. In 2013, the vast majority (85,6%) of South Africans described their religious affiliation as 'Christian' while a further 5,6% said that they were not affiliated to any religion in particular. Five percent of individuals subscribed to religions that was described as, 'ancestral, tribal, animist or other traditional African religions'. Muslims, who comprised 2% of the total, were predominantly found in Western Cape, KwaZulu-Natal and Gauteng. Hindus comprised about 1% of the population of South Africa, but 3,9% of the population of KwaZulu-Natal.<sup>97</sup>

### Case law pertaining to the right to freedom of conscience and religion

163. During the period under review, the right to express one's religion received judicial affirmation in a variety of cases. For example, in the case of *Antonie v Governing Body, Settlers High School*<sup>98</sup> a learner had been found guilty of "serious misconduct" for coming to school with dreadlocks and a cap – something which was considered part of her religious practice as a Rastafarian. The school decided that she had violated the school's code of conduct that had a rule about the appearance of learners. The Cape High Court set aside the decision of the governing body on the basis that it should have given 'adequate recognition' to the values and principles in the Constitution, including the learner's need to have freedom of expression.
164. In the case of *MEC for Education; Kwazulu-Natal v Pillay*<sup>99</sup> the Constitutional Court heard an appeal from the KwaZulu-Natal High Court concerning the right of a learner to wear a nose stud to school. In 2004 Sunali Pillay returned to Durban Girls' High School from the spring holiday with a small nose stud. The school decided that Sunali should not be allowed to wear the stud. Her mother took the school and the KwaZulu-Natal MEC for Education to the Equality Court alleging that they had unfairly discriminated against Sunali and had violated her religious and cultural rights.
165. The Equality Court found that the school had not unfairly discriminated against Sunali. On appeal, the High Court overturned the decision, finding that the school had discriminated against Sunali and that the discrimination was unfair. The High Court declared the decision prohibiting the wearing of a nose stud, in school, by Hindu/Indian learners to be null and void. Both the school and the Department appealed directly to the Constitutional Court.
166. Langa CJ wrote the majority judgment and found that the rule prohibiting the wearing of jewellery had the potential for indirect discrimination because it allowed certain groups of learners to express their religious and cultural identity freely, while denying that same right to others. The evidence before the Court showed that the wearing of a nose stud was a voluntary practice that formed part of Sunali's South Indian Tamil Hindu culture, which was part of her Hindu religion. The school had therefore interfered with Sunali's

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<sup>97</sup> General Household Survey, 2013

<sup>98</sup> 2002 (4) SA 738 (C)

<sup>99</sup> 2008 (2) BCLR 99 (CC)

religion and culture. As that burden was not imposed on others, the school's interference amounted to discrimination against her.

### Case law pertaining to the recognition of religious marriages

167. Another key development during the period under review has been the recognition of religious marriages which were not recognised during the apartheid regime.
168. In *Daniels v Campbell NO*<sup>100</sup> the applicant was a woman married in terms of Muslim rites, whose husband had died intestate. The court noted that Muslim marriages were not recognised in South African law and concluded that this violated section 9 of the Constitution. Accordingly, it was held that the applicant could inherit. The Constitutional Court thus recognised Muslim marriages, but the recognition was only in relation to monogamous Muslim marriages.
169. In the case of *Hassam v Jacobs NO*,<sup>101</sup> the applicant was a party to a polygamous Muslim marriage, whose husband had died intestate. The Constitutional Court held that precluding the applicant from inheriting unfairly discriminated on the grounds of religion and was therefore inconsistent with section 9 of the Constitution. The Court thus declared invalid section 1(4)(f) of the Intestate Succession Act<sup>102</sup> which excluded widows of polygamous Muslim marriages from the protection of the Act. Accordingly, it was held that the applicant could inherit. The ambit of this judgment extended the ruling in *Daniels v Campbell* to polygamous Muslim marriages.
170. Monogamous Hindu marriages also received legal recognition during the period under review. In the case of *In Govender v Ragavayah NO*<sup>103</sup> the court examined Constitutional Court cases which have extended the ambit of the Intestate Succession Act. The court found that the conclusion of a marriage in terms of Hindu rites and custom is an inherent element of the right and freedom associated with religious and cultural choices. Accordingly, it held that there is judicial support for the proposition that a spouse of a "marriage" by Hindu rites may well have the religious "marriage contract" given some recognition by South African law.
171. Following the courts' interventions, several pieces of legislation have been amended and/or enacted to recognise religious marriages, as are discussed elsewhere in the report.

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<sup>100</sup> 2004 (7) BCLR 735 (CC)

<sup>101</sup> (2009) ZACC 19

<sup>102</sup> Act No 81 of 1987

<sup>103</sup> 2009 (3) SA 178 (D)

## Article 9: Freedom of information and expression

172. The objective of the Constitutional right of access to information is to create a transparent society and a government accountable to the people. The right of access to information is a key that can be used to unlock access to other socio-economic rights and help ensure accountability of government to the people. This right can be as much about public service delivery as any other socio-economic right. The extension of the right of access to information includes the right to demand information from the private sector.<sup>104</sup>

### Compliance with PAIA

173. The Promotion of Access to Information Act, 2000<sup>105</sup> was enacted to give effect to the above constitutional requirement. Among the objects of the Act are the promotion of transparency and accountability in public and private institutions; the protection of certain security-related information held by public bodies, and the protection of privileged confidential professional information. There are various regulations issued in terms of PAIA.<sup>106</sup> In terms of Section 92 of PAIA, the Minister may by notice in the Government Gazette, make regulations among others regarding any matter required or permitted by PAIA to be prescribed, any matter relating to fees payable and any notice required by the Act. A manual for all staff members working on requests for access to information has also been developed to ensure that requests are processed in line with the ideals of the Act as well as the Constitution. The PAIA also sets up a detailed

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<sup>104</sup> S 32 “(1) Everyone has the right of access to

(a) any information held by the state; and

(b) any information that is held by another person and that is required for the exercise or protection of any rights.

(2) National legislation must be enacted to give effect to this right and may provide for reasonable measures to alleviate the administrative and financial burden on the state.”

<sup>105</sup> Act No. 2 of 2000

<sup>106</sup> **Government Notice: No. R. 1244 (22 September 2003)** Amendment to the Regulations published by Government Notice No. R187 with regard to availability of manuals by public bodies and availability of manuals by private bodies. In terms of the amended regulations, the information officer of a public body must immediately after the manual has been compiled, make available a copy of the manual in each of the three official languages to the South African Human Rights Commission, every office of that public body, and make the manual available on the website, if any, of the public body. The information officer may publish the manual in three official languages in the Gazette.

Immediately after a manual has been compiled by a private body, the head of a private body must make a copy of the manual available to the South African Human Rights Commission, to the controlling body of which that private body is a member, if applicable; must make the manual available on the website, if any, of the private body and the head of a private body may publish the manual in the Government Gazette.

**Government Notice: No. R. 187, 15 February 2002.** Subject: Regulations 187 of 15 February 2002 promulgated in terms of section 92 of PAIA makes provision for procedures pertaining to the availability of the section 10 Guide, availability of the manuals of public and private bodies, request fees and reproduction fees in respect of public and private bodies, and request forms.

**Government Notice: No. R. 223, 9 March 2001.** Subject: The Notice contains Regulations promulgated in terms of section 92 of PAIA relating to fees payable for the records of public bodies and private bodies

mechanism for the resolution of all disputes relating to requests for access to information. Under the PAIA the internal dispute resolution mechanisms must first be exhausted before one can take a matter to court. Government has developed the system for access to information over the years to ensure open and transparent governance and administrative justice in particular.

174. The South Africa Human Rights Commission has a specific mandate set out by PAIA to promote the right to access information and monitor compliance with the legislation. Since the inception of the legislation, the Commission has committed its resources to heighten awareness, monitor compliance and provide assistance to members of the public to assert their right to information. This function will become the function of the Information Regulator, as discussed more fully hereunder.
175. Sections 83 and 84 of the PAIA require the South African Human Rights Commission (SAHRC) to submit an annual report to the National Assembly. According the 2012-2013 Annual Report on the Promotion of Access to Information Act (PAIA) by the South African Human Rights Commission over 90% of municipalities remain non-compliant.<sup>107</sup> A total number of 24 institutions were sampled in 2012/13. The samples comprised of 10 national departments and 14 provincial departments. Requests were submitted to the selected institutions with only 4 responses received within the 30 day time frame that the PAIA provides. The responses were from the Department of Higher Education, Department of Women and Children, the Western Cape Department of Human Settlement, and Limpopo Department of Agriculture. 2 institutions out of 10 responded in the national department category, and only 2 institutions out of 14 responded at the provincial level. The research recorded a 16% response result.
176. The PAIA places an obligation on all public bodies to submit annual reports to the Commission on the number of requests received by each public body and how the requests were processed. This requirement is mandatory for all public bodies. The objective of the section 32 report is to establish the usage of the PAIA by the public and to test the readiness of public bodies to respond to requests for information. This is determined by the number of requests for information granted by the public body and the number of cases that go on appeal to the relevant authorities and the number of court applications that arise from requests for information that were refused.
177. Since the passage of the PAIA, compliance by public bodies with regard to the submission of section 32 reports has been low. In cases where the reports are submitted, many of the reports received do not accurately capture the requirements of section 32. In the reports however received, there is an increasing trend by public bodies not to comply with the provisions of the PAIA in dealing with information requests.<sup>108</sup>

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<sup>107</sup> p. 5

<sup>108</sup> 2012-2013 Annual Report on the Promotion of Access to Information Act (PAIA) by the South African Human Rights Commission, p. 33

178. Since PAIA became operational, our courts have emphasized that the right of access to information can *only* be limited when there is justification for such a limitation vis-à-vis other fundamental rights considerations.<sup>109</sup>

### **Legislative and policy measures to protect personal information**

179. The new Protection of Personal Information Act, 2013<sup>110</sup> deals with privacy of personal information. It regulates data protection and privacy in South Africa and imposes a number of stringent obligations on all persons who deal with personal information. It deals with the rights of personal privacy and the issue of how to balance those rights against the rights of freedom of expression.
180. The reason the Bill took a long time to be finalised is because of this complexity thereof and there was also considerable public participation in the process. There were extensive public hearings and some 36 submissions from various interested parties. When drafting the legislation special consideration was given to ensure that the Bill did not unduly restrict journalists or unduly restrict bloggers or the so-called citizen journalists, law enforcement agencies or any other literary or artistic expression.
181. The Protection of Personal Information Act, 2013<sup>111</sup> establishes a set of conditions for the processing of personal information. These include both general conditions and more detailed conditions for the processing of special personal information such as religious or philosophical beliefs, race and ethnic origins, political persuasion, to name a few. It also establishes an independent Information Regulator to regulate the implementation of the law. There will also be reliance on codes of conduct, approved by the Regulator for the various sectors, which would be legally enforceable. This implementation includes education and research, monitoring and enforcing compliance and the handling of complaints. The Regulator will have many functions to perform. It will be there to, not only, enforce compliance. It will also have a supervisory function. Sectors are encouraged to regulate themselves by drawing up codes of conduct for the processing of personal

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<sup>109</sup> In *Mittalsteel SA (Ltd) (formerly ISCOR Ltd) v Hlatshwayo* 2007 (1) SA 66 the focus was on the definition of a public body. The definition of "public bodies" subject to disclosure under PAIA includes state-owned companies that perform a government function and are under the control of the state, even if indirectly, and a formerly state-owned iron company must thus release records of meeting minutes. The Court found that, based on the facts and upon a review of comparative law, Iscor was under the control of the state, performed a public function in providing South African industry with a supply of government-regulated steel and, generally, met the test for a public body.

In *Unitas Hospital v Van Wyk* 2006 (4) SA 436 (SCA) a request for access to a record generated by a private hospital was lodged by the widow of a patient who had died at the hospital. The lower court granted the request for access, but that decision was appealed against in the Supreme Court of Appeal. In the majority judgment of the Supreme Court of Appeal it was noted that in general the question of whether a particular record is "required" for the exercise or protection of a particular right is inextricably bound up with the facts of the matter. The court found that the threshold requirement is that the requestor must show that the information will be of assistance although assistance alone is not sufficient. The information must be reasonably required in the circumstances and the requestor must demonstrate an element of need or substantial advantage.

<sup>110</sup> Act No. 4 of 2013

<sup>111</sup> Act No. 4 of 2013

information that must be approved by the Regulator. For example, an exemption has been made for journalists, subject to a code that sufficiently covers the relevant issues and the media is then, subject to that code, left to regulate itself. With a few exceptions, crimes are only committed when a party does not abide by an enforcement notice issued by the Regulator. An aggrieved party has the right to take the enforcement notice on appeal to the High Court.

182. Privacy is a valuable aspect of a person's personality, for that reason the definition of personal information is as wide as possible, including amongst others, everything from race, gender, marital status, sexual orientation, religion, language, employment history, email and telephone number, location and biometric information. It can also include personal opinions, views and preferences of a person. The Act also makes changes to the Promotion of Access to Information Act, as the responsibilities for the implementation of the Act are being transferred from the SA Human Rights Commission to the Information Regulator.
183. In protecting a person's personal information consideration should, therefore, also be given to competing interests such as the administering of national social programmes, maintaining law and order, and protecting the rights, freedoms and interests of others, including the commercial interests of industry sectors such as banking, insurance, direct marketing, health care, pharmaceuticals and travel services. The task of balancing these opposing interests is a delicate one.
184. Privacy and data protection legislation for South Africa is in line with international trends and the implementation will bring South Africa in line with international best practice. Many countries in the world, including African countries like Angola, Benin, Burkina Faso, Mauritius, Morocco and Senegal, already have legislation dealing with the protection of personal information.

### **Measures pertaining to the right to freedom of expression**

185. Freedom of expression is enshrined in section 16 of the Constitution.<sup>112</sup> As a general rule, any law that seeks to restrict freedom of expression, must be in conformity with section 36 of the Constitution, and in particular, it must not make inroads which are far too

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<sup>112</sup> S 16 (1) Everyone has the right to freedom of expression, which includes –

- (a) freedom of the press and other media;
- (b) freedom to receive and impart information or ideas;
- (c) freedom of artistic creativity;
- (d) academic freedom and freedom of scientific research.

(2) The right in subsection (1) does not extend to –

- (a) propaganda for war;
- (b) incitement of imminent violence;
- (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

extensive as to render the right a nullity.<sup>113</sup> The Promotion of Equality and Prevention of Unfair Discrimination Act, 2000,<sup>114</sup> in section 10, declares that no person may publish, propagate, advocate or communicate words against any person that is intended to be hurtful, harmful or intended to promote or propagate hatred save for *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. This Act provides for civil remedies.

186. The South African Government Communication and Information System convenes the Government Communicators Forum to ensure effective co-ordination of government communication. The main responsibility of GCIS is to keep the public informed about issues that affect their daily lives. GCIS also provides information on human rights and how to access them.
187. The Media Development and Diversity Agency (MDDA) was established in terms of the Media Development and Diversity Agency Act, 2002<sup>115</sup> to help in the creation of an enabling environment for media development and diversity that is conducive to public discourse and which reflects the needs and aspirations of all South Africans. The MDDA was set up to enable historically disadvantaged communities and persons not adequately served by the media to gain access to the media. To achieve its objective, the MDDA will:
- Encourage ownership and control of, and access to, media by historically disadvantaged communities, historically diminished indigenous language and cultural groups;
  - Encourage the channelling of resources to community and small commercial media;
  - Encourage human resource development and capacity building in the media industry, especially amongst historically disadvantaged groups;
  - Encourage research regarding media development and diversity.
188. The objects of the Act, in line with the national policy priorities and the Constitution, are to promote media development and diversity, media freedom, the right to freedom of expression and freedom to receive or impart ideas or information. The MDDA also conducts research into media development and diversity and has since produced several reports that assist academics, practitioners and policy makers in understanding the media industry in South Africa. Since its establishment the MDDA has achieved some major milestones including the awarding of grants to the amount of R183.6 million to over 407 projects, training of over 1300 people, the provision of 243 bursaries to different radio and print media and the receipt of unqualified audits.
189. Media ethics are important within the context of press freedom and freedom of expression.<sup>116</sup> The Press Council of South Africa, the Ombudsman and the Appeals Panel

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<sup>113</sup> *Islamic Unity Convention v Independent Broadcasting Authority* 2002 (5) BCLR 433 (CC)

<sup>114</sup> Act No. 4 of 2000

<sup>115</sup> Act No. 14 of 2002

<sup>116</sup> In this regards, see *NM and Others v Charlene Smith and Others* (2007) 7 BCLR 751 (CC). The Plaintiffs in this matter were three HIV positive women whose identities were withheld for their protection, and were simply

thereof are an independent co-regulatory mechanism set up by the print media to provide impartial, expeditious and cost-effective adjudication to settle disputes between newspapers and magazines, on the one hand, and members of the public, on the other, over the editorial content of publications.<sup>117</sup> The mechanism is based on two pillars: a commitment to freedom of expression, including freedom of the press, and to excellence in journalistic practice and ethics. In terms of the South African Press Code –

*“the press exists to serve society. Its freedom provides for independent scrutiny of the forces that shape society, and is essential to realising the promise of democracy. It enables citizens to make informed judgments on the issues of the day, a role whose centrality is recognised in the South African Constitution...Our work is guided at all times by the public interest, understood to describe information of legitimate interest or importance to citizens. As journalists, we commit ourselves to the highest standards of excellence, to maintain credibility and keep the trust of our readers. This means always striving for truth, avoiding unnecessary harm, reflecting a multiplicity of voices in our coverage of events, showing a special concern for children and other vulnerable groups, and acting independently.”<sup>118</sup>*

The Court held in the case of *Tshabalala-Msimang v Makhanya*<sup>119</sup> that:

*“The freedom of the press is celebrated as one of the great pillars of liberty. It is entrenched in our Constitution but it is often misunderstood. Freedom of the press does not mean that the press is free to ruin a reputation or to break a confidence, or to pollute the cause of justice or to do anything that is unlawful. However freedom of the press does*

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referred to as NM, SM and LH. The respondents were Charlene Smith (the writer of the biography), Miss Patricia de Lille (subject of the biography) and New Africa Books (the publishing company). NM, SM and LH alleged that their right to privacy as well dignity had been violated when a biography of Miss Patricia de Lille that was written and published disclosed their names as well as HIV statuses. The matter was adjudicated upon initially in the High Court where in it was held by Schwartzman J; that the public disclosure of the plaintiffs names and HIV statuses by the defendant was not unlawful and further that as a matter of policy, it would place an intolerable burden on journalists if they were required to always obtain the express, informed consent of the person concerned before disclosing his/her HIV status to the public at large.

The plaintiffs attempted to appeal the matter in the Supreme Court of appeal but were unsuccessful in doing so. The matter was then appealed in the Constitutional court and this was successful. Madala J, as supported by Moseneke DCJ, Mokgoro J, Skweyiya J, Van der Westhuizen J and Yacoob J set aside the High Court decision. In the Constitutional court it was held that the respondent's awareness that the applicants had not given their express consent but had still gone ahead and published their names was a violation of their rights to both privacy and dignity. The court held that the use of pseudonyms in this circumstance would not have made the story any less authentic, as well as that there was no proof that public interest warranted the publication of the applicant's actual names.

In finding the above the court held all three respondents liable for damages together with the publishers for their infringement of the applicants' rights to privacy and dignity from the moment of the publication of the book. The amount of R35 000.00 was awarded in damages, to be paid by the three respondents to each of the applicants.

<sup>117</sup> Press Council of South Africa website, <http://www.presscouncil.org.za/>

<sup>118</sup> Preamble to the Press Code

<sup>119</sup> 2008 (6) SA 102 (W)



*mean that there should be no censorship. No unreasonable restraint should be placed on the press as to what they should publish.*"<sup>120</sup>

190. Freedom of the media may be restricted in certain circumstances. In the case of *South African Broadcasting Corporation Limited (SABC) v The National Director of Public Prosecutions*<sup>121</sup> the issue was whether Constitutional Court should intervene to require the Supreme Court of Appeal to permit the national broadcasting corporation to broadcast on radio and television proceedings before the Supreme Court of Appeal. In a unanimous judgment, the Supreme Court of Appeal took the view that the "applicant's right to freedom of expression and to impart information, and the public's right to receive such information, collide four square with the respondents' respective rights." It noted that because of the power given to it by section 173 to regulate its own processes, it had to do so by considering how best to accommodate the competing rights of the parties. The Court held that a balancing exercise was required between the right of the applicant to freedom of expression and the right of the respondents to a fair trial.<sup>122</sup> The Supreme Court of Appeal held that television and radio broadcasts would violate fair trial rights.<sup>123</sup> The Constitutional Court held that it could not be said that the Supreme Court of Appeal reached its decision other than judicially. No basis has been established for intervening in the exercise by the Supreme Court of Appeal of its discretion to regulate its own process and to ensure that the arrangements within its own court room do not interfere with the administration of justice.<sup>124</sup>
191. In addition to the cases mentioned above, there are a number of cases which further illustrate the rights of information and expression.<sup>125</sup>

## Articles 10 and 11: Freedom of association and freedom of assembly

192. The rights to association and assembly find expression in sections 17 and 18 of the Constitution, respectively.<sup>126</sup>
193. In terms of the Regulation of Gatherings Act, 1993<sup>127</sup> extensive space was provided for individuals and groups to hold public gatherings during the period under review. The purpose of the Act is to regulate the holding of public gatherings and demonstrations. A

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<sup>120</sup> Para 35

<sup>121</sup> [2008] ZACC 6

<sup>122</sup> Para 10

<sup>123</sup> Para 12

<sup>124</sup> Para 67

<sup>125</sup> *Brümmer v Minister for Social Development and Others* 2009 (6) SA 323 (CC); *Minister for Provincial and Local Government v Unrecognised Traditional Leaders, Limpopo Province (Sekhukhuneland)* 2005 (2) SA 110 (SCA); *President of the Republic of South Africa and Others v M & G Media LTD* 2012 (2) SA 50 (CC)

<sup>126</sup> S 17 "Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions."

S 18 "Everyone has the right to freedom of association."

<sup>127</sup> Act No. 205 of 1993

gathering is a march, picket or parade of 16 people or more taking place in any public space and is an activity that expresses any form of contestation or is critical towards any person, company or government. A gathering requires prior notification to the relevant local authority. A march, picket or parade of 15 people or less is called a "demonstration" and requires no notification. The convener is responsible for notifying the relevant local authority of the proposed gathering. In terms of section 11 of the Act<sup>128</sup> the organisers of the protest march or demonstration could be held vicariously liable for the damage done by the marchers or demonstrators. This means that even if organisers of a protest march or demonstration took steps to prevent the destruction of property, the organisation may nevertheless be sued for the damages that occurred because of a riot that ensues.

### Case law pertaining to the right to assemble

194. During the period under review, in 2011, the constitutionality of section 11 of the Regulation of Gatherings Act was considered by the court. The Supreme Court of Appeal handed down judgment in *South African Transport & Allied Workers Union v Garvis*<sup>129</sup> dismissing an appeal against an order of the Cape High Court in terms of which it declared that s 11(2)(b) of the Act was not inconsistent with section 17 of the Constitution. Section 11 provides that if any riot damage occurs as a result of a gathering, every organisation on behalf of or under the auspices of which that gathering was held, shall be jointly and severally liable for that riot damage, as a joint wrongdoer together with any other person who unlawfully caused or contributed to such riot damage. Section 11(2) of the Act contains the provision challenged by the appellant, the South African Transport and Allied Workers' Union. This section provides that it shall be a defence to a claim if an organisation organising a gathering proves that it did not commit or connive at the act or omission which caused the damage, and that the act or omission did not fall within the scope of the objectives of the gathering and was not reasonably foreseeable; and that it took all reasonable steps within its power to prevent the act or omission. In defending the action the Union submitted that the statutory liability, coupled with the onerous task of establishing a defence in terms of s 11(2) of the Act, would have a negative effect on public demonstrations and that the latter subsection was consequently unconstitutional.
195. The SCA held that the rights set out in s 17 of the Constitution were not implicated and that only peaceful demonstrations were protected. It held that causing and participating in riots are the antithesis of constitutional values. The wording of s 17 is deliberate. It precludes challenges to statutes that restrict unlawful behaviour in relation to gatherings and demonstrations that impinge on the rights of others. It was submitted on behalf of the Union that damage caused by participants in a gathering was a small price to pay to protect the precious right to public assembly and protest.
196. The SCA accepted that assemblies, pickets, marches and demonstrations are essential instruments of dialogue in society. It held, however, that the struggle for workers' rights

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<sup>128</sup> Act No. 205 of 1993

<sup>129</sup> 2011 (6) SA 382 (SCA)

should take place within legal limits and with due regard to the rights of others. The SCA stated that in the past the majority of the population was subjected to the tyranny of the State and that historical events such as the Sharpeville massacre and the Soweto student uprising were imprinted on the national psyche. The court rejected the notion that the relevant provisions of the Act raised a spectre of limitless liability for organisers of gatherings. It rejected the argument that the defence provided for in s 11(2)(b) was illusory and set out a number of examples that proved the opposite. It held that s 11(2)(b) was not inherently contradictory and self-destructive and consequently dismissed the appeal.

### **Case law pertaining to the right to associate**

197. Similarly, individuals also have the right to associate. However, regard must always be had to the limitations clause, and specifically to the test of proportionality. It may include a right to exclude certain persons from a group and to prescribe certain requirements for admission to that group. In *Taylor v Kurstag NO*<sup>130</sup> the applicant sought to set aside an edict of a Jewish ecclesiastical court, effectively excommunicating him from the Jewish society for failing to comply with its decision. He argued that the edict conflicted with his individual rights to religion and to cultural association. The edict, according to the community, was the only means available to it to ensure compliance with the rulings of the ecclesiastical court. The Court enquired into whether the limitation of the applicant's rights could be justified by reference to the associational rights of the community. The court concluded that the limitation on the applicant's rights was reasonable and justifiable as a failure to enforce its rulings would result in the Jewish faith not being able to protect the integrity of Jewish Law. The associational rights of the organisation took precedence over the personal rights of the individual. In reaching its conclusion, the Court assessed the full extent of the limitation on the rights of the applicant and weighed this against the associational rights of the organisation.

### **The issue of exclusionary practices**

198. The issue of exclusionary practices by certain voluntary associations have also received attention during the period under review. In this regard, the SAHRC held a public enquiry after receiving complaints alleging violations of the rights to equality and dignity from persons excluded from joining voluntary associations. The purpose of the public enquiry into equality and voluntary associations was to enable the SAHRC to hear representations from all interested parties and reflect on the relevant constitutional and statutory provisions in order to suggest a set of principles that would achieve an appropriate balance between associational rights and the rights of equality and dignity. Hearings were held over three days from the 12th to the 14th July, 2005 in Johannesburg.
199. Individuals, together with cultural and religious organisations, made submissions on the constitutionality of their exclusionary practices. It was not the intention of the SAHRC

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<sup>130</sup> 2004 4 All SA 317(W)

either to get participants to defend their practices or to pronounce on the constitutionality of the policies, rules and conduct of the individual associations. They were invited to share their experiences, aspirations and visions with the SAHRC so as to enable it to have a better understanding of the role and importance of voluntary associations in the South African society. The purpose of the SAHRC's report, which flowed from the hearings, was to suggest principles that could be used to test the constitutionality of exclusionary policies, rules and conduct used by voluntary associations.<sup>131</sup>

## Article 12: Freedom of movement

200. The right to freedom of movement and residence is enshrined in the Constitution.<sup>132</sup>

### Legislative and policy measures to protect asylum-seekers and refugees

201. South Africa continues to be a major destination for asylum-seekers, as well as migrants and others seeking better economic and social opportunities. In, for example, 2008 a total of 207 206 applications were received and in 2009 the number rose to 223 324. Since then there has been overall decrease in the number of asylum seekers. In 2010, 185,918 applications were received. In 2011 the numbers fell, with only 87,020 asylum applications received. And in 2012, the number had reduced further to 85,058.<sup>133</sup>

202. An asylum seeker is a person who has fled his or her country of origin and is seeking recognition and protection as a refugee in the Republic of South Africa, and whose application is still under consideration. A refugee is a person who has been granted asylum status and protection in terms of the Refugee Act, 1998.<sup>134</sup> A refugee can be a "convention refugee" who has left his home country and has a well-founded fear of persecution for reasons of race, religion, nationality, political opinion or a membership in a particular social group. A refugee can also be a person "in need of protection" whose removal to his home country would subject him personally to a danger of torture or to a risk to his life or a risk of cruel and unusual treatment or punishment. The Government of the Republic of South Africa has an obligation to grant protection to refugees and other persons in need of protection under a number of UN Conventions such as the 1951 Convention Relating to the Status of Refugees.

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<sup>131</sup> *The Exclusionary Policies of Voluntary Associations: Constitutional Considerations*, SAHRC, 2005

<sup>132</sup> S 21 "(1) Everyone has the right to freedom of movement.

(2) Everyone has the right to leave the Republic.

(3) Every citizen has the right to enter, to remain in and to reside anywhere in, the Republic.

(4) Every citizen has the right to a passport."

<sup>133</sup> Speech by the Deputy Minister of Home Affairs, The Hon F Chohan, during the National Assembly Budget Vote Debate on Home Affairs, 9 May 2013

<sup>134</sup> Act No 130 of 1998

203. The great majority of applicants are work-seekers and not necessarily refugees as defined in any of the conventions South Africa is a signatory to. The entry of foreign nationals into South Africa is regulated under the Immigration Act, 2002.<sup>135</sup> The Immigration Act, 2002, was amended in 2007 by the Immigration Amendment Act, 2007<sup>136</sup> which provides for the clarification and revision of procedures and permits with regard to admission of non-nationals into South Africa. The amendment sought to ensure expediency and efficiency.<sup>137</sup>
204. Foreign nationals, once they enter South Africa, enjoy the protection provided by the Constitution of the Republic of South Africa. Section 7(1) of the Constitution expressly provides that the Bill of Rights enshrines the rights of “all people in our country”. An asylum seeker, is further entitled to the following whilst within the territory of South Africa:
- a formal written recognition as an asylum seeker, pending finalization of his or her application for asylum;
  - the right to remain in the Republic of South Africa pending the finalization of his or her application for asylum;
  - the right not to be unlawfully arrested or detained; and
  - the rights contained in the Constitution of the Republic of South Africa in so far as those rights apply to an asylum seeker.
205. The Refugees Amendment Act, 2008<sup>138</sup> amended the principal Act and infuses expediency in the process. The Act dissolved the Standing Committee for Refugee Affairs and the Refugee Appeal Board established under the Refugee Act, 1998. To replace these two bodies, the Refugee Appeals Authority is created with the primary duty to receive and consider appeals arising from persons applying for refugee status within the Republic. The Refugee Amendment Act also outlines the rights of refugees and asylum seekers, which includes full legal protection and enjoyment of rights enshrined in the Constitution except those rights that only apply to citizens.
206. A refugee is entitled to the following:
- a formal written recognition of refugee status;
  - full legal protection, which includes the rights set out in chapter 2 of the Constitution of the Republic of South Africa, except those rights that only apply to citizens;

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<sup>135</sup> Act No 13 of 2002

<sup>136</sup> Act No 3 of 2007

<sup>137</sup> The Immigration Amendment Act No 3 of 2011 and No 3 of 2007 have both become effective on 26 May 2014. The Minister of Home Affairs has in terms of Section 7 of the Immigration Act No 13 of 2002 issued Regulations. These Regulations became effective on 26 May 2014, in other words outside the period under review for this report.

<sup>138</sup> Act No. 33 of 2008

- permanent residence in terms of section 27(d) of the Immigration Act, after five years of continuous residence in South Africa;
  - an identity document;
  - a travel document if he or she applies in the prescribed manner; and
  - to seek employment.
207. South Africa does not host refugee camps. While their applications are being processed and they hold a valid asylum seeker visa, asylum seekers can move freely and have the right to work and study, as well as access to basic health services. Refugees are entitled to apply for birth certificates for their children born in South Africa, identity documents and travel documents that are limited only by not allowing travel to countries of origin.
208. In May 2008, South Africa experienced an outbreak of attacks on foreign nationals. These attacks against foreign nationals were followed by a swift response by Government, especially the police who contained the violence in key hot spot areas and prevented the spread of such attacks in other areas.
209. An Inter-Ministerial Committee, led by the Minister of Police, was established to deal with threats of violence against foreign nationals. Chaired by the Minister of Police, the IMC was comprised of several other ministers, including those of Home Affairs, Social Development, State Security, Basic Education, Cooperative Governance and Traditional Affairs, Arts and Culture as well as International Relations and Cooperation.

#### **Measures to address attacks on foreign nationals**

210. Since the outbreak of these attacks, 597 cases related to attacks on foreign nationals were recorded and about 1700 persons were arrested. In July 2009, statistics indicated a significant progress with 197 cases withdrawn by the National Prosecuting Authority, and 131 cases finalised with 82 guilty verdicts and 49 not guilty verdicts recorded. The momentum of the fight against xenophobia since 2008 was maintained and witnessed during the 2010 World Cup hosted by South Africa. Strict monitoring of proliferation of businesses owned by foreign nationals is maintained, including regulation and protection of such businesses.
211. In August 2008 government held a Social Dialogue on Xenophobia. It involved NGOs, religious organisations, government departments, affected communities, organisations representing foreign nationals and civil society. The aim of the gathering was to facilitate public dialogue on identifying strategies for promoting social cohesion and combating xenophobia. A Declaration was adopted committing various role players for shared responsibility on the elimination of xenophobia through public education, educating immigrants about their rights and responsibilities, strengthening stakeholder partnerships in migration management and to combat all manifestations of xenophobia.
212. In March 2010 the South African Human Rights Commission released a report entitled "*Report on the SAHRC Investigation into issues of the Rule of Law, Justice and Impunity*"

*arising out of the 2008 Public Violence against Non-Nationals.*" The report considered the preparedness and response of the organs of state to the 2008 crisis in terms of the prevention of impunity for violators of human rights, the securing of justice for victims of rights abuses, and efforts towards the restoration and maintenance of the rule of law, which is a precondition for the realisation of rights. Recommendations are made to strengthen state institutions and responses with a view to preventing future social conflict or mitigating it more effectively where it arises.

213. In July 2010 Government outlined a multi-faceted plan to prevent any outbreak of violence against anyone, including foreign nationals in South Africa and further called upon all civic organizations, political parties, youth formations and the religious fraternity to work together. According to some of the findings, these tensions were predominantly driven by criminal elements in areas where there are high levels of poverty and unemployment. The IMC further noted that the most disturbing factor is the marked involvement of unemployed young people. The perception amongst foreign shop-owners is that law enforcement agencies fail to protect them. Thus, as a response, foreign-owned business owners resort to defensive measures to prevent looting of their shops.<sup>139</sup>
214. Government's strategy, in partnership with various organs of civil society in proactively curbing and averting these threats, was outlined in a multi-faceted and integrated plan:
- Proactive facilitation of a societal dialogue: this has taken place at various areas around the country comprising of police, churches, community policing forums and NGOs. Communities need to blow the whistle against any criminals that are disguised behind xenophobia. Government has always and will always discourage covering up for criminals by community members. It also needs to be noted that the 2008 attacks against foreign nationals never spread to areas within Soweto and this can largely be attributed to a critical role played by community policing forums.
  - Extension of the 2010 FIFA World Cup National Joint Committee: The swift policing and justice approach that was witnessed during the World Cup will be adopted and continued, to respond to this issue of attacks against any form of criminality. Quick investigation, tighter sentencing and law enforcement agencies will not hesitate to act speedily and decisively against anyone found to incite violent acts against foreign nationals.
  - Strict monitoring of proliferation of businesses owned by foreign nationals and lack of regulation thereof.
  - Review and derive lessons from the May/June 2008 incidents. Some of the reasons for this trend include that after the attacks of May/June 2008, some foreign nationals looked for safer environments.
  - Reinforce civic education in society and within the law enforcement agencies.

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<sup>139</sup> Media Statement by GCIS, "Government outlines plan to deal with xenophobic threats", 8 July 2010

- Development of a Government Communication Strategy. The IMC noted and adopted that with immediate effect, Government Communication and Information System (GCIS) will spearhead an effective and aggressive communication strategy to counter and mitigate the risk posed by the unbalanced media reports which still instil fear about possible attacks. Government categorically stated that takes the threats of violence against foreign nationals seriously and reiterated that any attacks are totally unacceptable and will not be tolerated.<sup>140</sup>

215. The National Summit on Social Cohesion was held on 4-5 July 2012 at Walter Sisulu Square of Dedication, Kliptown, Soweto to review progress made in creating a caring and proud South African society and to provide a platform to discuss the National Strategy for Developing and Inclusive South African society. The summit adopted a Declaration and Programme of Action. The declaration acknowledges the challenges faced by South Africa in building a non-racial, non-sexist and united society after the dawn of our constitutional democracy. Furthermore, the summit recognises that social cohesion depends to a large measure on our ability, as society, to address this challenge.

#### **Applicable case law**

216. During the period under review, there were judgments of note, for instance in the case of *Khosa v Minister of Social Development*.<sup>141</sup> In this case the Constitutional Court held that non-nationals with permanent resident status in South Africa are entitled to social grants.

#### **Article 13: Right to participate in government**

217. Political rights are enshrined in section 19 of the Constitution.<sup>142</sup>

218. During the period under review, there were two national and provincial elections (2004 and 2009) and two local government elections (2006 and 2011).

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<sup>140</sup> Media Statement by GCIS, 8 July 2010

<sup>141</sup> 2004 (6) SA 505 (CC)

<sup>142</sup> S 19 "(1) Every citizen is free to make political choices, which includes the right –

(a) to form a political party;

(b) to participate in the activities of, or recruit members for, a political party; and

(c) to campaign for a political party or cause.

(2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.

(3) Every adult citizen has the right –

(a) to vote in elections for any legislative body established in terms of this Constitution, and to do so in secret, and

(b) to stand for public office and, if elected, to hold office."



### **The role of the Electoral Commission**

219. The Electoral Commission of South Africa is a permanent body established by the Constitution to promote and safeguard democracy in South Africa. It is a publicly funded body and while it is accountable to Parliament, it is independent of government. The IEC is charged to deliver regular, free and fair elections at all levels of government – national, provincial and local.
220. The IEC has to compile and maintain the voters' roll and it is responsible for counting, verifying and declaring the results of an election. The IEC is also responsible for compiling and maintaining a register of parties, undertaking and promoting research into electoral matters, developing and promoting the development of electoral expertise and technology in all spheres of government, continuously reviewing electoral laws and proposed electoral laws, and making recommendations and promoting voter education. The Electoral Court is established by the Electoral Commission Act, 1996<sup>143</sup> to review decisions of IEC and to act as final court of appeal in the adjudication of disputes by the courts; it has the same status as that of the High Court. The members are appointed by the President on the recommendation of the Judicial Services Commission.

### **Increase in number of registered voters**

221. South Africa has sought to ensure that citizens' participation in the electoral process is enhanced. This is done by way of various registration drives undertaken by the IEC. In the 2004 national elections, there were 20,6 million registered voters. This number increased to 21,05 million in the 2006 municipal elections. A total of 23,5 million people were eligible to vote in the 2009 national elections and 23,6 million in the 2011 municipal elections.

### **Increase in voting stations**

222. In addition to improving voter access to voting stations, the increase in voting districts and stations has meant that voters spend less time waiting in queues to vote at voting stations. The average number of registered voters per voting station in the 2004 elections was 1219 and this declined to 1175 registered voters per voting station in the 2009 elections. Research commissioned by the Electoral Commission and conducted by the Human Sciences Research Council in 2009 revealed that 86% of voters were able to get to their voting stations in 30 minutes or less during the 2009 elections. Furthermore, 80% of voters waited in a queue at their voting station for 60 minutes or less while waiting to vote. Moreover, 90% of rural voters queued for 60 minutes or less compared to only 67% of urban voters.<sup>144</sup>

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<sup>143</sup> Act No. 51 of 1996

<sup>144</sup> Electoral Commission of South Africa, 2009 Elections Report

223. South Africa and the world witnessed a highly competitive and yet peaceful political atmosphere in which multi-partyism was embraced. The number of registered political parties during this period increased from 75 in 2004 to 157 in 2009. Of these parties, 40 participated in the 2009 elections.<sup>145</sup>

### **Voter education**

224. South Africa remains 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.
225. Challenges were faced when dealing with indigenous groups, particularly the !Xun, !Khwe, Khomani San and the Nama. The challenge the IEC faced during voter education campaigns was the engagement of these communities and the creation of educational material in their own languages. For the Nama, the problem was mitigated following the translation of the voter education booklet into Nama. The translation was made possible with the help of the Pan South African Language Board (PANSALB). The process of developing a dictionary for the !Xun and !Khwe is underway. Programmes for the teaching of Nama language among the Khomani San and Nama have already been initiated. In the long run, South Africa has committed itself to increase its expenditure on voter education.

### **Measures to enhance participatory democracy**

226. Government has introduced a variety of platforms in an effort to consolidate, monitor and respond swiftly to public concerns including the Presidential Hotline, Public Liaison Offices, outreach activities and various access points across the country, including Thusong Service Centres.
227. The use of *izimbizo* encapsulates an active reciprocal participatory programme through which South African citizens provide feedback on policy delivery. The *imbizo*, in its traditional form, has constituted an important aspect of the African political system for many centuries, especially in South Africa. During the period under review, numerous izimbizo were held by various government Departments. Communication facilitated through unmediated platforms such as Izimbizo events constitute an integral element of accountability and the strengthening of mutually beneficial partnerships between government and communities. Under the hallmark of Izimbizo, principals are requested to commit to at least ten public engagements, including repeat and follow-up visits per year as part of the overall performance monitoring approach.

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<sup>145</sup> Electoral Commission of South Africa, 2009 Elections Report

228. During the period under review, Parliament undertook various Taking Parliament to the People Programmes. This programme gives South Africans the opportunity to make their voices heard by participating in parliamentary processes and seeing how Parliament works. The programme brings together the National, Provincial, and Local spheres of government in order to address service delivery issues in the targeted area and is one of the vehicles used by the NCOP to conduct oversight over the executive. The NCOP's constitutional imperatives of facilitating public participation, conducting its business in an open manner, and holding its sittings and those of its committees in public have been brought to life by the Taking Parliament to the People programme. Through this programme, the NCOP has been able to promote greater public participation in parliamentary affairs by enabling individuals and representatives of civil society to meet members of the NCOP in different parts of the country. The programme deepens awareness about the work of the NCOP and the provincial legislatures and how the public can participate in their processes.

### Applicable case law

229. In the Constitutional Court decision in *Richter v Minister of Home Affairs*<sup>146</sup>, the question before the court was whether the legislative scheme as it then was, which limited the right of South African citizens who were registered as voters but who would be out of the country when the elections took place on 22 April 2009, was consistent with the Constitution. O'Regan J, writing for a unanimous court, considered the ambit and purpose of the right to vote. She emphasised its symbolic and democratic value, and the obligations the right places on both the state and the voting public. In this light, O'Regan J held that the right to vote is infringed if a registered voter is willing to take reasonable steps to exercise his or her right to vote, but is nevertheless prevented from doing so by a statutory provision. On this basis, O'Regan J held that section 33(1)(e) of the Electoral Act and the related provisions of the Regulations constitute an unjustifiable limitation of section 19 of the Constitution in restricting the classes of registered voters who are absent from the Republic on election day from participating in elections. The consequence of this conclusion was that the Court had to make an order extending the period within which those who are to be abroad on polling day may notify the Chief Electoral Officer of their intention to do so. The effect of the Court's order was that all South African citizens who were registered voters and who would be abroad on polling day would be entitled to vote in the election for the National Assembly on 22 April provided they gave notice of their intention to do so by 27 March to the Chief Electoral Officer and identified the embassy, high commission or consulate where they intend to cast the special vote.
230. Other cases of note during the period under review include that of *Merafong Demarcation Forum v President of the Republic of South Africa*<sup>147</sup> which concerned the definition of public participation and *Doctors for Life International v Speaker of the*

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<sup>146</sup> 2009 (3) SA 615 (CC)

<sup>147</sup> 2008 (10) BCLR 968 (CC)

*National Assembly*<sup>148</sup> which concerned an important question relating to the role of the public and public participation in the legislative process.

## CHAPTER 2: ECONOMIC AND SOCIAL RIGHTS

### Article 14: Right to property

231. The right to property is enshrined in section 25 of the Constitution.<sup>149</sup> In essence, section 25 provides that property may not be expropriated by the state except where the expropriation is in terms of a law of general application and is for a public purpose or in the public interest. Where an expropriation meets these criteria, the state must pay compensation to the former owner. The right to property and land remains an issue that evokes strong, and often diverse, reactions in South Africa. At the core of these reactions is the question of land ownership which remains a reflection of the inequality that pervades the South African society.
232. As a result of past discriminatory practices, most of the country's commercial farm land is in the hands of the minority white population. Thus as stated in the First Periodic Report, it is in this context that the South African government has been engaged in a programme to effect land restitution, redistribution and reform. The administration of restitution programme faces numerous challenges including the lack of information and documentation, competing claims, disputes with land owners about the validity of claims, land owners who are unwilling to sell, and high land prices. In essence, the focus is on reversing the legacy of the 1913 Natives Land Act.
233. Land remains a critical resource in the construction of an inclusive economy. It is through land that we can create sustainable livelihoods, eradicate poverty and create decent employment in our rural areas.
234. The Ministry of Rural Development and Land Reform was created in 2009, in line with the Polokwane resolutions. For the first time in its history, the country would have a ministry dedicated to the social and economic development of rural South Africa; committed to ensuring that South Africans residing in rural areas enjoyed the same benefits as their urban cousins, so that that they too were covered by the blanket of human rights and basic dignity guaranteed in our Constitution. Following its establishment, the new ministry immediately embarked on an intensive process to define and conceptualise what rural development should be, and to provide a framework of how it should be implemented. Government's plan for developing rural areas, the Comprehensive Rural Development Programme (CRDP) is aimed specifically at curing the blight of poverty by the creation of vibrant, equitable and sustainable rural communities.

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<sup>148</sup> 2006 (6) SA 416 (CC)

<sup>149</sup> S 25 "(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."

235. To achieve its vision, the new department defined its role and mission as being that of facilitating integrated development and social cohesion through partnerships with all sectors of society. The most important strategy the department pursues to deliver on the CRDP's strategic objectives is, Agrarian Transformation.
236. Rural Development consists of three pillars, namely, meeting basic human needs, rural enterprise development, and rural industrialisation, supported by rural markets and credit facilities. Land Reform has four pillars, namely the restitution of land rights, redistribution, tenure reform, and development. The Green Paper on Land Reform defines three principles underlying land reform, namely deracialising the rural economy; the democratic and equitable allocation and utilisation of land across race, class and gender; and sustained production discipline.
237. The land restitution process is managed by a number of statutes.<sup>150</sup> By the end of 2012, 76 229 out of 79 696 claims received since 1994 had been settled. In 2012/13, a further 376 land claims were finalised, where payment and transfer of land was made to beneficiaries, while 602 land claims were settled through approvals. The Department had begun an extensive consultation process on the amendment of the Restitution of Land Rights Act, 1994. In 2012/13 the main focus of the Department was on acquiring strategically located land and allocating it accordingly. In pursuit of this aim, a total of 243 farms totalling 157 556 hectares of land were acquired. A total of 200 farms were placed under the Recapitalisation and Development Programme during the year. The Land Reform Programme has been a significant contributor to job creation, and a total of 1059 jobs were created in the land reform projects. Farmer support in the form of training provision also marked the achievements recorded. A total of 421 farmers were trained.
238. Some of the realities associated with the complex land issue in South Africa are that the process of acquiring and distributing a particular piece of land is often lengthy, and this escalates the cost of redistribution because the former owner stops investing in the land, this means that many of the farms are therefore in a poor state of repair at the point of acquisition. This led to the adoption, in November 2010, of a recapitalisation programme aimed at increasing food production and job creation through the commercialisation of small farmers. The focus of rehabilitation has been on rebuilding infrastructure, and there is a risk that, without adequate farmer support and development, the farms could again decline in future. Eleven thousand new smallholders have been established since 2009. Support has been provided to both new and long-established farmers through many programmes including Letsema, the Recapitalization and Development Programme and through the funding agency MAFISA.

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<sup>150</sup> For example, the Upgrading of Land Tenure Rights, 1991 (Act No. 112 of 1991), the Restitution of Land Rights, 1994 (Act No. 22 of 1994), the Land Reform (Labour Tenants) Act, 1996 (Act No. 3 of 1996), and the Extension of Security of Tenure Act, 1997 (Act No. 62 of 1997).

239. Many challenges have arisen in terms of land reform, to name a few: the increasing urbanization of South Africa, differences between large regional and sectoral land uses, the need for greater post-settlement support for new farmers, the slow pace and settling of remaining land restitution claims which result in negative impacts on agricultural production and the acquisition of land by Government at reasonable prices.
240. During the period under review, the Restitution of Land Rights Amendment Bill was finalised. The Bill aimed to, once passed, guarantee the right to lodge claims to certain categories of people who were excluded from the previous restitution process.

### Case law

241. There were attempts to address the problem of ownership of communal land, especially in rural areas through the passing of the Communal Land Rights Act, 2004.<sup>151</sup> However, during the period under review, this Act was declared unconstitutional by the Constitutional Court.<sup>152</sup> *Tongoane v Minister of Agriculture Land Affairs* Ngcobo CJ held that the inescapable conclusion is that various provisions of CLARA affect, in substantial measure, indigenous law and traditional leadership – areas of concurrent national and provincial competence. The Court concluded that Parliament followed an incorrect procedure in enacting CLARA. In considering the appropriate remedy the Court held that where the Constitution prescribes a legislative procedure, that procedure must ordinarily be followed. Enacting legislation that affects the provinces in accordance with the procedure prescribed in section 76 is a material part of the law-making process relating to legislation that substantially affects the provinces. The failure to comply with the requirements of section 76 renders the resulting legislation invalid. The Court accordingly held CLARA to be unconstitutional and invalid for want of compliance with the procedures set out in section 76 of the Constitution.

### Article 15: Right to work and the right to just and favourable conditions of work

242. Since the submission of the first periodic report, South Africa has continued to bolster its efforts to ensure that its workers are accorded equitable and satisfactory conditions of work. The Constitution<sup>153</sup> and a number of statutes provide the benchmark upon which the South African government measures its conditions of work and remuneration policy.

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<sup>151</sup> Act No. 11 of 2004

<sup>152</sup> 2010 (8) BCLR 741 (CC)

<sup>153</sup> S 22 "Every citizen has the right to choose their trade, occupation and profession freely. The practice of a trade, occupation or profession may be regulated by law." And s 23(1) "Everyone has the right to fair labour practices."

243. The workforce population distribution is based on the Quarterly Labour Force Survey (QLFS) published by Statistics South Africa on the Economically Active Population.<sup>154</sup> The EAP is meant to assist employers during the analysis of their workforce to determine the degree of under-representation of the designated groups. Further, it guides employers by assisting them in the setting of their numerical goals and targets in order to achieve an equitable and representative workforce.
244. With an unemployment rate of around 25%, South Africa's biggest challenge is the creation of jobs. The global recession of 2008 had a negative effect on the local labour market. However, the market is gradually recovering and this is expected to help employment figures. South Africa has a workforce of more than 18-million people (this includes those either working or available to work and actively seeking work). Of these, around 13,5-million are employed in the formal sector (9,6-million), the informal sector (2,2-million), agriculture (685 000) and private households (1,1-million).
245. The rate of unemployment remains high on the government agenda. **Table 2** below shows the unemployment rate in South Africa, during the period under review:

Year	Percentage
2002	27,2
2003	27,1
2004	24,7
2005	23,8
2006	22,6
2007	22,3
2008	22,7
2009	23,7
2010	24,7
2011	24,7
2012	25
2013	24,6

246. Government has undertaken various programmes and initiatives to create decent jobs. In the last five years of the review period alone, government has spent more than R100 billion on employment programmes, including municipal and provincial spending. More than 4 million job opportunities were funded over this time. Allocations will continue to grow strongly, and 6 million job opportunities will be created over the next five years. Some of these initiatives include –

- Government established a jobs fund of R9 billion to finance new job-creation initiatives over the next three years.

<sup>154</sup> The Economically Active Population (EAP) which includes people from 15 to 64 years of age who are either employed or unemployed and seeking employment.

- The Industrial Development Corporation has a number of schemes to boost job creation. In 2013, it created about 19 000 new jobs and saved about 4 000.
- The Automotive Investment Scheme saw the approval of 92 projects in 2013. The projected investment resulting from these approvals was close to R9 billion based on incentives of R2,5 billion, creating over 7 000 jobs as a direct result.
- The campaign to pay SMMEs on time, within 30 days, is proceeding well. The Department of Trade and Industry payment hotline (0860 766 3729) received about 20 000 calls in the 2010/11 financial year, and the value of payments facilitated was R210 million.
- Other departments have launched their own initiatives, for example the Re Ya Patala (We Pay) initiative of the Department of Public Works (0800 782 542).
- In communications, television and radio signals will be converted from the analogue platform to the more advanced digital signal which will enable quality pictures and sound. This process will create jobs in manufacturing, packaging, distribution and installation.
- The hosting of the Square Kilometre Array radio telescope has already provided construction job opportunities in the Northern Cape and will continue to do so.
- Through the combined programmes of business support, enterprise financing and labour intensive activities in the social sector, 3 335 new jobs were facilitated by the National Youth Development Agency (NYDA) in 2012/13.
- The Department of Public Works has set aside R210 million in 2011/12 to hire and train unemployed people to fix potholes, build low bridges and maintain public garden spaces following the recent floods across the country.
- Government has put President Jacob Zuma's job-creation plans into action by announcing the creation of 120 000 permanent jobs in infrastructure development. The organisations that have been earmarked to create jobs include Eskom and the departments of water affairs and of environmental affairs.
- The Department of Transport are creating 70 000 jobs in a R6,4-billion project to repair potholes. The project is part of a new labour-intensive road-maintenance programme called S'hamba Sonke (walking together). A total of R22,3 billion will be spent between February 2011 and April 2014.
- The Community Work Programme (CWP) is an innovative offering from government to provide a job safety net for unemployed people of working age. This programme created more than 79 000 work opportunities up to the second quarter of 2011/12, benefitting women and the youth particularly from the poor rural families.
- In addition, the Human Settlements Programme created over 50 000 direct jobs, 4 653 indirect jobs and 21 446 induced job opportunities. The Minister of Labour approved various initiatives aimed at creating employment through training and re-skilling of workers in order to give them capacity to compete in the open economy.
- Funding for the training of the Unemployed scheme: The scheme is aimed at developing skills in specific artisan trades with a view to trainees being eventually employed and possessing scarce skills. The training for the Unemployed scheme



is done in partnership with the various sector education and training authorities (SETAs).

247. Year-on-year changes highlight improvements in the labour market. Over the period Q4:2012 and Q4: 2013, employment increased by 653 000 largely as a result of an increase of 507 000 in the formal sector. Employment in the informal sector increased by 95 000 over the same period. Despite the increase in unemployment by 121 000, the unemployment rate declined by 0,4 of a percentage point to 24,1%. The labour force participation rate and the absorption rate increased by 1,2 and 1,1 percentage points respectively. Among the not economically active population, discouraged work-seekers declined by 4,4%, and the remainder of the not economically active group by 0,4%. Year-on-year changes in employment show that after seven successive quarterly declines, the number of jobs increased for twelve consecutive quarters over the period Q1: 2011 to Q4: 2013. The largest employment increase was observed in Q4: 2013, where 653 000 persons gained employment. Year-on-year changes in show that over the period Q4: 2012 and Q4: 2013, employment increased by 653 000. The Community and social services and Trade industries contributed the most to the increase (219 000 and 117 000 jobs respectively). Both the manufacturing and agriculture industries shed jobs over the same period (by 48 000 and 4 000 respectively).<sup>155</sup>

#### **Measures to increase opportunities for the youth**

248. It is noted that the youth constitutes a large part of unemployed persons in our society. Government is addressing this issue through a number of initiatives, including the Government subsidy programme for unemployed youth. The Social Accord on Youth Employment commits all stakeholders to a coordinated youth employment strategy that will bring a large number of young people into the job market. Under its auspices, Government has committed to increase the number of young people employed in the public sector through its various 'youth brigade' programmes. For example, youth in rural areas are already being skilled through the flagship rural programme – the National Rural Youth Service Corps (NARYSEC). There are currently some 13 000 participants in the NARYSEC programme at various stages of their training as development agents.
249. Government has also partnered with the Agricultural Research Council to train 900 youth in raising livestock for smallholdings and dairy production. In addition, youth have been active in building houses in Worcester, a youth hub in Beaufort-West, as well as brick making and paving projects in Limpopo. Government is investing R631 million in rural youth training programmes. A further R3.5 million is being invested to train 990 women and youth in rural arts and craft initiatives.
250. Further Education and Training (FET) colleges are a resource of youth skilled in a number of areas. Through the Small Enterprise Finance Agency (SEFA) and the Industrial

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<sup>155</sup> Quarterly Labour Force Survey, Quarter 4, 2013

Development Corporation (IDC) close to R3 billion is available for youth entrepreneurship.<sup>156</sup>

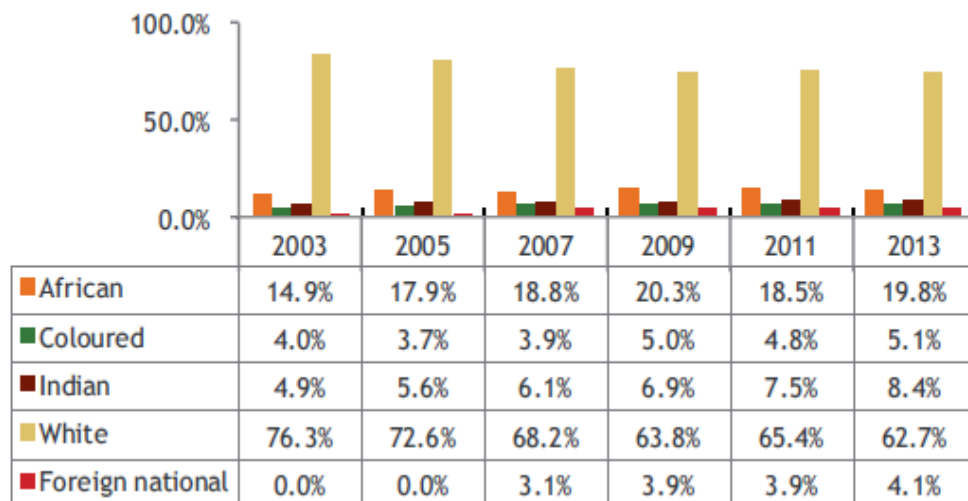
### Legislative measures to enhance skills development

251. South Africa has bolstered its efforts to increase opportunities for employment. In this regard, the Labour Department has been running skills development programmes that are suited to the specific needs of a community. The programme targets unemployed people in the communities and the informal sector, the aim of which is for the beneficiaries to be placed in income generating activities that are sustainable. A significant development in this regard involves various amendment of the Skills Development Act, 1998.<sup>157</sup> In 2008, the Skills Development Amendment Act, 2008<sup>158</sup> was enacted to broaden the scope of the Skills Development Act and to provide anew for the functions and composition of the National Skills Authority and in 2011 the Skills Development Amendment Act, 2011<sup>159</sup> was enacted.

### Employment Equity

252. The Commission for Employment Equity published the population group and gender workforce profile distribution trends in the first four occupational levels in terms of employment equity from 2003 to 2013. **Table 3** below shows the population group distribution at top management level from 2002 to 2013:

Top management - population group



<sup>156</sup> Media Statement, GCIS, "Overcoming youth unemployment together," 19 June 2013

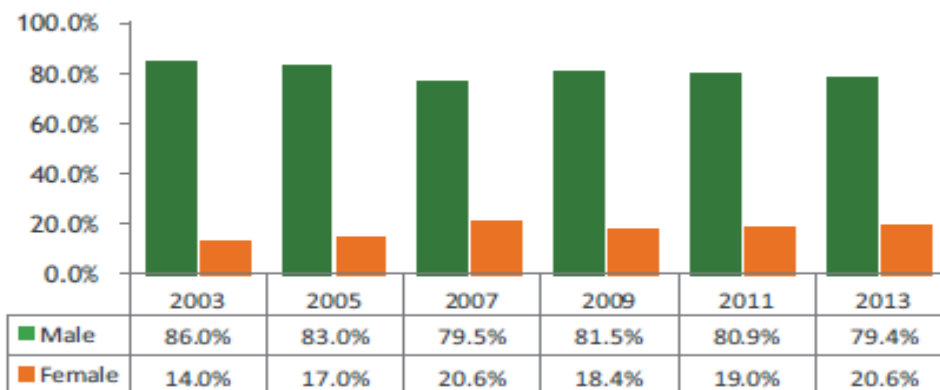
<sup>157</sup> Act No. 97 of 1998

<sup>158</sup> Act No. 37 of 2008

<sup>159</sup> Act No. 26 of 2011

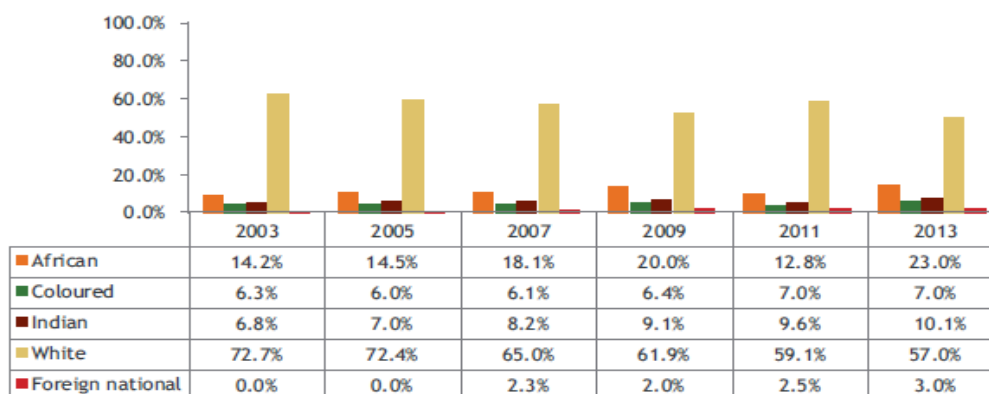
253. **Table 4** below shows the gender distribution at top management from 2003 to 2013.

**Top management - Gender**

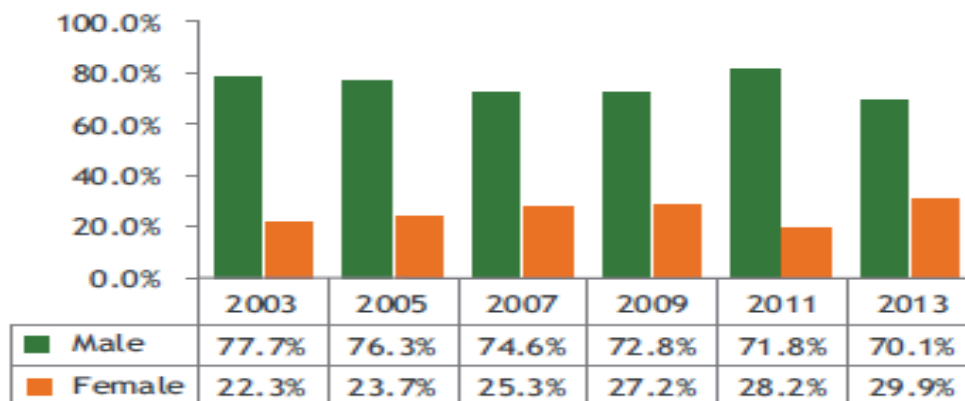


254. **Table 5** shows the population group distribution at senior management level from 2003 to 2013:

**Senior management - population group**



255. **Table 6** shows the gender distribution at senior management level from 2003 to 2013:



256. In view of the above, it is evident that employment equity requires ongoing attention. There is still a great need for employment equity in South Africa. Cognisant thereof, the Department of Labour amended the Employment Equity Act in 2013. The Employment Equity Amendment Act, 2013<sup>160</sup> sought to revise the definition of “designated groups” to ensure that black people, women and people with disabilities who became citizens of South Africa prior to 27 April 1994 or who would have obtained citizenship but for apartheid policies, will now benefit from affirmative action. Local spheres of Government are now subject to the Act.
257. Throughout the Act, the requirement to monitor and report on categories within the workforce has been removed. Only the requirement to monitor and report on levels in the workplace remains. The experience gained since the inception of the Act demonstrated that categories of work were too varied across different sectors and different workplaces to provide a meaningful basis of comparison. As such this amendment was made in order to simplify administrative requirements for employers as far as possible.
258. The concept of equal pay for work of equal value has been explicitly incorporated into the unfair discrimination provisions. This stipulates that it is unfair for an employer, based on a prohibited ground, or analogous arbitrary ground, to have different terms and conditions of employment for employees doing the same work, similar work or work of equal value. The law is now explicitly aligned with the International Labour Organisation prescripts on equal pay for work of equal value. Provision is now made in the Act for the Minister, after consultation with the Commission, to issue regulations to prescribe the criteria and methodology for assessing work of equal value.
259. Discrimination on the basis of arbitrary grounds has been added to the list of unfair discriminatory grounds. The onus provision in relation to unfair discrimination has been updated in the Act in order to create clarity and to align with emerging case law on employment equity. The onus provisions differ for listed grounds and arbitrary grounds. For listed grounds, once alleged, the employer must prove that either the discrimination did not take place, or it is rational and not unfair or otherwise justifiable. In the instance of arbitrary grounds, the complainant must prove that the conduct complained of is not rational, amounts to discrimination and is unfair.
260. Access is enhanced in relation to unfair discrimination cases as employees earning under the BCEA threshold or employees that allege unfair discrimination on the basis of sexual harassment may now have their cases conciliated and arbitrated by the CCMA. Previously these cases would have been adjudicated upon by the Labour Court – a much longer and more expensive process. In order to ensure fairness and in light of the legal importance of such cases, a full right of appeal is available for discrimination matters that are adjudicated upon by the CCMA.

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<sup>160</sup> Act No. 47 of 2012

261. The Act provides that psychometric assessments must now be certified by the Health Professionals Council of SA or other body authorised by law to certify such assessments. Smaller businesses are now required to report annually in order for improved data capturing. The CEE is cognisant of the increased frequency of reporting adding to the regulatory burden, but has already provided for more simplified reporting and continuous monitoring on the impact on small businesses.
262. There is also an enabling provision empowering the Minister, after consultation with NEDLAC, to issue regulations in this regard as well as on the specification of circumstances under which an employer's compliance may be assessed with respect to national and regional economically active population. The enforcement provisions of the EE Act are simplified to eliminate excessive mandatory enforcement steps as well as the mandatory criteria that must be taken into account in assessing compliance. This is intended to promote effective enforcement and will also prevent the delaying tactics of some employers that have abused the previous enforcement process. The new provisions should not prevent employers who are legitimately aggrieved by decisions from challenging these decisions at an appropriate juncture.
263. In terms of the Act, failure to consult, conduct an analysis, assign a senior manager, publish a report, keep records and comply with a DG request in 90 days can result in a voluntary undertaking or compliance order. On the other hand, failing to act on a compliance order may result in application to the Labour Court to impose a fine. Fines of between R1.5 and R2.7 million can be imposed. For more serious transgressions, such as failure to report, a complaint about an EE plan or a successive EE plan, or failure to comply with a DG recommendation within 180 days can be referred directly to Court by the DG. A fine of between 2% - 10% of turnover can be imposed.
264. In terms of the Act, failure to consult, conduct an analysis, assign a senior manager, publish a report, keep records and comply with a DG request in 90 days can result in a undertaking or compliance order, and failing compliance the matter can be referred to Court. Fines of between R1.5 and R2.7 million can be imposed.
265. For more serious transgressions, such as failure to report, a complaint about an EE plan or a successive EE plan, or failure to comply with a DG recommendation within 180 days can be referred directly to Court by the DG. A fine of between 2% - 10% of turnover can be imposed. The fines for breach of confidentiality, undue influence, obstruction and fraud in relation to the Act have been increased from R10 000 to R30 000 in order to reflect the seriousness with which these offences are regarded.

#### **Legislative and policy measures to improve conditions of work**

266. With regards to conditions of work, in 2010, the ILO adopted recommendations concerning HIV and AIDS and the world of work to guide member States on key principles to be taken into consideration when developing and implementing legislation, policies and programmes. South Africa has reviewed its Code of Good Practice on Key Aspects of

HIV/AIDS and Employment of 2000 and its Technical Assistance Guidelines (TAG) of 2003 in order to ensure alignment to the ILO Recommendations of 2010. The main aim of the reviewed Code and TAG is the alignment of terminology, broadening the scope to include both the infected and affected and to recognise and adopt policies and programmes to address Tuberculosis as a co-infection to HIV, which makes employees more vulnerable. The primary objective of the Code and TAG is to provide policy guidelines to assist employers, employees and their organisations to develop and implement comprehensive gender sensitive HIV and AIDS workplace policies and programmes.

267. The Basic Conditions of Employment Act was amended in 2002 and in 2013. The Basic Conditions of Employment Amendment Act, 2013<sup>161</sup> was enacted to further improve conditions of employees. It contains an important amendment that prohibits anyone from requiring or permitting a child under the age of 15 years to work. It also makes it an offence for anyone to require or permit a child to perform any such work or to provide any service that places the child's well-being at risk. The Amendment Act further empowers the Minister of Labour to regulate a broader range of matters in sectoral determinations, changes the Minister's powers in relation to sectoral determinations and changes enforcement procedures, which are intended to simplify the Department of Labour's ability to take enforcement steps against non-compliant employers and to access the Labour Court for this purpose.<sup>162</sup>

#### **Applicable case law**

268. A number of noteworthy court judgments were also handed down during the period under review. In *Minister of Home Affairs v Watchenuka*<sup>163</sup> concerned the rights of asylum seekers and in particular the extent to which they may be prohibited from being employed and from studying while they are waiting to be recognised as refugees. In *Affordable Medicines Trust v Minister of Health of RSA*<sup>164</sup> the court held that section 22 of the Constitution embraces both the right to choose a profession and the right to practice the chosen profession.
269. The case of *Union of Refugee Women v Director: Private Security Industry Regulatory Authority*<sup>165</sup> involved section 27(f) of the Refugees Act, which granted refugees the right to seek employment. Section 23(1) (a) of the Security Act limited the refugees' right to choose employment only to the extent that they could not work in the private security industry. While refugees were fully entitled to work in the RSA, the guarantee contained in section 22 of the Constitution of the right freely to choose a trade, occupation or profession was restricted to "citizens".

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<sup>161</sup> Act No. 20 of 2013

<sup>162</sup> The Act came into operation on 1 September 2014, in other words outside the reporting period.

<sup>163</sup> [2004] 1 All SA 21 (SCA)

<sup>164</sup> 2005 6 BCLR 529 (CC)

<sup>165</sup> 2007 (4) BCLR 339 (CC)

270. In terms of employment equity, the following Labour Court judgments are highlighted as they have direct policy implications that have been addressed through the amendments to the Employment Equity Act and its regulations. In *Director-General of the Department of Labour v Comair Limited*<sup>166</sup> Comair was referred to the Labour Court for failure to comply with the Director-General's recommendations pertaining to the preparation of the Employment Equity Plan. However, the decision of the DG to refer Comair to Court for noncompliance was reviewed and set aside in terms of Section 50(h) of the Employment Equity Act, 1998. The reasons for the review was due to the fact that the DG failed to take into account during the assessment process, all factors listed under Section 42 before referring non-compliance to Court. These factors included: (1) no consideration was made to the pool of suitably qualified people from designated groups from which the employer may reasonably be expected to promote or appoint employees, (2) economic and financial factors relevant to the sector in which the employer operates, and (3) present and anticipated economic and financial circumstances of the employer; etc. The gaps in these sections highlighted by the judgment have now been amended in the Act and further guidance will be provided in the regulations in order to strengthen the implementation and enforcement mechanisms of the Act to improve compliance.
271. In the case of *Solidarity v Department of Correctional Services*<sup>167</sup> Solidarity sought relief on behalf of the Western Cape Correctional Services' officials that were denied promotion, despite having acted in those positions for a long time and also having been recommended for promotion after interviews. These officials lodged an unfair discrimination case in relation to the Department's employment equity (EE) targets reflected in the EE Plan, which were geared towards Africans and not Coloureds for those particular positions. The Department's EE targets were formulated utilising only the demographics of the national economically active population and not taking into account both the national and regional demographics as required by Section 42 (a)(i) of the Act. The Court ruled that the Department of Correctional Services is required to take immediate steps to ensure that both national and regional demographics are taken into account in respect of members of the designated groups, i.e. black people, women and people with disabilities when setting targets at all occupational levels of its workforce. In order to provide guidance as to how designated employers should take into account both national and regional EAP, new provisions have been inserted under section 42(2) and 42(3) of the Act to empower the Minister to issue regulations that provide implementation guidelines on this matter.

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<sup>166</sup> [2009] 11 BLLR 1063 (LC)

<sup>167</sup> [2013] ZALCCT 38

## Article 16: Right to health (including the right to food and water and sanitation)

### Measures to improve the provision of health care services

272. The right to have access to health care, food and water are enshrined in section 27 of the Constitution.<sup>168</sup> South Africa's health system consists of a large public sector and a smaller but fast growing private sector. Health care in South Africa varies from the most basic primary health care, offered free by the state, to highly specialised, hi-tech health services available in the both the public and private sector.
273. While the state contributes about 40% of all expenditure on health, the public health sector is under pressure to deliver services to about 80% of the population. The private sector, on the other hand, is run largely on commercial lines and caters to middle- and high-income earners who tend to be members of medical aid schemes. It also attracts most of the country's health professionals. The situation is compounded by public health challenges, including the burden of diseases such as HIV and tuberculosis (TB), and a shortage of key medical personnel.
274. However, government is responding with a far-reaching reform plan to revitalise and restructure the South African health care system, including:
- Fast-tracking the implementation of a National Health Insurance scheme, which will eventually cover all South Africans.
  - Strengthening the fight against HIV and TB, non-communicable diseases, as well as injury and violence.
  - Improving human-resource management at state hospitals and strengthening co-ordination between the public and private health sector.
  - Deploying health teams to communities and schools.
  - Regulating costs to make health care affordable to all.
  - Increasing life expectancy from 56.5 years in 2009 to 58.5 years in 2014.
275. Before South Africa's first democratic elections, hospitals were assigned to particular racial groups and most were concentrated in white areas. With 14 different health departments, the system was characterized by fragmentation and duplication. Transformation is now under fully under way.
276. The Department of Health holds overall responsibility for health care, with a specific responsibility for the public sector. Provincial health departments provide and manage comprehensive health services, via a district-based, public health-care model. Local hospital management has delegated authority over operational issues, such as the

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<sup>168</sup> S 27 "(1) Everyone has the right to have access to –  
(a) health care services, including reproductive health care;  
(b) sufficient food and water; and  
(c) ..."



budget and human resources, to facilitate quicker responses to local needs. Public health consumes around 11% of the government's total budget, which is allocated and mostly spent by the nine provinces.

277. The Department of Health is focused on implementing an improved health system, which involves an emphasis focus on public health, as well as improving the functionality and management of the system through stringent budget and expenditure monitoring. Known as the "10-point plan", the strategic programme is improving hospital infrastructure and human resources management, as well as procurement of the necessary equipment and skills.
278. Under this plan, health facilities – such as nursing colleges and tertiary hospitals – are being upgraded and rebuilt to lay the way for the implementation of the National Health Insurance (NHI) scheme. The NHI is intended to bring about reform that will improve service provision and health care delivery. It will promote equity and efficiency to ensure that all South Africans have access to affordable, quality health care services regardless of their employment status and ability to make a direct monetary contribution to the NHI Fund. The NHI will be phased in over 14 years. In 2012/13, the government earmarked R1-billion to its pilot projects. Apart from infrastructure and management overhauls, another factor for ensuring the success of the NHI will be the strict regulation of the sector to make it more affordable to all South Africans.
279. During the period under review, new hospitals were commissioned in several rural districts, for example Dilokong, Nkhensani, Vryburg and Moses Kotane Hospitals. A total of 29 other hospitals in rural and urban areas are currently under construction, while 17 others are in the planning and design stage. These facilities provide a comprehensive package of health services that includes HIV care.
280. In the area of improving the health system effectiveness, substantial steps have been taken towards establishment of the National Health Insurance System. A Green Paper has been produced and released publicly for input. The Department of Health has conducted an audit of service quality in over 75% of health facilities and improvement plans are now being developed. The Department has also developed a human resource strategy which links intake of health professionals to projected demand. An audit of all 122 nursing colleges is underway with 45 of the target 105 already refurbished.
281. Significant progress has been made towards strengthening the Primary Health Care (PHC) system for South Africa with a focus on three initiatives, namely placing a group of clinical specialists in each health district to strengthen maternal and child health, strengthening school health services and deployment of a PHC team in each municipal ward. To this end, government has reoriented 5,000 Community Health Workers (CHWs) who are part of the PHC teams in the key priority health programmes of HIV and TB and maternal and child health.

282. The National Health Laboratory Service is the largest pathology service in South Africa. It has 265 laboratories, serving 80% of South Africans. The labs provide diagnostic services as well as health-related research.
283. The doctor-to-population ratio is estimated to be 0.77 per 1 000. But the vast majority of general practitioners – 73% – work in the private sector. In response, the Department of Health has introduced clinical health associates, midlevel health-care providers, to work in underserved rural areas. About 1 200 medical students graduate annually. In some communities, medical students provide health services at clinics under supervision. Newly graduating doctors and pharmacists complete a year of compulsory community service in understaffed hospitals and clinics. To ensure sufficient availability of adequately trained, appropriately skilled, suitably placed, highly motivated and properly remunerated health care providers, the Department of Health launched the Human Resource for Health Strategy in October 2011. One of the strategic objectives is to ensure that rural areas have equitable access to health care providers – which in turn means providing patients living in rural and remote areas with good quality HIV and AIDS treatment. The Department sends about 80 students annually to Cuba to train as medical practitioners, as part of implementing this strategy. Government has also made it easier for other foreign doctors to register in South Africa.

#### **Legislative measures to ensure better health care**

284. The National Health Act, 2003<sup>169</sup> provides a framework for a single health system for South Africa. The Act provides for a number of basic health care rights, including the right to emergency treatment and the right to participate in decisions regarding one's health.
285. Other legislation relating to health care, passed in the period under review, include laws which aim to ensure that all health establishments comply with minimum standards through an independent entity,<sup>170</sup> make medicines and pharmaceuticals more affordable and provide for transparency in the pricing of medicines,<sup>171</sup> to limit smoking in public places, create public awareness of the health risks of tobacco by requiring certain information on packaging, and prohibit the sale of tobacco products to anyone younger than 18.<sup>172</sup>
286. Other legislation provides for the introduction of mandatory community service for nurses,<sup>173</sup> and introduces a process to develop and redesign mental health services so as to grant basic rights to people with mental illnesses.<sup>174</sup> Other important developments in health care policy and legislation include the Traditional Health Practitioners Act, 2004<sup>175</sup>

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<sup>169</sup> Act No. 61 of 2003

<sup>170</sup> National Health Amendment Bill, 2010

<sup>171</sup> Medicines and Related Substances Amendment Act, 2002, (Act No. 59 of 2002)

<sup>172</sup> Tobacco Products Control Amendment Act, 2007 (Act No. 23 of 2007).

<sup>173</sup> Nursing Act, 2005 (Act No. 33 of 2005)

<sup>174</sup> Mental Health Care Act, 2002 (Act No. 17 of 2002)

<sup>175</sup> Act No. 35 of 2004

and new Regulations relating to the Labelling and Advertising of Foodstuffs which came into effect in May 2012, and aim to empower citizens to make healthy food choices.

### Measures to fight HIV/AIDS

287. In May 2012, government had cut the mother-to-child transmission rate from 3.5% in 2010 to less than 2%. The rate of new infections had dropped from 1.4% to 0.8% in the 18 to 24 age groups. As outlined in the HIV and STI Strategic Plan for South Africa 2007-2011, South Africa has adopted a multi-sectoral approach to the challenge of HIV and the wide-ranging impacts of AIDS. During 2011 a collaborative effort was undertaken by the South African National AIDS Council, in which government, business, labour and civil society are represented, to review the implementation of these strategic plans and to develop the next five year plan (for the period 2012-2016). There is in place a comprehensive prevention, care and treatment programme. Key components of the programme include Voluntary Counselling and Testing (VCT), prevention of mother to child transmission (PMTCT), antiretroviral therapy, condom distribution, and awareness education. Over the years, South Africa has been expanding its infrastructure for the implementation of the HIV and AIDS response programme. Public health facilities offering VCT and PMTCT have been expanded to cover the whole country.
288. The co-infection rates of HIV and TB exceed 70%, with TB being the most common opportunistic infection in HIV-positive patients. Because of late detection, poor treatment management, drug-resistant forms of TB (known as DR-TB or multidrug-resistant TB; and XDR TB or extensively drug-resistant TB) have increased significantly, with about 5 500 cases diagnosed during 2009. Integrating the double scourge of HIV/Aids and TB for the first time, government has launched the National Strategic Plan for HIV/AIDS and TB for 2012 – 2016. The plan seeks to address the social structural drivers of HIV/Aids, STD and TB care, prevention and support; to prevent new infections; to sustain health and wellness; and to protect human rights and access to justice of sufferers.
289. The HIV Counselling and Testing (HCT) campaign was launched in April 2010. By 2011, 19.9 million people had undergone voluntary testing for HIV. By mid- 2012, almost 20-million people had been tested and knew their status. Millions were also screened for TB. South Africa has the largest ARV therapy programme in the world, and an improved procurement process has seen a 50% decrease in the prices of ARV drugs. The cost of ARVs has been halved making it possible for government to treat more people within the same resources. In the area of combating HIV and AIDS including tuberculosis, we have witnessed a stabilisation of the number of people living with HIV in the country. In improving maternal and child health, we have reached 70% immunisation coverage for diarrhoea and pneumonia.<sup>176</sup>

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<sup>176</sup> Media statement by Minister in The Presidency for Performance Monitoring and Evaluation on the release of the Mid-Term Review, June 2012

290. During 2012/13, the health sector succeeded in negotiating reductions in the price of medicines. The amounts saved were as follows:
- R69 million on TB drugs
  - R169 million on antibiotics
  - R70 million on oncology medication
  - R69 million on injectables
  - R3 million on drops and inhalers
  - R105 million on tablets.<sup>177</sup>

### **Measures to ensure better nutrition**

291. The Department of Health has implemented various nutrition interventions during the period under review. Some programmes are included in health lifestyles programmes and various information and communication programmes on nutrition. Other initiatives include the fortification of staple food with selected vitamins and minerals to address micronutrient deficiencies. Addressing challenges of malnutrition and stunting amongst children require a concerted effort and partnership with other government departments, civil society and development partners. To this end, among the key evidence based interventions to improve child survival is the promotion of breastfeeding and the provision of Vitamin A to children under the age of five. Further, the Department has re-committed itself in promoting, protection and support of breastfeeding with an aim to secure the health of infants and prevent under-nutrition.

### **Measures to improve the health of mothers and children**

292. South Africa is a signatory to several international commitments such as the UN's Millennium Development Goals (MDGs), which seeks to address the health needs of women and children. Five major causes of maternal death have been identified, namely non-pregnancy related infections – mainly resulting from AIDS (43.7%); complications of hypertension (15.7%); obstetric haemorrhage (12.4%); pregnancy-related sepsis (9%); and pre-existing maternal disease (6%). The country's efforts to reduce maternal deaths date back to 1997, when the then Minister of Health established the National Committee of Confidential Enquiry into Maternal Deaths (NCCEMD), which was the first on the African continent. The NCCEMD has since released five triennial reports.
293. Empirical evidence shows that the health status of South Africans is improving. In August 2012, the Burden of Disease Research Unit at the Medical Research Council (MRC) published an independent scientific report from its Rapid Mortality Surveillance (RMS) system, which provides empirical estimates of the mortality based high level indicators for Outputs 1 and 2 of the Health Sector's NSDA 2010-2014. The overall life expectancy of South Africans has increased from 56, 5 years in 2009 to 60 years in 2011. The Under-5 mortality rate (U5MR) has decreased from 56 deaths per 1,000 live births in 2009, to

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<sup>177</sup> Government's "Year of Delivery 2012 – 2013"

42 deaths per 1,000 live births in 2011. The Infant Mortality Rate (IMR) has decreased from 40 deaths per 1,000 live births in 2009, to 30 deaths per 1,000 live births in 2011.<sup>178</sup>

294. Under the national prevention of mother-to-child (PMTCT) programme, every pregnant woman is offered HIV testing and counselling. If a woman tests positive for HIV, she is put on to a regime of anti-retroviral therapy to avoid transmitting the virus to her baby, and is offered a continuum of treatment, care and support for herself and her infant. The Department of Health has a strategic plan in place which identifies "priority interventions" that will have the greatest influence on reducing mortality rates, as well as enhancing gender equity and reproductive health. The campaign on Accelerated Reduction of Maternal Mortality in Africa (CARMMA), an African Union initiative, was launched in May 2012 and aims to reduce maternal and infant mortality rates.
295. Immunisation is a significant barrier against disease and death, and the rates of children receiving their primary vaccines have steadily been increasing under immunisation programmes. These aim to protect children against vaccine-preventable diseases, such as measles, TB, cholera and pertussis. Measures to improve child health also include the expansion and strengthening of school health services and the establishment of district clinical specialist teams. Other prevention services, such as regular deworming and growth monitoring, help protect children's health.
296. The *Health of our Children* report in 2010, which surveyed 8 966 children, found that HIV prevalence among infants (age 0 to 2 years) was 2.1%, lower than the 3.3% average in the age 0 to 4 years, suggesting a positive impact of the national Prevention of Mother-to-Child Transmission programme, begun in 2006.

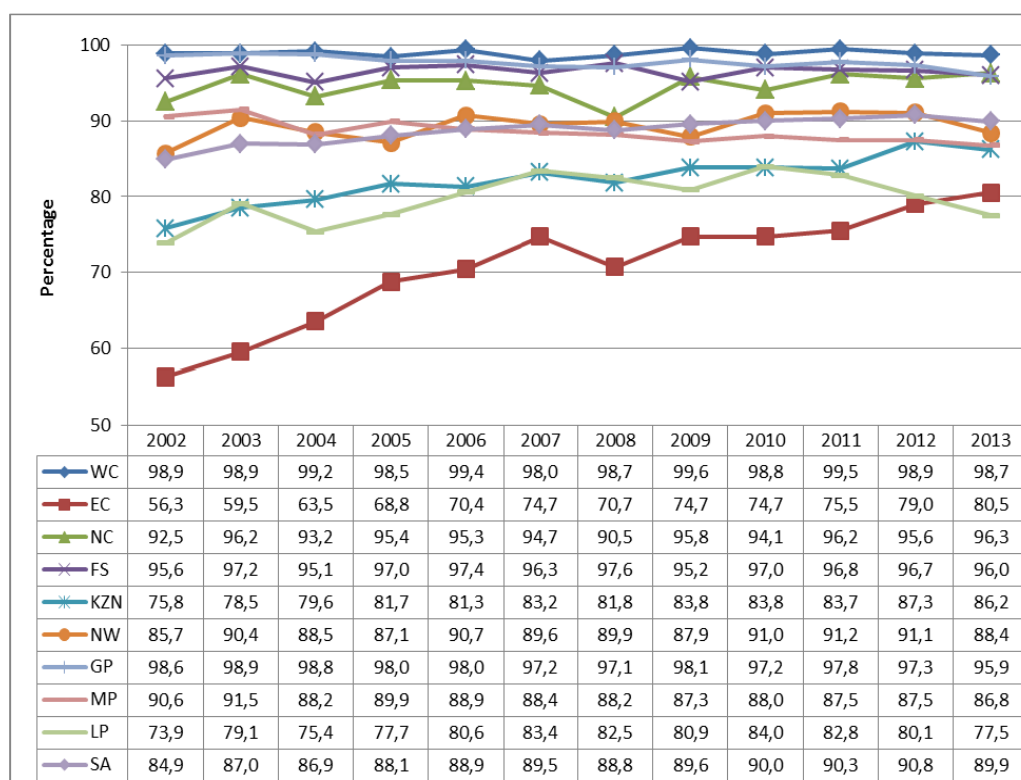
### The right to water and sanitation

297. Significant progress has been made in the area of water and sanitation. Some 89,9% of South African households had access to piped water in 2013. **Table 7** below shows the percentage of households that have access to improved sanitation facilities (e.g. flush toilets or pit toilets with ventilation pipes) increased from 62,3% in 2002 to 77,9% in 2013. The percentage of households who had no access to toilet facilities or who used bucket toilets decreased from 12,3% in 2002 to 5,3% in 2013.<sup>179</sup>

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<sup>178</sup> Department of Health, Annual Performance Plan, 2013/14 – 2015/16

<sup>179</sup> General Household Survey, 2013



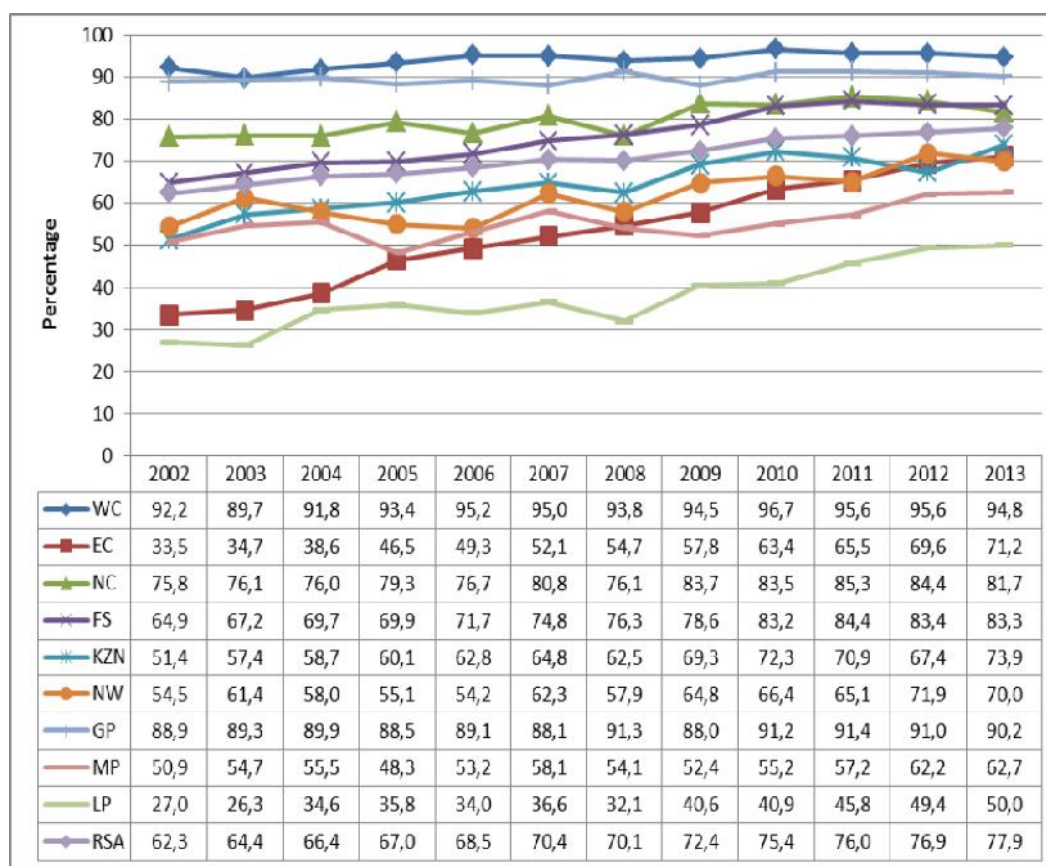
298. With regards to the main sources of drinking water used by households. An estimated 45,3% of households had access to piped water in their dwellings in 2013. A further 26,8% accessed water on site while 15,2% relied on communal taps and 2,6% relied on neighbours' taps. Although 4,2% of households still had to fetch water from rivers, streams, stagnant water pools and dams, wells and springs in 2013, generally households' access to water is improving. This is a decrease of more than five percentage points from 9,5% of households that had to access water from these sources in 2002.

299. **Table 8** below confirms that the number and percentage of households with access to piped water had increased since 2002.

Water source	Statistic	Year											
		2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
Piped water in dwelling	Number	4 409	4 559	4 607	4 749	4 980	5 163	5 611	5 622	5 862	6 294	6 504	6 845
	Percentage	40,8	41,1	40,4	40,5	41,2	41,6	43,7	42,3	42,7	44,4	44,5	45,3
Piped water on site	Number	3 009	3 173	3 367	3 490	3 681	3 838	3 501	3 743	4 019	4 106	4 055	4 051
	Percentage	27,8	28,6	29,5	29,7	30,5	30,9	27,3	28,1	29,3	29,0	27,7	26,8
Borehole on site	Number	290	284	188	160	141	155	155	190	157	212	203	259
	Percentage	2,7	2,6	1,6	1,4	1,2	1,3	1,2	1,4	1,1	1,5	1,4	1,7
Rainwater tank on site	Number	142	90	38	33	49	61	68	44	45	91	82	74
	Percentage	1,3	0,8	0,3	0,3	0,4	0,5	0,5	0,3	0,3	0,6	0,6	0,5
Neighbour's tap	Number	60	48	260	257	250	265	336	358	346	388	424	388
	Percentage	0,6	0,4	2,3	2,2	2,1	2,1	2,6	2,7	2,5	2,7	2,9	2,6
Public/communal tap	Number	1 465	1 649	1 682	1 858	1 852	1 910	1 996	2 201	2 131	2 008	2 307	2 290
	Percentage	13,6	14,8	14,7	15,8	15,3	15,4	15,6	16,5	15,5	14,2	15,8	15,2
Water-carrier/tanker	Number	68	65	69	115	134	123	146	171	200	134	199	230
	Percentage	0,6	0,6	0,6	1,0	1,1	1,0	1,1	1,3	1,5	0,9	1,4	1,5
Borehole off-site/communal	Number	300	254	297	273	273	199	248	209	177	183	165	189
	Percentage	2,8	2,3	2,6	2,3	2,3	1,6	1,9	1,6	1,3	1,3	1,1	1,3
Flowing water/stream/river	Number	606	511	519	421	390	406	442	507	433	374	336	382
	Percentage	5,6	4,6	4,5	3,6	3,2	3,3	3,4	3,8	3,2	2,6	2,3	2,5
Stagnant water/dam/pool	Number	77	75	62	35	30	52	37	30	41	53	30	42
	Percentage	0,7	0,7	0,5	0,3	0,2	0,4	0,3	0,2	0,3	0,4	0,2	0,3
Well	Number	146	115	113	76	124	64	70	50	37	75	55	71
	Percentage	1,3	1,0	1,0	0,6	1,0	0,5	0,5	0,4	0,3	0,5	0,4	0,5
Spring	Number	208	254	196	226	158	146	188	119	208	172	191	143
	Percentage	1,9	2,3	1,7	1,9	1,3	1,2	1,5	0,9	1,5	1,2	1,3	0,9
Other	Number	28	30	17	45	24	26	32	59	75	82	70	143
	Percentage	0,3	0,3	0,2	0,4	0,2	0,2	0,3	0,4	0,5	0,6	0,5	1,0
Subtotal	Number	10 806	11 107	11 413	11 737	12 087	12 409	12 830	13 303	13 731	14 172	14 620	15 107
	Percentage	100,0	100,0	100,0	100,0	100,0	100,0	100,0	100,0	100,0	100,0	100,0	100,0
Unspecified	Number	8	6	12	16	20	76	55	0	0	1	11	0
Total	Number	10 814	11 113	11 425	11 753	12 107	12 485	12 885	13 303	13 731	14 173	14 631	15 107

300. More households, particularly the previously disadvantaged, are receiving basic services from the municipalities in which they reside. Environmental hygiene plays an essential role in the prevention of many diseases. It also impacts on the natural environment and the preservation of important natural assets, such as water resources. Proper sanitation is one of the key elements in improving environmental sanitation.

301. **Table 9** below identifies the percentage of households per province that had access to RDP standard toilet facilities, i.e. flush toilets connected to a public sewerage system or a septic tank, and a pit toilet with a ventilation pipe. Nationally, the percentage of households with access to RDP-standard sanitation increased from 62,3% in 2002 to 77,9% in 2013.



302. Factors linked to previous discriminatory practices still prevent the free disposal of water to all people. For instance, the lack of necessary infrastructure in rural areas and the lack of effective cost-recovery programs are challenges.
303. Linked to the access of safe water and the right to sanitation is the issue of acid mine drainage in South Africa. It is a phenomenon caused by a series of chemical reactions that occur between water and sulphite minerals which combine to form sulphuric acid solution. It is most prevalent in areas where mining has exposed fresh sulphite minerals to elements and in South Africa it is notably in the gold fields, various coal and copper mines. A December 2011 report on mine water management in the Witwatersrand gold fields to the Inter-Ministerial Committee on mine management, the main risks identified with regards to the above problem were risks owing to the flooding of mines and risks owing to the decanting of acid mine drainage to the environment. The generic approach suggested to the management of this issue focuses on three priority areas: decant prevention and management, ingress control in terms of the reduction of the rate of flooding and central decant volume, finally water quality management.
304. With regards to water infrastructure, progress has been made with regard to Water Augmentation Schemes and the rehabilitation of 9 out of 25 dams has been completed. Progress has also been made to address water licence backlogs. Securing adequate funding for water infrastructure through an appropriate pricing strategy is a focus area.



## Case law

305. Notable cases which relate to the right to access to water include *Mazibuko v City of Johannesburg*.<sup>180</sup> In this case the applicants sought to challenge, among others, the introduction of a quantified provision of kiloliters of water per family per month and also the introduction of prepaid meters in Phiri Township in Soweto. The Court upheld the policy of introducing prepaid meters as well as the setting of an allowance of free water by the City of Johannesburg. The Constitutional Court acknowledged is that most of the problems that the poor of South Africa face, in relation to accessing water, are intimately related to the skewed policies that apartheid implemented. Government thus faces the monumental task of reversing the effects of apartheid in almost all spheres of life.
306. In *Nokotyana v Ekurhuleni Metropolitan Municipality*<sup>181</sup> the applicants relied on sections 27 and 26 of the Constitution, the Water Services Act and the decision in *Mazibuko* to enforce their right to basic sanitation. In the Gauteng High Court in the matter of *Federation for Sustainable Environment v Minister of Water Affairs*<sup>182</sup> the court considered the contaminated water supply in Silobela and Carolina communities which is contaminated by acid mine water to an extent that it is not healthy for both human and animal consumption. The court ordered the municipality to engage actively and meaningfully with the applicant and the community regarding the steps to be taken to ensure potable water can once again be supplied through the water supply. In *Beja v Premier of the Western Cape*<sup>183</sup> the City of Cape Town was ordered to enclose 1000 toilets in Makhaza, Khayelitsha after the court held that the City has violated the dignity of residents.

## The right to food

307. The right to food is protected in three different articles of the Constitution. Very often the focus is mainly on section 27, as this is the principal provision which entrenches everyone's right to have access to sufficient food and water. But it is equally important to note the provisions of section 28(1)(c) which states that every child has the right to basic nutrition and section 35(2)(e) which provides that everyone who is detained, including every sentenced prisoner, has the right to conditions of detention that are consistent with human dignity including the provision, at state expense, of adequate nutrition.
308. Household access to food has improved since 2002, but has remained static since 2011. The Household Food Insecurity Access Scale which is aimed at determining households' access to food showed that the percentage of South African households with inadequate or severely inadequate access to food decreased from 23,9% in 2010 to 23,1% in 2013. During this time, the percentage of individuals that were at risk decreased from 28,6% to

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<sup>180</sup> (2009) ZACC 28

<sup>181</sup> 2010 (4) BCLR 312 (CC)

<sup>182</sup> (35672/12) [2012] ZAGPPHC 128 (10 July 2012)

<sup>183</sup> (10) BCLR 1077 (WCC)

26%. Between 2002 and 2013, the percentage of households that experienced hunger decreased from 29,3% to 13,4% while the percentage of individuals who experienced hunger decreased from 23,8% to 11,4%.<sup>184</sup>

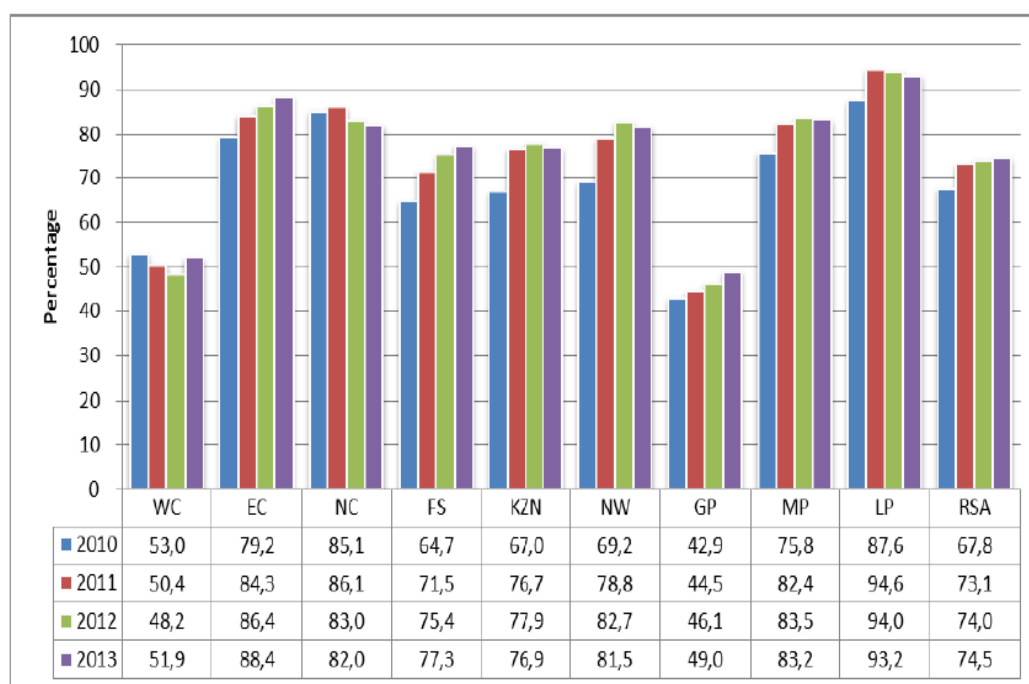
309. The Department of Health has implemented various nutrition interventions. Some programmes are included in health lifestyles programmes and various information and communication programmes on Nutrition. Other initiatives include the fortification of staple food with selected vitamins and minerals to address micronutrient deficiencies in the South African population. Addressing challenges of malnutrition and stunting amongst children require a concerted effort and partnership with other government departments, civil society and development partners. To this end, among the key evidence based interventions to improve child survival is the promotion of exclusive breastfeeding and the provision of Vitamin A to children under the age of five. Further, the Department has re-committed itself in promoting, protection and support of breastfeeding with an aim to secure the health of infants and prevent under-nutrition.
310. The issue of food security has been critical in many parts of the world, including South Africa. In South Africa, food security received much attention after 1994 when South Africa became a democratic country. The Department of Agriculture, Forestry and Fisheries was mandated to develop agricultural policies and support programmes to ensure that all are given agricultural opportunities that will enable them to meet their basic food needs. In the 2010/2011 financial year food security was re-prioritised as one of the top priorities for South African government. This is in line with the United Nations Millennium Development Goal, which aims to halve the proportion of people who go hungry by 2015.
311. As mentioned, the DAFF's major role is, among others, to ensure that opportunities are created to encourage South African citizens to participate in agriculture and produce to reduce food insecurity in the country. The Department has since initiated a number of programmes that are meant to contribute positively to food security in the country. The Department prioritized the development of appropriate agricultural skills among those previously excluded to ensure equitable participation in the agricultural sector. In this regard, a dedicated unit in the Department for the promotion of appropriate agricultural skills was established. This unit came to be known as Education, Training and Extension Services (DETES). The purpose of the DETES is to ensure that farmers and other Stakeholders access appropriate agricultural skills for the development of agriculture as an industry.
312. The DAFF, in conjunction with the District Municipalities and the municipal health services, have held Pesticides Safety Awareness campaigns at various primary schools nationwide. The campaign is part of the Department's drive to increase the level of awareness among people after some communities have experienced sporadic incidents of children becoming ill because of a lack of knowledge of pesticides. The Department's

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<sup>184</sup> General Household Survey 2013

plan is to introduce more sustainable interventions that will create awareness among the previously disadvantaged communities. It also entrenches the commitment to a safe environment and management of pesticides and the intention to eradicate the unlawful street vending of pesticides.

313. Agriculture had increased its contribution to the GDP up to 5,8% in the second quarter of 2012. The financial sector has also thrown in its weight behind agriculture. In 2012 the Land Bank and the African Development Bank entered into a R1bn funding agreement to help emerging and commercial farmers get finance.
314. The National School Nutrition Programme (NSNP) aims to promote better quality education for the poorest learners by providing a daily meal to learners benefiting from the programme. During the 2009/10 financial year, the National School Nutrition Programme (NSNP) made a valuable contribution to the Departmental goals of learner performance and access to education, through providing a daily nutritious meal to 7 125 273 learners. For the first time the programme was successfully extended to quintile (Q)1 secondary schools in April 2009. The programme will then be phased-in to include Q2 and 3 secondary schools in 2010 and 2011 respectively. **Table 10** below shows the extent of the programme in the various provinces from 2010 to 2013:



## Article 17: Right to education and culture

315. Section 29 of the Constitution provides for the right to **education**.<sup>185</sup>
316. Educational attainment outcomes continue to improve with improved access to educational facilities and services. Among individuals aged 20 years and older, the percentage who attained Grade 12 as their highest level of education increased from 21,9% in 2002 to 27,7% in 2013. The percentage of these individuals with tertiary qualifications furthermore improved from 9,3% to 12,8% whilst functional illiteracy declined from 27,3% to 16,2% between 2002 and 2013.<sup>186</sup>
317. With regards to attendance of an educational institutions, nationally, 73,5% of persons aged 5–24 were attending educational institutions in 2013. As **Table 11** below shows, this is almost the same level as observed in 2002 when the attendance rate was 73,6%. Whilst the percentage in this broad age group has not changed, at peak ages of 7-16 years, attendance is almost universal.

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<sup>185</sup> S 29 (1) "Everyone has the right-

- (a) to a basic education, including adult basic education; and
- (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.

(2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account-

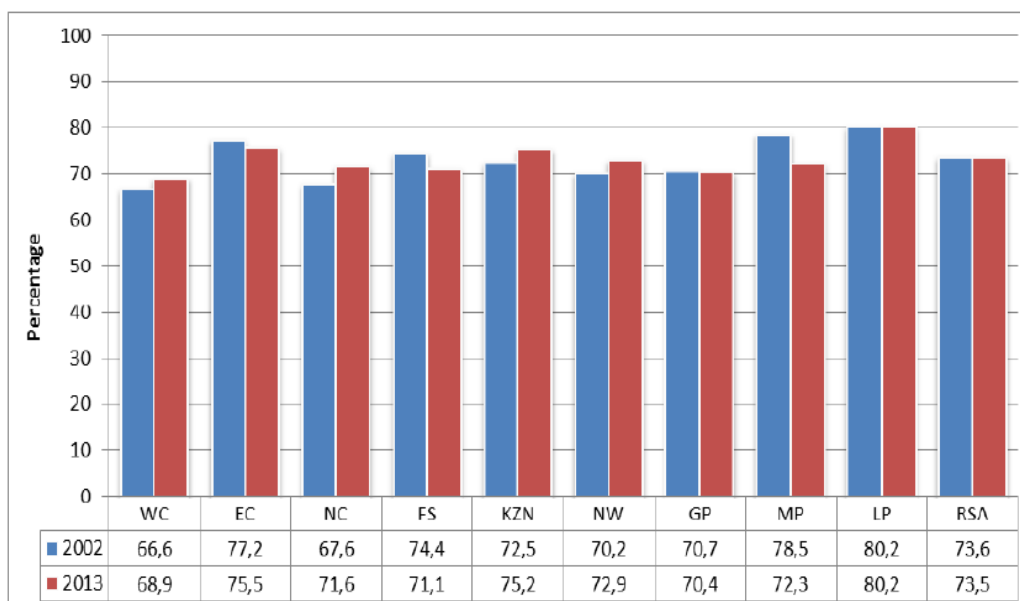
- (a) equity;
- (b) practicability; and
- (c) the need to redress the results of past racially discriminatory laws and practices.

(3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that-

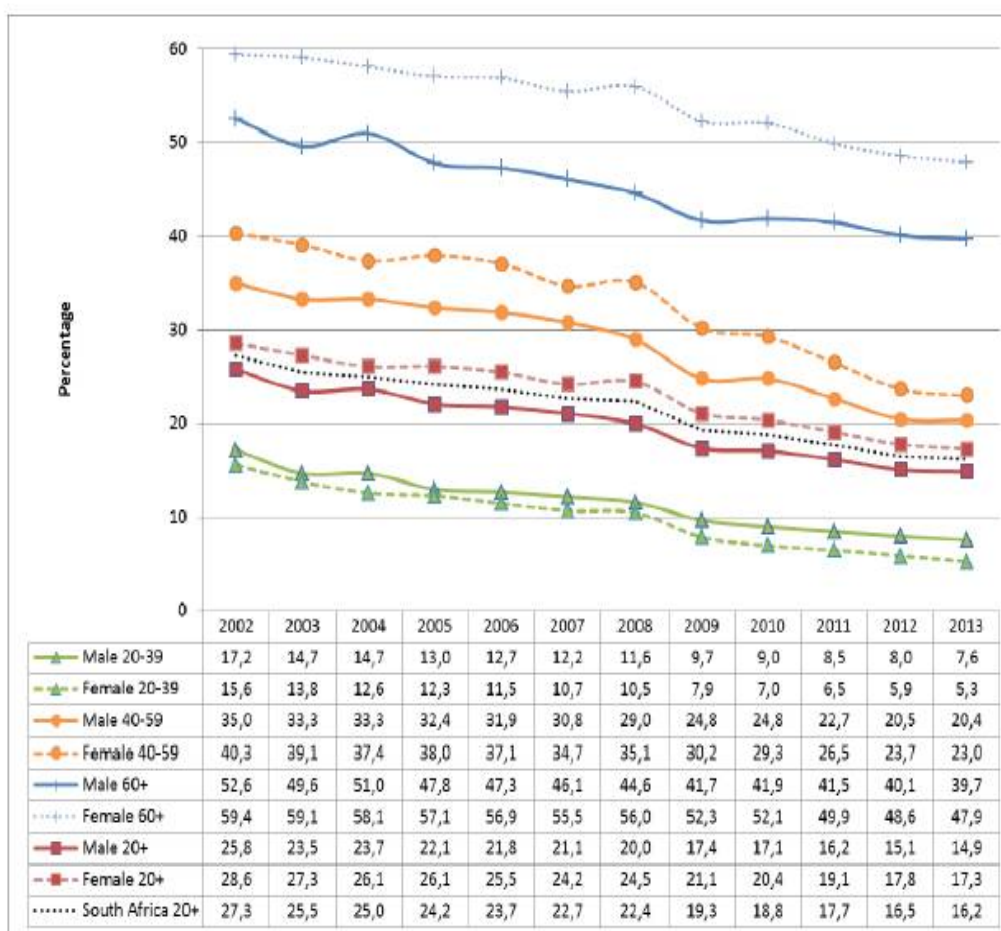
- (a) do not discriminate on the basis of race;
- (b) are registered with the state; and
- (c) maintain standards that are not inferior to standards at comparable public educational institutions.

(4) Subsection (3) does not preclude state subsidies for independent educational institutions."

<sup>186</sup> General Household Survey, 2013



318. Literacy rates can be used as a key social indicator of development. In this regard, as **Table 12** below shows, the percentage of individuals over the age of 20 years who could be regarded as functionally illiterate has declined from 27,3% in 2002 to 16,2% in 2013.



319. A significant development in the education sector since the presentation of the first periodic report has been the restructuring of the national department responsible for administering education in South Africa. Following the 2009 elections, the new administration split the Department of Education into two national departments: the Department of Basic Education and the Department of Higher Education and Training. The rationale underpinning this change was recognition of the need to intensify and strengthen educational improvement initiatives at all levels of the education system, from foundation phase through to tertiary level.
320. The almost universal access to primary education has been made possible through the implementation of a range of initiatives, during the period under review, aimed at ensuring learners' access to and their retention in the schooling system.
321. Legislative and policy initiatives include the adoption of a policy of 'no-fee' schools. The SA Schools Act, 1996 was amended by the Education Law Amendment Act, 2005<sup>187</sup> which authorises the declaration of schools in poverty-stricken areas as "no-fee schools". The 'no-fee' schools policy is designed to support learners from poorer backgrounds.
322. Another important initiative is the provision of free transport for learners who live far away from schools.
323. In acknowledging that many learners have to walk long distances to reach schools, especially in rural areas, government introduced a learner transport scheme which is designed to ensure that all learners have access to schooling. Many challenges remain in ensuring safe and adequate transport to learners. Some of the provincial departments have also explored hostel facilities for learners to reduce the demand for learner transport.
324. A child cannot learn on an empty stomach, that is why the National School Nutrition Programme (NSNP) was introduced to ensure the right of poor children to basic food and education. The programme was rolled-out further during the period under review. The programme ensures that nutritious meals are served to deserving learners on all school days. The programme also provides an incentive for children to attend school regularly and punctually. The overall purpose is to enhance learning capacity and improve access to education of primary and secondary school learners. The objectives are to enhance learning through school feeding, to strengthen nutrition education in schools, to promote food gardens in schools and to develop and strengthen partnerships to enhance the programme. The NSNP is funded through a Conditional Grant that is transferred to provinces according to the Division of Revenue Act (DORA) and other directives from the Department of Basic Education and the National Treasury.
325. In 2012, the National Curriculum Framework for children from birth to four years of age and the Guidelines for Developing Learning Programmes were finalised. There are now

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<sup>187</sup> Act No. 24 of 2005

- 19 261 registered early childhood development (ECD) centres with just under 845 000 children receiving ECD and partial care services.
326. The Kha Ri Gude Mass Literacy campaign for adults reached 2 243 766 adults between 2008 and 2011, with 665 246 adults in classes in 2012.
327. The significant number of policy interventions has been instituted during the period under review. The Accelerated Schools Infrastructure Delivery Initiative (ASIDI) has been introduced to ensure consistency in the provision of infrastructure and address backlogs in construction and maintenance. In October 2012, new schools were opened at villages at Libode and Lusikisiki in the Eastern Cape. These schools were the first of 49 mud schools identified for replacement in 2012 under ASIDI. Asidi is the first programme of its kind to bring together government and private financial institutions in a way that aims to get rid of all mud schools and inappropriate structures by 2015. With a budget of more than R8,2 billion over the next three years, the programme will replace 496 mud schools, provide water and sanitation to 1 257 schools, and electricity to 878 schools.
328. A further practical policy innovation has been the introduction of workbooks. Workbooks are provided to children in grades R – 6. The Guidelines for the Rationalisation of Small or Non-violable Schools<sup>188</sup> provide for the implementation of agreements with land owners in terms of section 14 of SA Schools Act, 1996<sup>189</sup> and the Merger and Closure of rural and farm schools. South Africa has adopted Education White Paper 6: Special Needs Education: Building an Inclusive Education and Training System. In 2005 the National Department of Education published three sets of guidelines for the implementation of White Paper 6.<sup>190</sup> The national Department of Basic Education has also adopted the National Strategy on Screening, Identification, Assessment and Support<sup>191</sup> to guide the policy by defining the process of identification, assessment and enrolment of learners in special schools. The Guidelines for Responding to Learner Diversity in the Classroom through Curriculum and Assessment Policy Statements<sup>192</sup> is intended to provide practical guidance to school managers and teachers on planning and teaching to meet the needs of a diverse range of learners.

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<sup>188</sup> July 2009

<sup>189</sup> Act No. 84 of 1996

<sup>190</sup> *The Conceptual and Operational Guidelines for the Implementation of Inclusive Education: Full Service Schools* – These guidelines explain the main principles, upon which full service schools are founded, describe their characteristics and outline the institutional development of such schools.

*The Conceptual and Operational Guidelines for the Implementation of Inclusive Education: Full Service Schools as Resource Centres*: These guidelines provide a conceptual framework for an inclusive education system. They provide, inter alia that disability should be seen not only in medical terms, but also in terms of the rights of the disabled person.

*The Conceptual and Operational Guidelines for the Implementation of Inclusive Education: District Support Teams*. These guidelines sketch the role of support providers employed at the National Department of Education to assist education institutions such as schools and early childhood centres to identify and address barriers to learning and to promote effective teaching and learning.

<sup>191</sup> 2008

<sup>192</sup> 2011

329. The Annual National Assessments (ANA) were introduced in 2010 with the aim of improving the quality of education. Unless the DBE was able to assess and diagnose learner problems using a national diagnostic instrument it would be unable to reach the desired outcomes for learners. ANA provided learners, teachers and parents, and also districts and schools, with useful diagnostic information on areas of difficulty, which led to restructuring by the DBE of targeted remedial programmes. ANA also encouraged schools to celebrate areas of outstanding performance. The Annual National Assessments are standardised national assessments for languages and mathematics in the intermediate phase (grades 4 – 6) and in literacy and numeracy for the foundation phase (grades 1 – 3). The question papers and marking memoranda (exemplars) are supplied by the national Department of Basic Education and the schools manage the conduct of the tests as well as the marking and internal moderation.
330. In March 2013, the Deputy Minister of Basic Education officially launched an e-learning project at the Sunward Park High School in Boksburg which became the first public school to transform learning into a fully digital platform. More than 1 200 learners from grades eight to 12 use this digital educational platform to log into the school portal and download the textbooks specific to that grade and subject. At the start of the school year in 2013, the entire school, began using the e-learning tools.
331. In June 2013, the North West Provincial Government announced that it would write off over R42 million in youth bursary debt, for the benefit of young people from poor and disadvantaged backgrounds who had studied through the Office of the Premier Bursary Scheme. As from April 2013, provincial departments have been budgeting and administering their bursary programmes.
332. In November 2013, the Minister of Higher Education and Training hosted the Brazil, Russia, India, China and South Africa (BRICS) meeting in Paris, France, on the margins of the 37th session of the United Nations Educational, Scientific and Cultural Organisation (Unesco) General Conference. The aim was to strengthen collaboration between BRICS universities, partnerships and knowledge exchanges and investigate how information and communications technology could be used effectively to improve the quality of learning.
333. In short, we are encouraged that we have more children going to school. The number of children attending Grade R has more than doubled, moving from about 300 000 to more than 700 000 between 2003 and 2011.<sup>193</sup> Student enrolment at universities has increased by 12% from 837,779 in 2009 to 938,201 in 2012/13, while Further Education and Training College enrolments increased from 345,566 in 2010 to 657,690 in 2012/13. The matric pass rate has gone up from around 61% in 2009 to 78,2% in 2013 and the bachelor passes improve each year. What is more impressive with the achievement of the education

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<sup>193</sup> In 2003 there were 315,387 students enrolled in Grade R, according to the basic education department. By 2011, enrolment had increased to 734,654. In 2013, it had increased to 779,370. These figures include both public and independent schools.



targets is that the proportion of girls attending primary, secondary and tertiary education has improved significantly.

334. Having achieved almost universal access to primary education, South Africa is now focusing on improving the quality of the education, expanding the provision of infrastructure, facilities and learning resources, and strengthening the capacity of the educator cadre to deliver an enhanced range and quality of basic education.

### Case law

335. During the period under review important court decisions contributed to improve the realization of the right to education. The judgment in *The Governing Body of Rivonia Primary School v The MEC of the Gauteng Department of Education*<sup>194</sup> highlights the continued racial disparities in our schooling system as the court found that school governing bodies may not have an unqualified power to decide upon the admission policy to public schools.
336. *In Head of Department, Department of Education, Free State Province v Welkom High School; Head of Department, Department of Education, Free State Province v Harmony High School*<sup>195</sup> the Court considered the rights of pregnant learners and policies which state that pregnant learners must be absent from school for a certain period of time. In this case, a 16-year old learner in Grade 10 at Harmony High School in the Free State fell pregnant. She continued attending classes and passed her grade 10 examinations. The following year she returned for grade 11 and attended classes for the first and second terms. During the winter school holidays she gave birth. She then returned to school for the third and part of the fourth school terms. In October, only a month before final examinations and in accordance with the school's pregnancy policy, the learner and her mother were instructed that she would not be admitted to school for the remainder of the year and should return only in January of the next year. This meant that the learner would not be allowed to write her year-end examinations and would then have to repeat grade 11.
337. The Court found that these policies violate pregnant learners' constitutional rights and therefore ordered that the policies must be reviewed. The Court considered the policies and found that the policies differentiated between male learners and female learners. At Harmony High School only pregnant learners (or learners who have given birth) are required to leave school – male learners who are equally responsible for the pregnancy are permitted to continue their education without interruption and the policy contains no provisions regarding a "leave of absence" for paternity purposes. Therefore the policies lead to unfair discrimination, as it treats boys and girls differently.

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<sup>194</sup> 2012 (5) BCLR 537 (GSJ)

<sup>195</sup> 2013 (9) BCLR 989 (CC)

338. Secondly, the policies limit pregnant learners' fundamental right to basic education in terms of section 29 of the Constitution by requiring them to repeat up to an entire year of schooling. Although in theory they are entitled to return to school and therefore to complete their education, many learners simply cannot afford to add an extra year to their studies. Moreover, statistics from Harmony indicated that two-thirds of the learners who fell pregnant never returned to complete their secondary-school education. The policies thus have drastic effects on learners' ability to complete their schooling.
339. Thirdly, the policies violated learners' rights to human dignity, privacy and bodily and psychological integrity by obliging them to report to the school when they believe they are pregnant. In addition, all other learners are required to report to school authorities when they suspect that a fellow learner is pregnant. The policies thus have the effect of creating an atmosphere in which pregnant learners feel the need to hide their pregnancies rather than seek help from school authorities for medical, emotional and other support.
340. The case of *Western Cape Forum for intellectual Disability v Government of the Republic of South Africa*<sup>196</sup> involved the rights of severely and profoundly intellectually disabled children in the Western Cape. In addition to these judgments, there are further judgments which were handed down during the period under review which also pertain to the right to education.<sup>197</sup>

### The right to cultural practices

341. In relation to the right to participation in **cultural practices** of one's choice, section 30 and 31 of the Constitution apply.<sup>198</sup> The section 31 right protects both individual and group interests in cultural integrity.
342. Government is constantly mindful of the fact that South Africa is a country of rich cultural diversity. Perhaps one of the most outstanding things about South African culture is that it is not one single culture, but rather a range of different cultures representing every

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<sup>196</sup> 2011 (5) SA 87 (WCC)

<sup>197</sup> *Centre for Child Law v MEC for Education, Gauteng* 2008 (1) SA 223 (T), *Hoërskool Ermelo v Head of Department of Education: Mpumalanga* 2009 (3) SA 422 (SCA), *Governing Body of the Juma Masjid Primary School v Essay N.O.* 2011 (8) BCLR 761 (CC) and *Minister of Education (Western Cape) v Mikro Primary School Governing Body* [2005] 3 All SA 436 (SCA)

<sup>198</sup> S 30 "Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights." And s 31 "(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community-

- (a) to enjoy their culture, practise their religion and use their language; and
  - (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.
- (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights."

level of a very stratified community. Hybrid mixtures of these different cultures also exist, making South Africa one of the most culturally diverse countries in the world.

343. As a result, government is continuously seeking to overcome the legacy of past discriminatory practices and strives to develop one nation, united in our diversity. The country has thus undertaken not only to promote diversity and tolerance but it has also taken positive measures to promote the rights of minority groups. The Department of Arts and Culture (DAC) is specifically tasked to create an environment conducive to the growth and development of South Africa's arts and culture. Among its key objectives are the improvement, re-orientation and expansion of the arts and culture sector to serve South Africa's cultural needs. The DAC's vision is to develop and preserve South African culture so as to ensure social cohesion and nation-building. For example, as part of our efforts to promote inclusive citizenships, the DAC hosted no less than eighty community conversations held throughout South Africa to determine from communities the kind of society they seek to build. These conversations culminated in our country's first National Summit on Social Cohesion, held in Kliptown in July 2012. The summit brought together South Africans; black and white, women and men, rich and poor, young and old, urban and rural, with a diversity of beliefs, seeking to unite them under a common declaration and through a practical programme of action.
344. As part of implementing the Mzansi Golden Economy strategy the DAC continued to support major cultural events in all the provinces. Some of the events supported include: the National Arts Festival, the South African Music Awards, the Mbokodo Awards, Joy of Jazz, Mapungubwe Arts Festival, the Buyel'ekhaya Pan-African Music Festival, the Cape Town International Jazz Festival and the Mangaung African Festival (Macufe), to mention a few.
345. An estimated total of 25 000 job opportunities were created in the past couple of years as a result of some twenty-eight cultural events supported by the DAC across the country. Future plans are to upgrade some of these events with a view to enhancing their contribution to the goals of nation building, social cohesion and economic development.<sup>199</sup> The Department of Arts and Culture has demonstrated its unwavering commitment to bring arts, culture and heritage activities into the mainstream to provide economic and transformational tools for the vast majority of South Africans. This sector now forms an essential part of South Africa's New Growth Path. There is greater appreciation of the contribution of the arts to the GDP of the nation.
346. The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities is a state institution supporting constitutional democracy in South Africa. It draws its mandate from the Constitution and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act of 2002.<sup>200</sup>

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<sup>199</sup> DAC, Annual Report 2012-2013

<sup>200</sup> Act No. 19 of 2002

347. The Commission has been operational since 2003 and is mandated to promote respect for and further the protection of the rights of cultural, religious and linguistic communities; promote and develop peace, friendship, humanity, tolerance, national unity among and within cultural, religious and linguistic communities on the basis of equality, non-discrimination and free association; to promote the right of communities to develop their historically diminished heritage and to recognise community councils. The Commission works along five key strategic areas: public education and information; investigation and dispute resolution; policy and research; community councils; and national consultative conference.

### **Rights of indigenous peoples**

348. South Africa's approximately 320,000 indigenous citizens include the San peoples—!Xun, Khwe, and Khomani—the Nama Communities, the Griqua associations and Koranna descendants, and the “revivalist Khoisan,” which we refer to collectively as the Khoisan. In the apartheid period, indigenous identification and culture were discouraged, and many Khoisan people were forced to learn Afrikaans as their primary language. In 1996, the post-apartheid South African government took steps toward recognizing Khoisan rights in Article 6 of the Constitution, requiring the Pan South African Language Board (PanSALB) to promote not only the eleven official languages, but also ‘the Khoi, Nama and San languages’. PanSALB created a Khoi and San National Language Board.
349. Following the first democratic elections in 1994, and as part of a comprehensive strategy to implement the new South African Constitution, particular attention was also paid to the question of the constitutional accommodation and recognition of Khoi-San identity. With a view to giving effect to this objective, the Government decided in 1997 that there be established a National Griqua Forum. This body then proposed that a national body be established to represent the Khoi-San communities in South Africa that would serve as a single body with which Government would consult on all issues relating to the Khoi-San. On 27 May 1999 a national non-statutory body that became known as the National Khoi-San Council (NKC) was established. The NKC consists of 21 members drawn from the five main groupings of Khoi-San society.
350. The function of the NKC is to consult with government on matters pertaining to, and affecting the Khoi-San people. Currently the NKC has aided government by providing expert council on the recognition of the Khoi-San as well as providing assistance when researching the history of the Khoi-San. Most importantly, the NKC had extensive input in drafting the National Traditional Affairs Bill, as it relates to the Khoi-San.
351. In addition, South Africa has implemented and funded practical steps and significant educational, economic and scientific programmes for the protection and promotion of indigenous people. Known as the Indigenous Knowledge System, this ambitious programme brings together indigenous communities, universities, research centres and economic partners and enjoys the support of the government.

352. The Department of Science and Technology's National Indigenous Knowledge Systems Office (NIKSO) has received international recognition for its innovation in enhancing indigenous knowledge systems in the country.

### **Heritage**

353. The DAC declared 2012 the year of heritage in order to increase focus on preserving and promoting our country's cultural heritage, with particular emphasis on our liberation heritage. Specifically, the sacrifices and contributions of some of the heroes and heroines of our struggle for national liberation were celebrated. Significant progress has been made in implementing the twenty-nine heritage projects across the country. These include the completion of the Steve Biko Centre in Ginsberg in the Eastern Cape, the opening of the museum component of Freedom Park, the building of a road linking Freedom Park and the Voortrekker Monument, the completion of the Ncome Museum in Northern KwaZulu-Natal and the Matola Monument and Museum in Mozambique. Progress with refurbishing the former President of the ANC, O.R. Tambo's, homestead in Bizana and with building an interpreting centre. We have also developed policies on living heritage, Under Water Cultural Heritage, Digitisation and Human Resources Development strategies for heritage.
354. The National Heritage Council of South Africa is a statutory body that is responsible for the preservation of the country's heritage. Since its inception in February 2004, it has managed to place heritage as a priority for nation building and national identity. The important areas that the NHC focuses on are policy development for the sector to meet its transformation goals, public awareness and education, knowledge production in heritage subjects that were previously neglected, including the funding of projects that place heritage as a socio-economic resource. The South African Heritage Resources Agency is a statutory organisation established under the National Heritage Resources Act, 1999<sup>201</sup> as the national administrative body responsible for the protection of South Africa's cultural heritage. The Act follows the principle that heritage resources should be managed by the levels of government closest to the community.

### **Language**

355. The promulgation of the Pan Language South African Board Act of 1995 has been applied in South African cultural and language communities so as to protect and promote their indigenous languages. It takes into account the broad acceptance of linguistic diversity, social justice, the principle of equal access to public services and programmes, and respect for language rights. This is indicative of the integration of indigenous peoples which South Africa seeks to achieve through the recognition of the multiple cultures and linguistic communities who all live in South Africa.

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<sup>201</sup> Act No. 25 of 1999

## Creation of the Department of Traditional Affairs

356. Chapter 11 of the Constitution states that the institution, status and roles of traditional leadership, according to customary law, are recognised, subject to the Constitution. The establishment of the Department of Traditional Affairs was approved by Cabinet on 5 March 2008. The former Department of Provincial and Local Government was given a mandate deriving from a March 2008 Cabinet decision to drive the processes for the establishment of this new department.
357. The strategic role of the department is not only to assist the institution of traditional and the Khoi-san leadership to transform themselves to be strategic partners with Government in the development of their communities, but also to coordinate the traditional affairs activities of the Department and those of other Departments at national, provincial and local government levels. This is meant to ensure that their needs in terms of development, service delivery, governance, access to indigenous knowledge systems, traditional courts and indigenous law, traditional healing and medicine are adequately met.
358. The Department of Traditional Affairs was established in April 2010 to underline the critical focus on traditional leadership. This signifies the importance that is placed on the role and place of traditional leaders in the lives of people, especially in rural areas. The department is working on a range of policies which, among other things, include policy on unity and diversity, initiation, traditional healing, traditional leaders protocol, family trees, involvement of the Khoisan people in the system of governance in South Africa, and remuneration and benefits of traditional leaders based on uniform norms and standards.
359. In 2011, the Department introduced the National Traditional Affairs Bill, which provided for the recognition of Khoi-San communities, leaders and councils. The Bill also provided for the establishment of an advisory committee which would investigate and make recommendations on the recognition of Khoi-San communities and leaders. In order to accommodate all the matters relating to the Khoi-San, it was decided to replace the Traditional Leadership and Governance Framework Act, 2003<sup>202</sup> and the National House of Traditional Leaders Act, 2009<sup>203</sup> with a single comprehensive Bill dealing with all matters relating to traditional and Khoi-San leadership and governance matters as well as matters relating to the houses of Traditional Leaders. This recognition is now contained in the National Traditional Affairs Bill. This Bill makes provision for the Khoi-San to indisputably become part of traditional structures and will ensure that the interests of the Khoi-San will in future be protected and promoted. Furthermore, to ensure uniformity, existing legislation is also to be consolidated.

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<sup>202</sup> Act No. 41 of 2003

<sup>203</sup> Act No. 22 of 2009

## Traditional leadership

360. The Constitution recognises customary law as an independent source of law, embodied in the customary law is the custom of traditional leadership amongst others. The National House of Traditional Leaders was established in terms of the National House of Traditions Leaders Act, 1997.<sup>204</sup> Its objectives and functions are to promote the role of traditional leadership within a democratic constitutional dispensation, enhance unity and understanding among traditional communities and advise national government. Provincial houses of traditional leaders were established in eight (8) provinces, namely the Eastern Cape, Western Cape, Northern Cape, KwaZulu-Natal, the Free State, Mpumalanga, Limpopo and North West. Unlike the other provinces, Gauteng only has a Council of Traditional Leaders and not a Provincial House of Traditional Leaders.
361. The Traditional Leadership and Governance Framework Act, 2003<sup>205</sup> provides for the establishment of local houses of traditional leaders. The national and provincial houses of traditional leaders enhance the co-operative relationships within national and provincial government, while the establishment of local houses of traditional leaders deepen and cement the relationship between municipalities and traditional leaders on customary law and development initiatives. The Act has transformed the composition of traditional councils to provide for elements of democracy.
362. Closely connected to the role of traditional leadership in South Africa is the position of customary law. The status and relevance of customary law in South Africa has been acknowledged by the Constitutional Court, however, customary law and the institution of traditional leadership cannot be used to perpetrate racial discrimination as it would then fall foul of the Constitution.<sup>206</sup>

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<sup>204</sup> Act No. 10 of 1997

<sup>205</sup> Act No 41 of 2003

<sup>206</sup> *Bhe v Magistrate Khayelitsha* 2005 (1) BCLR 1 (CC) and *Alexkor Ltd v Richtersveld Community* 2003 (12) BCLR 1301 (CC). In *Shilubana and Others v Nwamitwa* 2008 (9) BCLR 914 (CC) a dispute arose between Ms Shilubana, the daughter of Hosi Fofeza Nwamitwa and Mr Nwamitwa, the son of Hosi Malathini Richard Nwamitwa. On 24 February 1968 Hosi Fofeza died without a male heir. At that time, succession to Hosi (the Chieftainship) was governed by the principle of male primogeniture. Therefore, Ms Shilubana, HosiFofeza's eldest daughter, was not considered for the position, despite being of age in 1968. Instead, Hosi Fofeza's younger brother, Richard, succeeded him as Hosi of the Valoyi community. The dispute in this case arose following the death of Hosi Richard on 1 October 2001. The Constitutional Court explained that the issue to be decided was whether the community has the authority to restore the position of traditional leadership to the house from which it was removed due to gender discrimination, even if this discrimination occurred prior to the coming into operation of the Constitution. The Court reiterated that Section 211(2) specifically provides for the right of traditional communities to function subject to their own system of customary law, including amendment or repeal of laws. If the traditional authority had only those powers accorded it by the narrow view; it would be contrary to the Constitution and would frustrate the achievement of the values in the Bill of Rights as Section 39(2) of the Constitution obliges the Court to develop the customary law in accordance with the spirit, purport and aims of the Bill of Rights.

### **Harmful cultural practices**

363. Harmful practices, which negatively affect the fundamental rights of women and girls, are more fully discussed in Part B of this report. Harmful cultural practices are expressly prohibited in South Africa. In this regard, the Equality Act, section 8 (d), stipulates that unfair discrimination on the ground of gender includes *“any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and well-being of the girl child.”*
364. “Ukuthwala” is a form of abduction that involves kidnapping a girl or a young woman by a man and his friends or peers with the intention of compelling the girl or young woman’s family to endorse marriage negotiations. Ukuthwala was traditionally intended for people of the same age group who, in the normal course of events, would have been expected to marry each other and never intended to apply to minor children. However, forced marriage of girls as young as 12 to adult men, is still practiced in some remote villages in the country. In most circumstances, victims maintain silent acceptance and tolerance of the practice.
365. The Commission for Gender Equality commissioned a study on *“Ukuthwala in KwaZulu-Natal: an investigation into state prevention and responses”* in 2012. The CGE in its concluding remarks commended the Office of the Premier for initiating research into the extent of harmful traditional practices in the province, as well as the Department of Social Development’s outreach and awareness interventions, including their response to individual cases and support for victims of Ukuthwala. The CGE also acknowledged the positive measures put in place by the Department of Education and commend Provincial Cabinet Leadership for its endeavours in calling for collaboration between departments and civil society organizations to support children at risk.

### **Article 18: Right to protection of family, women, children and the disabled (including the right to housing and social security)**

366. The equality clause in the Constitution expressly mentions marital status as one of listed grounds upon which unfair discrimination is prohibited. The DSD’s White Paper on Families in South Africa<sup>207</sup> provides that along with the economy, polity and education, the family is universally viewed as one of the essential sectors without which no society can function. The family influences the way society is structured, organised, and functions.
367. The solemnisation and registration of civil marriages, customary marriages and civil unions are managed by the Department of Home Affairs. Civil marriages are governed by

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<sup>207</sup> October 2012



the Marriage Act, 1961<sup>208</sup> and regulations issued in terms of the Act. South Africa also recognizes customary marriages through the Recognition of Customary Marriages Act, 1998<sup>209</sup> which became effective in November 2000. Civil unions are recognised in terms of the Civil Union Act, 2006.<sup>210</sup>

368. The Civil Union Act, 2006 allows anyone, regardless of their sexual orientation, to marry either through a civil union, a civil marriage or a customary marriage. Civil unions may be conducted by designated marriage officers for specific religious denominations or organisations and designated officers employed by the Department of Home Affairs and the Magistrates' Courts. At least two competent witnesses must be present at the ceremony. Requirements for registering a Civil Union are that both persons must be 18 years or older and both persons may not be already married in terms of any other Act. Furthermore, with regards to the rights of LGBTI persons in South Africa, in addition to having legalised same-sex marriages, both joint and step adoption by same-sex couples is allowed.

### Case law relating to marriage

369. In addition to the case law mentioned under the right to religion as discussed in the report, courts have interpreted other clauses in the Bill of Rights, including equality, human dignity and sexual orientation, to give concrete recognition to the rights of marriage. A Constitutional Court decision in this regard involved the issue as to whether non-nationals who are married to South African citizens ought to enjoy rights regarding the processing of residence permits above those enjoyed by other non-nationals. The Court affirmed that non-nationals who are married to South African citizens are entitled to such special rights.<sup>211</sup>

### Women and children

370. South Africa has made significant progress in the promotion and protection of women's rights. This progress is discussed in detail in Part B of this report.
371. Two major legislative developments occurred during the period under review in relation to children's rights in South Africa. Firstly, the Children's Act, 2005<sup>212</sup> was enacted into law, ushering in a new legal dispensation for the protection and promotion of children's rights in the country. The Act sets out principles relating to the care and protection of children. It provides that the best interest of the child should always be a paramount consideration when dealing with children's issues. It defines parental responsibilities and rights in addition to making provision for adoption. The Act also addresses child abduction and trafficking in children.

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<sup>208</sup> Act No. 25 of 1961

<sup>209</sup> Act No. 120 of 1998

<sup>210</sup> Act No. 17 of 2006

<sup>211</sup> *Dawood & Another, Shalabi & Another, Thomas & Another v Minister of Home Affairs* 2000 (8) BCLR 837 (CC)

<sup>212</sup> Act No. 38 of 2005

372. During the period under review, the implementation of the Children's Act, 2005 changed the terminology previously used in respect of children. It has also defined the parental rights and responsibilities that parents or other parties may have, and confers equal and joint guardianship status on parents of children born from marriage. The child's best interest is a constitutional right of every child. In all matters concerning a child, the best interests of the child is paramount. The Act provides a list of factors that have to be considered when determining a child's best interests.
373. The Children's Act, 2005 came into force on the 1st July 2007. The parental responsibilities and rights that a person may have in respect of a child, include the responsibility and the right to care for the child, to maintain contact with the child, to act as guardian of the child; and to contribute to the maintenance of the child. The biological mother of a child, whether married or unmarried, has full parental responsibilities and rights in respect of the child. The biological father of a child has full parental responsibilities and rights in respect of the child if he is married to the child's mother; or if he was married to the child's mother at the time when the child was conceived (in other words, when the mother fell pregnant) or at the time of the child's birth; or any time between these events.
374. Unmarried fathers have full parental responsibilities and rights in respect of the child if at the time of the child's birth, he is living with the mother in a permanent relationship; or even if he is not living with the mother or has never lived with her, he is identified as the child's father or pays damages in terms of customary law, contributes or has tried to contribute to the child's upbringing for a reasonable period; and contributes or has tried to contribute towards the child's maintenance for a reasonable period.
375. However, this does not affect the duty of a father to contribute towards the maintenance of the child. If there is a dispute between the unmarried father and the mother of a child regarding any of these conditions, the matter must be referred for mediation to a family advocate, social worker, social service professional or any other qualified person.
376. Both parents have a legal duty to support their children. Where children are not given reasonable care, then the court may remove the child from the parent's care in terms of child care provisions. The duty of parents to support their children ends when the children become independent, for example when they marry, or when they become self-supporting. If the children are not living with the mother or the father, the person who is looking after them can apply for maintenance from the parents. For example, if a child is living with the grandparents, the grandparents can apply to get maintenance from the father and the mother of the child.
377. When people become parents they have legal responsibilities and rights in respect of their children. Parents must give their children enough support to live at the same standard of living as the parents. This duty continues until the children are self-

supporting. This support includes food, clothing, housing, medical and dental expenses, and education. Children are minors until they reach the age of 18.

378. Secondly, the Child Justice Act, 2008<sup>213</sup> was enacted into law. The Act establishes a criminal justice system for children who are in conflict with the law and are accused of committing offences. It entrenches the notion of restorative justice in the criminal justice system in respect of children who are in conflict with the law. The Child Justice Act is discussed in paragraphs 88 to 101 of this report.

### **Improvements to the maintenance system**

379. The Maintenance Act, 1998 provides the framework for monitoring and implementing maintenance orders. It provides for 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. The Isondlo Project helped to alleviate the problem of tracing defaulters through the training of investigators. This project has delivered better maintenance services.
380. In order to protect minor children the Department of Justice and Constitutional Development has over the past 20 years been committed to ensuring the protection of children in our society. One of the areas which have a profound impact on the lives of children is that of maintenance.
381. In an effort to address the neglect of children and youth in society, the Department has identified child maintenance as one of its key priorities. It receives more than 200 000 new applications annually which are tragically indicative of the growing trend of child neglect in our country.
382. Parents are jointly responsible to maintain their children, yet today the responsibility of financially maintaining children often rests on the shoulders of single mothers who in many instances do not receive the financial support from the biological father. These single mothers then face laborious court applications to bring these fathers to book.
383. The Department continuously puts steps in place to improve the maintenance system. These steps contain both proactive and reactive measures. Proactive measures target the making of orders prior to default. Many orders were poorly framed and this contributes to the incidence of maintenance default. The defaulter will now pay the beneficiary directly into their bank account.
384. It was further felt that increasing the efficiency and effectiveness of the use of recovery measures would ensure that there was an increased success rate in the payment of

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<sup>213</sup> Act No. 75 of 2008

outstanding maintenance to beneficiaries. A zero tolerance approach was adopted when dealing with maintenance defaulters. This includes the attachment of pensions for maintenance.

385. The Department has appointed complaints managers and maintenance investigators in all regions to manage maintenance services complaints. The Department's maintenance programme was designed to minimise the time spent on queues, strengthen the investigation process used in tracing maintenance defaulters, and improve the payment system to ensure that rightful beneficiaries are paid on time.
386. This strategy has had great success in bringing thousands of maintenance defaulters to book. Many defaulters have been arrested and brought to court, resulting in hundreds of maintenance beneficiaries receiving regular pay-outs. The strategy has reduced the loopholes in the system and introduced tighter mechanisms to enforce payments.
387. The Department is determined to reduce the turnaround time of maintenance payments by ensuring that garnishee payments are made directly to maintenance beneficiaries. These direct payments assist maintenance beneficiaries as the money is received directly from the garnishee, instead of waiting for funds to clear in court's bank account. An electronic fund transfer system (EFT) was created so that beneficiaries have quick and safe access to funds.

## Harassment

388. In a bid to strengthen the protection of victims of harassment, the Protection from Harassment Act, 2011<sup>214</sup> was passed in Parliament. The Act affords the victims of harassment an effective remedy against harassment. A victim of harassment can approach the magistrates' courts in terms of the Act to obtain a protection order against any person who is harassing them. A person who breaches a protection order may be criminally charged and, if found guilty, held liable to a fine or imprisonment. Harassment in this regard means directly or indirectly engaging in conduct that causes harm or inspires the reasonable belief that harm may be caused to the complainant or a related person by unreasonably—(a) following, watching, pursuing or accosting of the complainant or a related person, or loitering outside of or near the building or place where the complainant or a related person resides, works, carries on business, studies or happens to be; (b) engaging in verbal, electronic or any other communication aimed at the complainant or a related person, by any means, whether or not conversation ensues; or (c) sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant or a related person or leaving it where it will be found by or given to, or brought to the attention of, the complainant or a related person.

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<sup>214</sup> Act No. 17 of 2011

389. The process for applying for a protection order is uncomplicated and inexpensive. The clerks of the court are obliged to explain the procedure to all applicants and are trained to assist applicants and guide them through the process.

### **Trafficking**

390. The Prevention and Combating of Trafficking in Persons Act, 2013<sup>215</sup> is a comprehensive law dealing with the issue of trafficking, which was previously dealt with in various pieces of legislation. In addition to creating very specific offences criminalising trafficking in persons, the Act also focus on the plight of victims, by allowing for those convicted of trafficking to be forced to pay compensation to a victim for damages, injuries, both physical and psychological harm suffered and loss of income, amongst others.
391. In this regard, the Prevention and Combating of Trafficking in Persons Act is forward-looking in that it satisfies modern developments in terms of human rights law, such as that the law should not only serve to prosecute offenders and prevent re-offending, but it should also look at the reparative needs of the victim. This is incidentally also in-line with the spirit and aim of the General Comment on Torture, issued by the Committee Against Torture, which states that redress has five key elements which ought not to be overlooked, that is: restitution, rehabilitation, compensation, satisfaction and guarantees of non-repetition.<sup>216</sup>
392. The Act deals comprehensively with human trafficking in all its various forms and in particular provides for the protection of and assistance to victims of trafficking. Persons engaged with trafficking will be liable on conviction to a severe fine or imprisonment, including imprisonment for life, or such imprisonment without the option of a fine or both.
393. Extra-territorial jurisdiction is an important feature of the Act and South African courts will have jurisdiction in respect of acts committed outside South Africa if those acts would have been an offence under the Act had they been committed in South Africa. The Act also enables the state to prosecute traffickers and confiscate their assets. In addition, it will provide mechanisms to the Department of Social Development in the eradication of "latter-day" slavery.
394. The Act further provides for social service professionals to play a role in the reporting, identification and assessment of a person who is a victim of trafficking. Once this is confirmed the victim is entitled to be placed under an approved programme and child victims are to be placed in temporary safe care. Such programmes will offer accommodation, counselling and rehabilitation services as well as aim to reintegrate the victim back into their families and communities. The programme also offers education and skills development training for adults. Child victims of trafficking will fall under all the

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<sup>215</sup> Act No. 7 of 2013

<sup>216</sup> Committee against Torture, General Comment No.3 (2012)

protective measures of the Children's Act, whilst organisations that provide services to adult victims must be accredited and must comply with certain norms and standards and must offer specific programmes to victims of trafficking. A set of guidelines have furthermore been developed to ensure that minimum norms and standards are in place when dealing with child and adult victims of trafficking. This will ensure the treatment of victims of trafficking with the dignity as enshrined in the Constitution.

395. The Act also provides for the establishment of the Inter-sectoral Committee on Prevention and Combating of Trafficking in Persons.
396. Institutionally, South Africa has established a multi-sector alliance to combat trafficking. The alliance draws membership from government departments and relevant agencies, the IOM, NGOs both national and international and various UN and identified foreign missions in South Africa. A Trafficking in Persons Inter-sectoral Task Team has also been established. The Task Team has formulated a strategy to effectively address trafficking in persons. Elements of this strategy include – information sharing, capacity building and development; victim assistance and integration; policy and legislation development; liaison and consultation; and monitoring and evaluation.
397. The “Tsireledzani programme”,<sup>217</sup> which means “Let us protect each other” in Tshi-Venda - one of the country's official languages, is the name given to the initiative to combat trafficking in persons and to comply with international commitments. The programme was initiated in 2007, and relied on the input of a wide range of partners both within Government, civil society and international partners. The “Tsireledzani Programme” consists of various pillars of which the International Organization for Migration (IOM) was responsible for the area that focused on capacity building and its aim was to provide government officials with the necessary skills to adequately identify and respond to incidences of both, internal and international, trafficking in persons in South Africa. The IOM provided technical capacity building support through a designed, developed and tested curricular/ training modules tailored to selected government departments. The training modules are accredited by the South African Qualifications Authority (SAQA). As part of the Tsireledzani programme, the IOM also compiled a ‘Handbook on Counter-Trafficking for South African Government and Civil Society’. South Africa has signed a 3-year funding agreement with the European Union in June 2006 to support the implementation of this strategy.
398. In the law enforcement sector, the National Prosecuting Authority's SOCA Unit is responsible for the prosecution of persons accused of human trafficking. In anticipation of the legislation being passed the National Prosecuting Authority (SOCA Unit) in December 2012 established a Trafficking in Persons Task Team. The Task Team has since developed comprehensive policy directives, annexures to charge sheets, training manuals and data collection tools. The NPA has also during the 2013/14 financial year

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<sup>217</sup> This Programme, initiated by the National Prosecuting Authority, was funded by the European Union and started in 2007. It ran until the end of 2011 after which the South African government continued the anti-trafficking efforts with its partners (Input from the National Prosecuting Authority, January 2015)

conducted 10 training sessions for prosecutors; which were attended by 193 prosecutors. During the 2014/15 financial year they conducted a further 6 training sessions; attended by 109 prosecutors. They have also trained police investigators on the new legislation, with 30 SAPS (Hawks) TIP co-ordinators attending the training.

399. The South African government increased its efforts to ensure that trafficked victims had access to protective services. Government has accredited 13 multi-purpose shelters in 2011 to host trafficked victims and trained personnel to assist trafficked victims. These shelters provided services to 59 trafficking victims referred by government – the only body authorized by judicial authorities to refer crime victims to private shelters. Government identified 22 additional shelters that could potentially care for trafficking victims and began their assessment for accreditation. It also began provision of a nine-week rehabilitation program to address the psycho-social well-being of trafficked victims in the care of these shelters.
400. In recognition of the fact that human trafficking is a transnational crime, South Africa has ratified international and regional instruments that facilitate trans-national collaborative measures aimed at combating trafficking in women and children. These instruments are: the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; and the UN Convention against Trans-national Organized Crime. South Africa is also in the process of concluding memoranda of understanding on cooperation to combat trafficking in persons and assisting victims of trafficking with the following countries: Angola, Brazil, Indonesia, Malaysia, Mozambique, Nigeria, and Thailand.
401. In the UNDOS GTIP *Report 2012: Forced Labour Prevails*, it is reported that South Africa is a source, transit, and destination country for men, women, and children subjected to forced labour and sex trafficking. Children are trafficked mainly within the country, from poor rural areas to urban centres such as Johannesburg, Cape Town, Durban, and Bloemfontein. Girls are subjected to sex trafficking and domestic servitude; boys are forced to work in street vending, food service, begging, criminal activities, and agriculture.
402. Government is demonstrating increased efforts to address human trafficking through conviction of offenders. Our courts have also handed down severe sentences in trafficking cases. For example, in *S v Aldina Dos Santos* a sentence of life imprisonment for trafficking in persons for sexual exploitation of children was handed down in 2011. In *S v Jezile* the accused was sentenced to 20 years in January 2014 for trafficking for sexually exploiting a child. The full bench on appeal confirmed the conviction and sentence. And there are many other cases.<sup>218</sup>

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<sup>218</sup> In *S v Nahima Allima* the accused was sentenced to life imprisonment for trafficking in persons for sexual exploitation in June 2014. In *S v Foster Simelane* a sentence of 30 years for trafficking for sexual exploitation of a child was handed down in August 2014. In *S v Gwambe* the accused was sentenced to 15 years in 2013 for trafficking for sexual exploitation of children. In *S v Vukile Shembe* the accused was sentenced to 23 years in

403. In February 2012 a successful raid on a brothel led to the rescue of 16 females – including eight children, some as young as 13 – and the arrest of four offenders with sex trafficking and drug and prostitution offenses. In October 2011, Western Cape police arrested two police officers and one additional suspect in Nelspoort for the alleged sex trafficking of South African girls between the ages of 12 and 15.
404. The NPA's SOCA unit seeks to implement best practices and policies in the area of human trafficking cases. SOCA seeks to achieve improved conviction rates, to actively protect vulnerable groups and reduce secondary victimisation. SOCA continued to lead anti-trafficking efforts through its six provincial task teams, which enabled police, prosecutors, and NGO staff to work together to investigate potential cases. Between April and December 2011, the NPA trained 116 prosecutors on the use of existing legislation to prosecute trafficking cases. In December 2011, the Department of Home Affairs provided training on trafficking and the identification of victims to 350 officers from the South African National Defence Forces, who assumed the role of immigration management at all South African airports. Foreign embassies in South Africa reported that when they reported cases of abuse of their nationals to law enforcement, both police and prosecution authorities responding seriously by vigorously investigating the allegations, though this varied from one province to another.

#### **Sexual violence:**

405. In a bid to increase the state's capacity to deal with sexual violence against women and children, South Africa promulgated, on 16 December 2007, the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007.<sup>219</sup> This Act criminalises a wide range of acts of sexual abuse and exploitation. It repeals the common law offence of rape and replaces it with a new expanded statutory offence of rape, applicable to all forms of sexual penetration without consent, irrespective of gender. It also repeals the common law offence of indecent assault and replaces it with a new offence of sexual assault which contains a wider range of acts of sexual violation without consent.
406. Moreover, the Act targets for punishment sexual predators who prey on children and people who are mentally disabled. It criminalises sexual exploitation or grooming of children and mentally disabled persons, exposure or display of child pornography or pornography to children and the creation of child pornography. The Act also provides for an offence of trafficking in persons for sexual purposes.
407. In addition to criminalising a wide range of acts of sexual abuse and exploitation, the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007<sup>220</sup> establishes

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2012 for trafficking for sexual exploitation. In *S v Lloyd Mabuza* the accused was sentenced to 8 life sentences for trafficking.

<sup>219</sup> Act No. 32 of 2007

<sup>220</sup> Act No. 32 of 2007



a mechanism for the adequate and effective protection of victims of sexual violence. In terms of the Act, victims of sexual offences are entitled to post-exposure prophylaxis. It provides for the compulsory testing of alleged sex offenders and the keeping of a national register of sex offenders. The Act imposes an obligation on a person who has knowledge that a sexual offence has been committed against a child to report such knowledge to a police official forthwith.

408. Capacity building and training of the SAPS members is an on-going process commencing in basic training. The SAPS engages in public awareness and education campaigns with the purpose of creating a greater awareness of the relevant legislation and government's commitment to eradicating violence against women and children. These awareness campaigns have, over the years, encouraged communities to report these crimes to the police and also compelled the police to improve the policing of these crimes.
409. It must be noted that the NPA (facilitated by the SOCA Unit) developed a comprehensive training manual for prosecutors in line with the Act, and from July 2008 until March 2012 have delivered 38 training sessions attended by 993 prosecutors. From April until December 2012, 5 more sessions attended by 99 prosecutors were conducted. In addition, an integrated training manual for stakeholders at TCC's has been compiled, focusing on the management of sexual offences predominantly. In the 2011/12 financial year 20 sessions attended by 483 delegates were conducted and from April to Dec 2012, 22 sessions attended by 628 delegates. These training manuals are annually reviewed and updated with the latest developments in law and training is also an ongoing activity.
410. The SAPS has developed National Instructions on the Domestic Violence Act and the Criminal Law (Sexual Offences and Related Matters) Amendment Act in order to provide clear policy directives for the police in support of members to improve service delivery to victims. The NPA (facilitated by SOCA), in line with Act 32 of 2007 also developed directives for prosecutors on how best to deal with sexual offences in the criminal justice system.
411. Following the promulgation of the Criminal Law (Sexual Offences and Related Matters) Amendment Act in 2007, the Department of Justice and Constitutional Development developed registers aimed at protecting persons, children in particular, against sexual offences and abuse (known as the Sexual Offenders Register and the National Child Protection Register). The registers were established in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 and the Children's Act, 2005 respectively. Data on the registers will enable employers to vet applications and ensure that convicted child abusers (including sex offenders) are not employed in positions where they are in contact with children. The purpose of the registers is to have a record of persons who are unsuitable to work with children so as to protect children against abuse from these persons.
412. The Inter-Ministerial Committee on the Root Causes of Violence and Women and Children was established by Cabinet in May 2012 to investigate root causes of violence

against women and children and to develop a comprehensive strategy to deal with the scourge of violence against women and children. The Committee comprised the Ministers of Social Development, Women, Justice and Constitutional Development, Health, Home Affairs, Police and Basic Education. The findings of the research done has led to the development of the Integrated Programme of Action which will address violence in general, as well as violence against women and children, working hand in hand with all relevant stakeholders, including civil society. The Integrated Programme of Action has four key outcomes<sup>221</sup> that must be achieved by 2018.

413. A major component of our fight against sexual violence are the Thuthuzela Care Centers (“TCCs”). We have also recently re-established the sexual offences courts. These dedicated services use intermediaries, audio-visual equipment and specialised training, among other measures. In June 2012, the former Minister of Justice and Constitutional Development established the Ministerial Advisory Committee on Adjudication of Sexual Offences Matters (MATTSO) to investigate the feasibility of re-establishing sexual offences courts (SOC’s). The investigation led to the recommendation for the re-establishment of the SOC’s, and in Aug 2013, the 1<sup>st</sup> SOC was launched by the former Minister in August 2013. Some **33** regional courts have since been upgraded into sexual offences courtrooms.
414. The NPA’s Sexual Offences and Community Affairs (SOCA) Unit developed comprehensive training manuals which are updated annually to be in line with the latest developments in law for specialist prosecutors and also an integrated training manual for stakeholders at our TCCs. Through sexual offences courts, we are able to provide specialised victim-support services, improve the effectiveness of witnesses in court, reduce the turnaround time in the finalisation of sexual offences matters, and improve conviction rates. The courts aim to minimise secondary trauma for victims. The Physical Features of Sexual Offences Courts include -
- Separate Private waiting rooms for child victims and adult victims with relaxing furniture and information services;
  - Private Toilet facilities for witnesses to which accused persons have no access;
  - Information screens in the waiting rooms to empower victims with witness court preparation and other court services;
  - 2-Way CCTV to enable witness to identify the accused from the testifying room, where the identity of accused is in dispute;

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<sup>221</sup> The four outcomes are –

1. The creation of a national enabling environment to transform attitudes, practices and behaviours leading to women and children living free from violence in line with human rights principles;
2. Women and children at-risk, and survivors of violence, must benefit from improved access to comprehensive, integrated and timely support services;
3. There must be an increased number of female and child survivors utilising long-term care, support and empowerment services, and
4. Ensuring that women and children are better protected from violence through a strengthened system of supportive legislative, policy, institutional frameworks, adequate resources, organisational capacity and a comprehensive and evolving evidence base.

- Private Testifying Room to allow the victim to testify outside the physical presence of the accused, which may cause more trauma;
- A Bench Monitor to give the presiding officer the close view of the victim from the testifying room so as to assess her demeanour and quickly respond to possible signs trauma or tiredness;
- 2 x Large screen monitors that can be tilted and zoomed at 360 degrees to give the clear view of the courtroom and the Private Testifying Room.

### **Victim empowerment**

415. As the lead department on the issue of Victim Empowerment, the Department of Social Development has, as part of its mandate, the responsibility of promoting the wider government goal of protecting the rights of women and children. This is also inspired by the fact that South Africa is a signatory to the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.
416. Victims are entitled to access the mechanisms of justice and seek prompt redress for the harm and loss suffered and should receive adequate specialized assistance in dealing with emotional trauma and other problems caused by the impact of victimization. In order to give effect to these obligations, an Integrated National Policy Guidelines for Victim Empowerment was developed in 2007 to ensure that holistic and integrated services are rendered to victims of crime and violence.
417. The VEP Policy Guidelines seek to create a society in which the rights and needs of victims of crime and violence are acknowledged and effectively addressed within a restorative justice approach. This approach is in-line with international trends to promote a victim-friendly approach in criminal justice. The policy guidelines provide a framework for sound inter-departmental and inter-sectoral collaboration and for the integration of effective institutional arrangements for multi-pronged approach in managing victim empowerment. Such approach facilitated the establishment of partnerships in the VEP sector to effectively address the diverse and sensitive needs of victims holistically.
418. The policy also serves as a guide for sector-specific victim empowerment policies, capacity development and a greater emphasis on the implementation of victim empowerment programmes by all relevant partners. Partnership between various government departments and civil society organizations on service delivery to victims of crime and violence holds key to the success of the integrated Victim Empowerment Programme. The VEP sector's specific roles and responsibilities of all relevant partners and stakeholders are clearly defined in the policy guidelines.
419. The Department of Social Development released the National Policy Guidelines for Victim Empowerment in July 2009. The Victim Empowerment Policy is based upon the concept of restorative justice. Whereas formerly the focus was almost exclusively on the progress of the perpetrator through the system, the current focus is also strongly on serving the

needs of the victim. Wherever a victim-centred approach has been put into practice internationally, it has invariably resulted in a reduction of victimisation, while simultaneously improving service standards in the system.

420. The priority target group for victim empowerment under the Policy Guidelines includes women, victims of domestic violence, victims of sexual assault and rape, victims of human trafficking, and abused children. In essence, the Policy Guidelines provide a framework for the implementation of several acts of Parliament that address violent crime in South Africa, including the Domestic Violence Act, 1998,<sup>222</sup> the Children's Act, 2005<sup>223</sup> and the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007.<sup>224</sup> The Policy Guidelines provide a framework for sound inter-departmental and inter-sectoral collaboration and for the integration of effective institutional arrangements for a multi-pronged approach in managing victim empowerment. Such an approach facilitates the establishment of partnerships in the victim empowerment sector to effectively address the diverse and sensitive needs of victims holistically. Of particular importance is the cross-cutting nature of the programme. In addition, the National Policy Guidelines serve as a guide for sector-specific victim empowerment policies, capacity development and a greater emphasis on the implementation of victim empowerment programmes by all relevant partners.
421. Crime Victims' Rights Week is an annual National Campaign informing victims of crime about their rights and generally raising awareness about victims' rights in the broad sense, so as to empower victims and communities. Victims of crime are at the centre of our criminal justice system. It is for this reason that South Africa has a Victims' Charter. The Victims Charter was approved by Cabinet on 1 December 2004 and it is a consolidation of rights from the Constitution and other legislation. It contains seven rights, namely the right to dignity and privacy, the right to offer information and the right to receive information, the right to protection, the right to assistance, the right to compensation and the right to restitution.

### **Domestic violence**

422. Every year South Africa takes part in the global 16 Days of Activism for No Violence Against Women and Children campaign, which runs from 25 November (International Day for the Elimination of Violence against Women) through to International Human Rights Day on 10 December. While the campaign runs only for 16 days each year, its objectives are reinforced by a year-long programme and a national plan to combat abuse.
423. Government, business, civil society organisations, faith-based organisations and the media are all participating in the drive to increase awareness of the negative impact of violence and abuse on women and children. The campaign also aims to:

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<sup>222</sup> Act No. 116 of 1998

<sup>223</sup> Act No. 38 of 2005

<sup>224</sup> Act No. 32 of 2007

- Challenge the perpetrators of violence to change their behaviour.
  - Involve men in helping to eradicate violence.
  - Provide survivors with information on services and organisations that can help lessen the impact of violence on their lives.
424. In addition to these new developments, South Africa bolstered its efforts to combat domestic violence, including through the prosecution of domestic violence perpetrators.
425. In 2008, the Government, in conjunction with and to support the judiciary, launched a set of guidelines for handling domestic violence cases. The guidelines have been circulated widely. In 2009, a review of the implementation of the Domestic Violence Act, 1998<sup>225</sup> was finalised. The Government in conjunction with the NPA has also been running the Ndabezitha Project<sup>226</sup> which seeks to train traditional leaders, prosecutors and court clerks on domestic violence matters in rural areas. Government has also been running awareness campaigns (through the media, booklets, pamphlets) aimed at sensitising communities about domestic violence services.
426. Most recently, electronic forms and systems have been developed and approved to be piloted at two Magistrates' Courts after which they will be rolled out to all Magistrates' Courts' service points in order to further improve the handling of domestic violence cases. Government is also in the process of developing a booklet called "No More Violence" which is aimed at teaching the role-players at service points, as well as victims, to how to manage and improve in alleviating domestic violence matters.
427. As part of commemorating the 16 Days for No Violence Against Women and Children, the Department of Justice and Constitutional Development launched a Domestic Violence Safety Plan booklet in November 2013. This formed part of the Department's endeavours to empower victims of violence. The Safety Plan is a ground-breaking preventative initiative which seeks to assist victims to enhance their safety and that of their families against domestic violence. It is also aimed at encouraging victims to plan for their safety whilst leaving an abusive relationship.
428. The DSD facilitated the establishment of shelters for abused women in South Africa and developed a Shelter Strategy that served as a guideline for service providers rendering services to abused women. To date, ninety seven (97) shelters have been established in South Africa. Minimum standards for service delivery in shelters were also developed to standardise services in shelters. Furthermore, there is a programme which has been conceptualised as "white and green door" safe houses. These are shelters provided by ordinary people, approved and funded by government, and serve as shelters for women and children who are victims of violence and abuse. At this stage the programme is being

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<sup>225</sup> Act No. 116 of 1998

<sup>226</sup> Ndabezitha means "Your Highness" - one of the praise and respect words used when Zulu and other Nguni tribes want to acknowledge loyalty to an Nguni royal.

rolled out in Gauteng and the Eastern Cape, and rollouts to other provinces are under way.

429. In 2012/13 we had 10 Khuseleka One Stop Centres which provides counselling services for victims of GBV and 97 VEP shelters (managed by NGO's funded by DSD) providing safe shelter to adult victims of GBV, mostly women and their children.

### **The aged**

430. South Africa is well aware of the vulnerability that comes with old age. The size and shape of the African population over the next 100 years will change dramatically. The population of the continent is set to quadruple to over 4 billion people. In South Africa, the percentage of the population over 60 is already 8% and is predicted to grow to 14% by 2030.
431. The Older Persons Act, 2006<sup>227</sup> stands as one of the key interventions to stop abuse of older persons in the country. The national inter-sectoral implementation of this Act is led by the Department of Social Development. It is an Act intended to protect, promote and maintain the status, rights, well-being and security of older persons. Section 30 of the Act criminalizes any act of abuse against an older person, and further defines 'abuse' as including physical abuse, sexual abuse, psychological abuse and economic abuse. The Act provides for the prescription of norms and standards that define the acceptable levels of services that may be provided to older persons and in terms of which services must be monitored and evaluated. It provides for the registration, regulation and monitoring of community-based programmes and residential facilities for older persons.
432. Section 31 requires the Minister of Social Development to keep a register of persons convicted of the abuse of an older person. This is mainly to prevent all registered convicted persons from working in environments that will expose them to older persons. The aim is to reduce the re-offending rate in these cases, while protecting older persons from potential abuse.
433. In relation to the protection of older persons, the Act requires any person who suspects that an older person has been abused or suffers from an abuse-related injury to immediately notify the Director-General or a police official of his or her suspicion. Abuse of an older person is broadly defined to include physical, sexual, psychological, and economic abuse. Where a person has been convicted of any crime and it is found that that person abused an older person in the commission of such crime, then that fact will be regarded as an aggravating circumstance for sentencing purposes.
434. South Africa has also taken positive measures to ensure that older persons are offered social assistance. Under the Social Assistance Act, 2004<sup>228</sup> older persons are entitled to an older person's grant from the age of 60 for both men and women. Social assistance in South Africa is fundamentally designed to assist children, disabled individuals and older persons and it can therefore be expected that significant proportions of grant

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<sup>227</sup> Act No. 13 of 2006

<sup>228</sup> Act No. 13 of 2004

beneficiaries would be found amongst children and older people. Grants are generally means-tested and do not discriminate on the basis of race or gender. This was however not always the case for old age grants as men formerly only became eligible to be considered for grants at the age of 65 years compared to 60 years for females.

435. The discrepancy was subsequently corrected through the Social Assistance Amendment Act, 2008<sup>229</sup> in which the eligibility age for men was incrementally reduced from 65 to 63 in 2008, 61 in 2009 and finally, 60 in 2010. Although men from 2010 benefited equally with females, the former practice has led to a situation in which women were significantly more likely to be grant beneficiaries than men.

436. The grant is administered by the South African Social Security Agency (SASSA) established under the South African Social Security Agency Act, 2004.<sup>230</sup> Since the enactment of Social Assistance Act the number of older persons receiving the older person's grant has been growing, as indicated in **Table 13** below. By December 2013 some 2 938 214 persons were receiving an older person's grant.

**Table 13: Growth in the number of persons receiving an older persons grant**

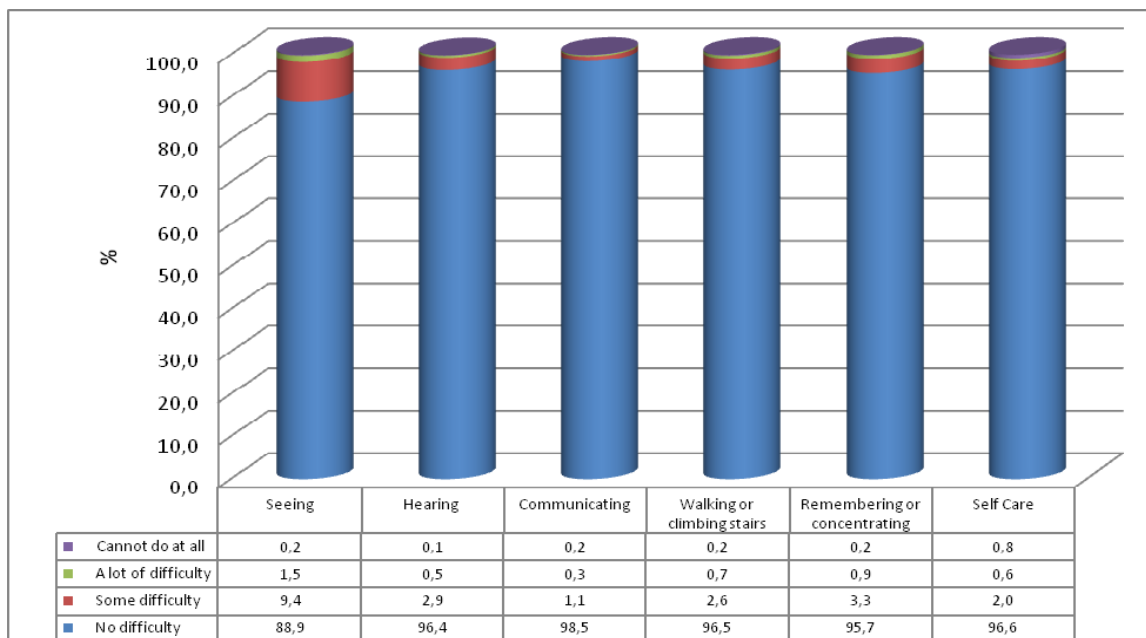
Year	No of older persons who received older person's grant
2002/03	1 943 248
2003/04	2 050 572
2004/05	2 124 984
2005/06	2 146 344
2006/07	2 195 018
2007/08	2 229 550
2008/09	2 390 543
2009/10	2 546 657
2010/11	2 678 554
2011/12	2 750 857
2012/13	2 873 197

<sup>229</sup> Act No. 6 of 2008

<sup>230</sup> Act No. 9 of 2004

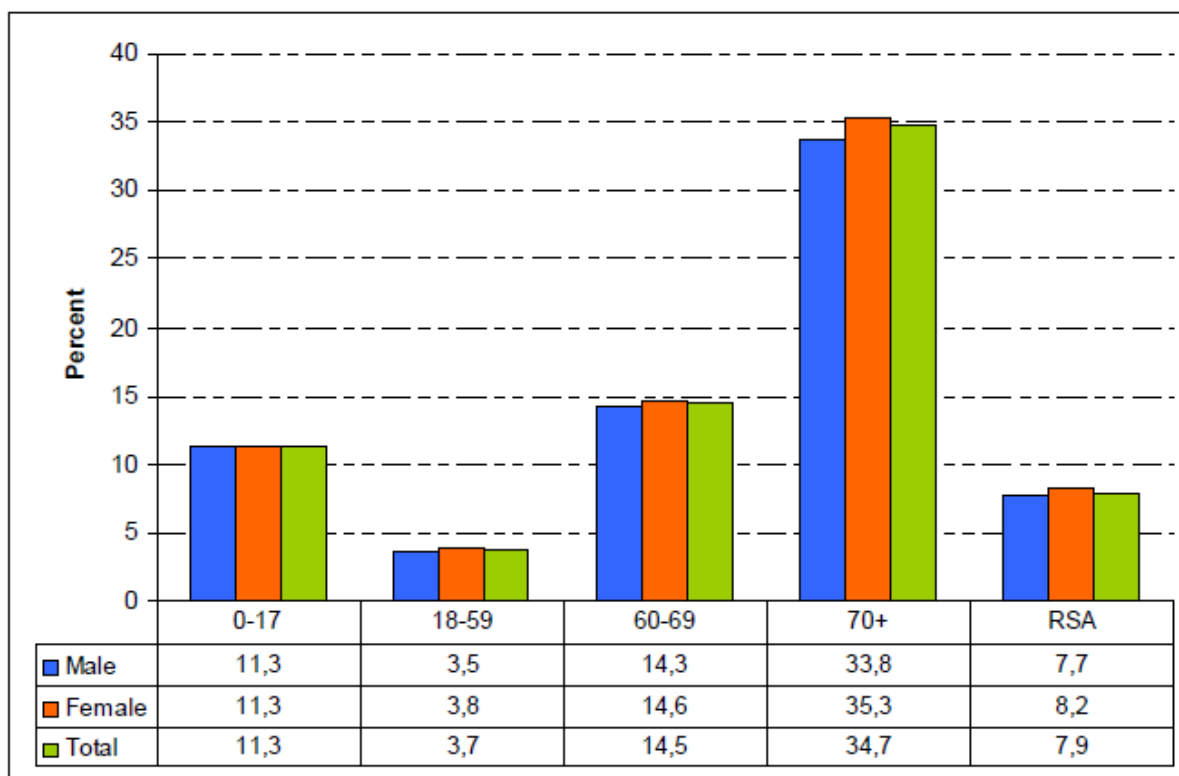
**Persons with disabilities:**

437. In Census 2011, disability was defined as difficulties encountered in functioning due to body impairments or activity limitation, with or without the use of assistive devices, as **Table 14** below indicates.



438. Results indicate that most people (more than 90%) had no difficulty or limitation that prevented them from carrying out certain functions at the time of the census.

439. **Table 15** shows the disability figures from 2002 to 2009.





440. It should be noted that disability was measured differently since 2009, in order to align better with international standards on data.<sup>231</sup> The percentage of persons over the age of four years with disabilities increased from 5,6% in 2009 to 6,2% in 2010 before declining to 5,4% in 2013.
441. South Africa has adopted a number of measures to ensure that persons with disabilities enjoy fundamental rights and freedoms. As was reported in the two previous reports, South Africa adopted the *Integrated National Disability Strategy White Paper (INDS)* in 1997 which seeks to ensure that government departments consciously make their policies, procedures, practices and programmes disability integrative and inclusive. It also seeks to radically transform attitudes, perceptions and behaviour towards people with disabilities, thus creating a work environment in which disability issues and the needs of the people of disabilities are fully integrated. A recent development at provincial level has been the establishment of provincial versions of the INDS, termed in some provinces as the *Integrated Provincial Disability Strategies (IPDS)*.
442. These have been established to facilitate the implementation of the INDS at provincial level. Provincial legislatures have a responsibility to ensure that these strategies are implemented with adequate resources. At the local level, the Disability Framework for Local Government 2009-2014 was adopted to serve as a framework that will support and facilitate the mainstreaming of disability issues into all policies, plans, programmes and activities of the local government. South Africa ratified the Convention on the Rights of Persons with Disabilities on 30 November 2007. At the national level, government departments have stepped up their efforts to mainstream disability issues into their activities.
443. The *Job Access Strategy 2006-2010* adopted by Cabinet in 2007 refined and expanded the operational definition of disability in South Africa. The Strategy defines disability as 'the loss or elimination of opportunities to take part in the life of the community equitably with others that is encountered by persons having physical, sensory, psychological, developmental, learning, neurological, or other impairments, which may be permanent, temporary, or episodic in nature, thereby causing activity limitations and participation restriction with the mainstream society. These barriers may be due to economic, physical, social, attitudinal and/or cultural factors'. The Job Access Strategy's main objective is to transform the public sector to be inclusive of persons with disabilities.
444. In an effort to fast track the realisation of the priorities of the Job Access Strategy, the Department of Public Service and Administration developed a *Handbook on Reasonable Accommodation for Persons with Disabilities in the Public Service*. The handbook is an integral part of the Job Access Resource Kit for the recruitment, employment and retention of persons with disabilities in the Public Service and serves as a tool that would enable government departments to create conducive environments for persons with disabilities both as employees of the State and as clients of Government's services.

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<sup>231</sup> Social Profile of South Africa, 2002- 2009, StatsSA

445. South Africa has also taken positive measures to ensure that economic and social needs of persons with disabilities are guaranteed. Free health care for persons with disabilities has been implemented since 1 July 2003. Moreover, persons with disabilities are entitled to a disability grant in terms of the Social Assistance Act, 2004.<sup>232</sup>
446. The number of persons with disabilities receiving the disability grant has increased as shown in **Table 16** below.

**Table 16: Growth in the number of persons with disabilities receiving social grants**

Year	No persons with disabilities who received the disability grant
2002/03	840 424
2003/04	1 228 231
2004/05	1 293 280
2005/06	1 315 143
2006/07	1 422 808
2007/08	1 408 456
2008/09	1 286 883
2009/10	1 264 477
2010/11	1 200 898
2011/12	1 198 131
2012/13	1 164 192

## Housing

447. Section 26 of the Constitution provides that everyone has the right to have access to adequate housing and that the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.<sup>233</sup> As **Table 17** below shows, between 2002 and 2013, the percentage of households that lived in formal dwellings and whose dwellings were fully owned increased from

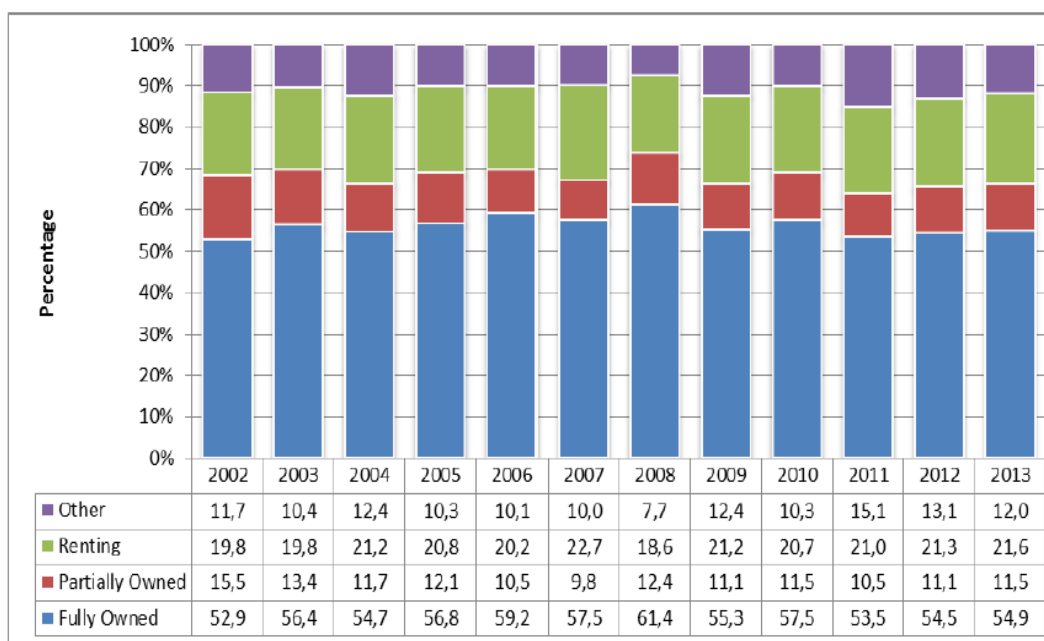
<sup>232</sup> Act No. 13 of 2004

<sup>233</sup> S 26 (1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, achieve the progressive realisation of this right.

(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

52,9% to 54,9% while the percentage of partially owned dwellings declined from 15,5% to 11,5%.<sup>234</sup>



448. The Housing Act, 1997<sup>235</sup> provides for the facilitation of a sustainable housing development process and lays down the roles, responsibilities and functions of the different spheres of government. Government's responsibilities are outlined in the Housing Act. National government is responsible for, among other things, determining a housing policy, setting broad national housing delivery goals and monitoring the performance of provincial and local government delivery goals and budgets. It is also required to establish and maintain a national housing data bank and information system. Broadly, provincial government is required to "promote and facilitate the provision of adequate housing in its province within the framework of national housing policy". It must coordinate housing development in the province and support municipalities in the performance of their duties. Municipalities must ensure that the right to housing is progressively realised in their jurisdiction. They must also identify and designate land for housing and ensure that water, sanitation, electricity, roads, storm water drainage and transport are provided.

449. The National Norms and Standards 2007 outline the minimum physical requirements for standalone dwellings. Each house must have 40m<sup>2</sup> of floor space, two bedrooms, a separate bathroom with a toilet, a shower and hand basin, and a combined living area and kitchen. It must also have an electrical board installed that has access to electricity. There are further requirements regarding access to water, sanitation, roads, storm water drains and street lighting.

<sup>234</sup> General Household Survey, 2013

<sup>235</sup> Act No. 107 of 1997

450. The Social Housing Act, 2008<sup>236</sup> establishes and promotes a sustainable social housing environment, provide for the establishment of the Social Housing Regulatory Authority in order to regulate all social housing institutions or housing obtained through public funds and allow for the undertaking of approve project by other delivery agents with the benefits of public money. Social housing means a rental or co-operative housing option for low to medium income households, and the social housing institution is accredited institution to carry out the business of providing social housing.
451. The Department of Human Settlements has taken significant steps in addressing the inequalities that existed in the past as a result of race and gender discrimination. Various regulatory measures have been put in place to encourage financial institutions to extend credit to historically disadvantaged groups. One of these measures was the Home Loan and Mortgage Disclosure Act, 2000<sup>237</sup> which sought to encourage financial institutions to provide credit to help historically disadvantaged persons to acquire housing. The Housing Consumers Protection Act Measures Act, 1998<sup>238</sup> was amended during the period under review, in 2007,<sup>239</sup> and provides for the protection of housing consumers and the establishment and functions of the National Home Builders Registration Council.
452. The National Housing Code, 2009 sets the underlying policy principles, guidelines and norms and standards which apply to Government's various housing assistance programmes introduced since 1994 and updated. The purpose of this guide is to provide an easy to understand overview of the various housing subsidy instruments available to assist low income households to access adequate housing. The detailed description of the policy principles, guidelines, qualification criteria and norms and standards are available in the National Housing Code.
453. The Community Schemes Ombud Service was established in terms of the Community Scheme Ombud Service Act, 2011.<sup>240</sup> The CSOS regulates the conduct of parties within community schemes and ensures their good governance. A community scheme is an arrangement where the use and responsibility for parts of land and buildings is shared including sectional titles development schemes, share block companies, home or property owners associations, housing schemes for retired persons and housing co-operatives. Any person in a community scheme may make an application to the CSOS if such a person is a party to or is materially affected by a dispute.
454. South Africa has also put in place policies that increase historically disadvantaged groups' access to credit to ensure that they are empowered economically. In addressing the needs of the poor for housing and shelter, the Rural Housing Loan Fund has been established to provide loans through intermediaries to low-income households for incremental housing purposes. Incremental housing is a people-driven process that seeks to empower low-income families in rural areas to access credit, to improve their homes

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<sup>236</sup> Act No. 16 of 2008

<sup>237</sup> Act No. 63 of 2000

<sup>238</sup> Act No. 27 of 1999

<sup>239</sup> As amended by Act No. 17 of 2007

<sup>240</sup> Act No. 9 of 2011

or to build homes. The subsidy beneficiaries must contribute towards achieving access to the benefits of the housing subsidy. As of April 2002, all subsidy beneficiaries were required to make a contribution (of R2 479.00). Significantly, beneficiaries of rural subsidies are exempt from making this contribution. People with disabilities requiring reasonable accommodation have access to a "top-up" subsidy to compensate for the additional cost of housing.

455. The DHS conducted a review of its current national human settlements mandate and strategy and subsequently a macro structure that will support the delivery thereof has been developed. The recommended structure is aligned with the new mandate, broadened from the limited scope of "housing" into all spheres of "human settlements", consequently necessitating the broader strategic objectives. The focus required value-added analysis to ensure that the Department's mandate would be enabled through the adoption of recommended changes, which would result in a tangible improvement in the current service delivery levels within the country. Within this broader vision, the Department is committed to meeting the following specific objectives:

- Accelerating the delivery of housing as a key strategy for poverty alleviation;
- Utilising provision of housing as a major job creation strategy;
- Ensuring property can be accessed by all as an asset for wealth creation and empowerment;
- Leveraging growth in the economy;
- Combating crime, promoting social cohesion and improving quality of life for the poor;
- Supporting the functioning of the entire single residential property market to reduce duality within the sector, by breaking the barriers between the first economy residential property boom and the second economy slump; and
- Utilising housing as an instrument for the development of sustainable human settlements, in support of spatial restructuring.

456. The Comprehensive Plan for the Creation of Sustainable Human Settlements envisages enhanced delivery systems and approaches to achieve the vision and objectives set out above. Specifically, the Plan requires the housing sector to implement bold initiatives to achieve the objectives of delivering sustainable human settlements.

457. The human settlement sector has made strides and progress in setting the delivery framework and systems for the achievement of government's Outcome 8 targets. In the Informal Settlement Upgrading Programme we have improved outputs and have to date provided nearly 190 000 households with upgraded services and secure tenure.

458. In 2011/12 we also took the necessary steps to ensure that households in the affordable sector increased their ability to access adequate housing. The National Housing Finance Corporation has commenced with the necessary work to activate the Mortgage Default insurance programme. The department has also revised the finance-linked individual

subsidy programme (FLISP) to improve the ability of households in the income category R3 501–R15 000 to access mortgage finance for housing, thus increasing access to housing finance and the provision of shelter and basic services. In the 2012/13 financial year, the management of the Urban Settlement Grant continued to receive attention in the devolution of powers to the local sphere of government.

459. The Department of Human Settlements is providing support to provinces and municipalities to map, categorise and implement informal settlement upgrading plans in 45 priority municipalities. It is also focusing on rationalising the Housing Development Finance Institutions and increasing their support to provinces to develop mixed income and mixed use projects. A further area of focus in the future will be monitoring of the contribution of private banks to the affordable housing market.

### Case law

460. The case of *Port Elizabeth Municipality v Various Occupiers*<sup>241</sup> concerned the fate of a small group of people who had been unlawfully occupying some vacant, unused and private land in the jurisdiction of the municipality of Port Elizabeth. At the instance of the landowners and a large number of concerned locals, the municipality applied for their eviction. It fell to the court to decide whether the eviction could go ahead under the circumstances. It found that it could not. Sachs J made reference to the judiciary's "new task," which was to manage "the counter positioning of conventional rights of ownership against the new, equally relevant, right not to be arbitrarily deprived of a home, without creating hierarchies of privilege.
461. In *Occupiers of 51 Olivia Road, Berea Township and 197 Main street, Johannesburg v City of Johannesburg*<sup>242</sup> more than 400 occupiers of two buildings in the inner city of Johannesburg (the occupiers) applied for leave to appeal against a decision of the Supreme Court of Appeal. They challenged the correctness of the judgment and order of that Court authorising their eviction at the instance of the City of Johannesburg (the City) based on the finding that the buildings they occupied were unsafe and unhealthy. The City was ordered to provide those of the occupiers who were "desperately in need of housing assistance with relocation to a temporary settlement area". The application for leave to appeal was granted.
462. In *Abahlalibase Mjondolo Movement SA v Premier of the Province of KZN* (2009) ZACC 31, the Abahlalibase Mjondolo Movement of South Africa, an organisation representing thousands of people who live in informal settlements, and its President approached the KwaZulu-Natal High Court, Durban, challenging the constitutionality of the KwaZulu-Natal Elimination and Prevention of Re-emergence of Slums Act. The High Court dismissed the challenge. They also contended that section 16 of the Act was inconsistent with the Constitution and invalid. Section 16 gives the Member of the Executive Council of the province power to publish a notice in the provincial gazette determining a period within which an owner or person in charge of land or a building that is occupied by unlawful

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<sup>241</sup> 2005 (1) SA 217 (CC)

<sup>242</sup> 2008 (3) SA 208 (CC)

occupiers must institute proceedings to evict the occupiers under the PIE Act. If the owner or person fails to comply, the municipality must bring proceedings to evict the occupiers. On the constitutional validity of section 16 of the Act the Constitutional Court held that section 16 of the Act is inconsistent with the Constitution and invalid. The Court noted that section 16 of the Act will make residents of informal settlements, who are invariably unlawful occupiers, more vulnerable to evictions should an MEC decide to issue a notice under section 16.

463. In *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga avenue*<sup>243</sup> the occupiers of 7 Saratoga Avenue are a community of 86 desperately poor people living in disused industrial property in Berea, Johannesburg. In 2006, they were sued for eviction by the owner of the property. They opposed the application, stating that they could not be evicted unless and until the City of Johannesburg discharged its constitutional obligation to provide them with temporary alternative accommodation pending ultimate access to formal housing as part of the national housing programme. They joined the City of Johannesburg ('the City') to the proceedings and sought an order compelling it to do so. The South Gauteng High Court, granted the eviction and ordered the occupiers to vacate the property. The Court directed the City either to provide the occupiers with temporary accommodation or to pay each of the occupiers' households R850 per month towards the cost of finding their own alternative accommodation. The City subsequently appealed the SCA judgment, and the appeal was heard in the Constitutional Court. Judgment was handed down, the Court accordingly upheld the order of the SCA but ordered the eviction of the occupiers 14 days after the City was ordered to provide those occupiers who were in need with temporary accommodation. This was to ensure that they would not be rendered homeless because of the eviction.
464. In *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others (SCA)*<sup>244</sup> Changing Tide Properties had applied for the eviction of the occupiers, which was unopposed by the occupiers. However, the owner highlighted that the eviction may lead to homelessness. The South Gauteng High Court ordered the City of Johannesburg (the City) to provide alternative accommodation to approximately 100 unlawful occupiers of a building in inner city Johannesburg.

### Social security

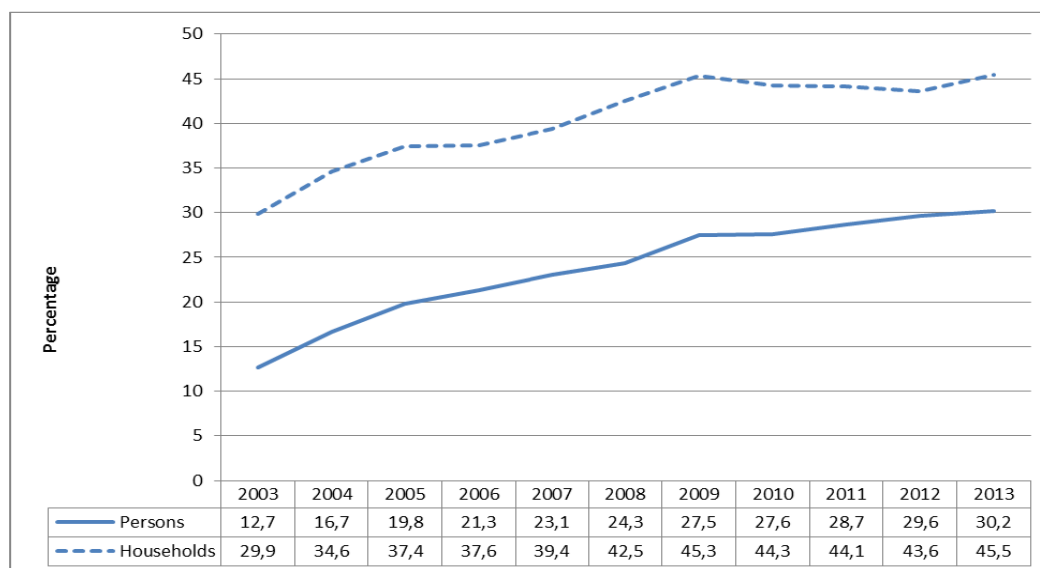
465. Out of the total population, the percentage of individuals who benefited from social grants increased from 12,7% in 2003 to 30,2% in 2013. As **table 18** below indicates, the percentage of households that received at least one grant increased from 29,9% to 45,5%.<sup>245</sup>

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<sup>243</sup> [2010] ZAGPJHC 3

<sup>244</sup> [2012] ZASCA 116

<sup>245</sup> General Household Survey, 2013



466. The Social Assistance Act, 2004<sup>246</sup> provides a national legislative framework for the provision of different types of social grants, social relief of distress, the delivery of social assistance grants by a national Agency and the establishment of an Inspectorate for Social Security.
467. The South African Social Security Agency Act, 2004<sup>247</sup> provides for the establishment of the as a schedule 3A public entity in terms of the Public Finance Management Act. The principle aim of the Act is to make provision for the effective management, administration and payment of social assistance and service through the establishment of the South African Social Security Agency. The mandate of the South African Social Security Agency is to ensure the provision of comprehensive social security services against vulnerability and poverty within the constitutional and legislative framework.
468. Different types of social grants include grants-in-aid (“GIA”), child support grants (“CSG”), foster care grants (“FCG”), care dependency grants (“CDG”), war veteran’s grants (“WVG”), disability grants (“DG”) and grants for older persons (“OAG”). **Tables 19 (a) and (b)** below provide an indication of the number of different grants per province (Eastern Cape, Free State, Gauteng, Kawzulu-Natal, Limpopo, Mpumalanga, Northern Cape, North West and Western Cape) as at 31 December 2013.

<sup>246</sup> Act No. 13 of 2004

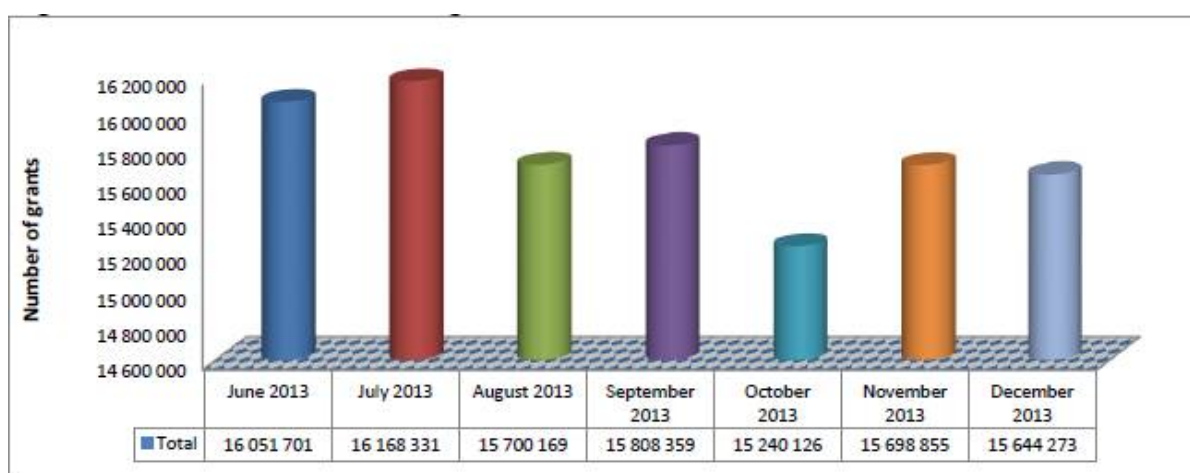
<sup>247</sup> Act No. 9 of 2004



Region	Grant type							Total
	OAG	WVG	DG	GIA	CDG	FCG	CSG	
EC	514,290	65	180,207	11,558	18,252	105,519	1,745,740	2,575,631
FS	175,626	6	83,814	1,477	6,181	35,591	622,458	925,153
GP	441,715	120	115,553	1,926	15,226	52,787	1,512,224	2,139,551
KZN	604,621	64	297,499	29,626	35,089	121,663	2,604,465	3,693,027
LP	417,325	36	91,297	12,422	12,417	53,381	1,594,850	2,181,728
MP	214,987	20	76,270	3,231	8,620	31,958	968,466	1,303,552
NC	76,551	13	49,546	4,505	4,583	13,067	268,626	416,891
NW	222,553	17	86,014	4,803	8,360	37,609	738,943	1,098,299
WC	270,546	138	148,933	9,620	10,847	27,206	843,151	1,310,441
<b>Total</b>	<b>2,938,214</b>	<b>479</b>	<b>1,129,133</b>	<b>79,168</b>	<b>119,575</b>	<b>478,781</b>	<b>10,898,923</b>	<b>15,644,273</b>

Source: SOCPEN system

NB: The total include grant in aid



Source: SOCPEN system

NB: The totals include grant in aid

469. Since 2008, the following measures were put in place to increase social grant coverage: the qualifying age for Older Person's Grant was equalised at 60 years for men and women and the progressive extension of CSG was raised to 18 years. Social assistance coverage in the form of the Child Support Grant was extended to children up to the age of 18 years with effect from January 2010. This was an attempt by government to further reduce child poverty and encourage school attendance, thus promoting the development of human capital. The extension of coverage of the CSG has benefitted more than 10 million children. Government is currently developing proposals to reform the social security system, with a view to introducing a contributory scheme for old age, disability and survivor benefits. This will deepen the reach of the social security system to provide enhanced coverage for those who are income earners.

470. In order to give effect to section 7(2) of the Promotion of Administrative Justice Act, 2000,<sup>248</sup> the Social Assistance Act, 2004<sup>249</sup> was amended in 2010. Both applicants and beneficiaries who disagree with a decision and / or the reasons given by the South African

<sup>248</sup> Act No. 3 of 2000

<sup>249</sup> Act No. 13 of 2004

Social Security Agency (SASSA) for rejecting a grant application, may now apply for reconsideration of its SASSA decision. Furthermore, the applicant (or beneficiary) is also able to lodge an appeal to an Independent Tribunal specifically established to deal with social grant appeals. This provides an easier and less expensive remedy for applicants and beneficiaries before resorting to the courts for a remedy.

471. In March 2011, Government Notice No. R232 was published in the Government Gazette providing for recipients of Social Relief of Distress not to repay the amount received in any form of social assistance in the event of a disaster. The floods at the end of 2010 left numerous households without food, clothes and possessions. Many of these areas were declared disaster areas and SRD was issued to eligible individuals and households. However, regulation 10(3) required that the SRD paid to social grant beneficiaries must be recovered as a person cannot receive both SRD and a social grant. To avert undue hardship beneficiaries are now exempted from repayment of SRD in the event of a disaster. In an effort to prevent social assistance beneficiaries and more people drowning into poverty, grant values and means test thresholds increase annually in line with the inflation rate.
472. Through the War on Poverty Campaign, the Department of Rural Development and Land Reform (DRDLR), together with other departments, have developed social and economic database of poor households and their members that live in the most deprived municipal wards of the country. The information of household needs that is obtained from this database is then referred to government departments so that the services can be delivered to those poor households. This Campaign also includes coverage of the indigenous communities such as those in Riemvasmaak in the Northern Cape, where a trust was established to drive the development agenda of the entire community. Farms bought through this mechanism have entered into a partnership with a private entity for enhancing management of the community and raising productivity.
473. South Africa has continuously taken measures to ensure the economic, social and cultural development of its people. In particular, a comprehensive approach has been adopted to eradicate extreme poverty and hunger. The anti-poverty approach combines income support (through the grant system) with a social wage package that includes clinic-based free primary health care for all, compulsory education for all those aged seven to fifteen years (or the 9<sup>th</sup> grade, whichever occurs first)<sup>250</sup> and provision of subsidised housing, electricity, water, sanitation, refuse removal, and transportation.
474. The Department of Agriculture, Forestry and Fisheries (DAFF) Food Security and Rural Development Programme provides agricultural starter packs and food production information packs to food insecure rural households. The Department of Social Development Poverty Relief Programme provides support for rural community food gardens and income generating projects.
475. With each passing year, South Africa has seen visible improvements in the life circumstances of its citizens. The Millennium Development Goals Country Report 2013

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<sup>250</sup> S 3 of the South African Schools Act, 1996 (Act No. 84 of 1996)

indicates that as far as poverty alleviation is concerned, South Africa has made good progress, yet we are aware that levels of poverty among vulnerable groups such as women and children, which is higher than the poverty levels for the general population, still remain a challenge. A myriad of poverty alleviation programmes addressing income, human capital and asset poverty resulted in more South Africans having access to some form of household income, even if only in the form of a social grant, housing, piped water and sanitation. Overall South Africans are enjoying a higher standard of life.

## **CHAPTER 3: PEOPLES' RIGHTS**

### **Article 19: All people shall be equal**

476. The right to equality is addressed in paragraphs 13 to 25 of this report.

### **Article 20: Peoples' rights to existence and self-determination**

477. South Africa is committed to the basic international principles that denounce colonialism and foreign domination. South Africa has in the recent years grown increasingly concerned about the situation in the Middle East, in particular the Israel-Palestine conflict. South Africa has continued to support the peace process and the two states solution by calling on all parties to commit to negotiation to realise these goals.

478. Another development in respect to the question of colonialism and foreign domination concerns the definition of terrorist activities under the Protection of Constitutional Democracy against Terrorist and Related Activities, 2004.<sup>251</sup> The Act excludes an armed struggle against colonialism and foreign domination from the definition of terrorism.

### **Article 21: Rights to dispose of wealth and natural resources**

479. As stated in the First Periodic Report, the South African Constitution guarantees the South African people the right to freely dispose of their wealth and natural resources. In addition, the Constitution reinforces the common law principle of compensation in case of spoliation or expropriation in the public interest. Significant developments in respect to this right have revolved around the restitution and redistribution of land.

480. The stated aim of the Minerals and Petroleum Resources Development Act, 2002<sup>252</sup> ("MPRDA") is to redress past racial discrimination in respect of access to the mining industry. Unused 'old order' rights (rights awarded under the previous system) including mineral rights where the surface and minerals were not separated, could be converted into 'new order' mining rights within one year of the coming into operation of the Act (i.e. by 1 May 2005). Other old order mining rights (those in use) could be converted into

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<sup>251</sup> Act No. 33 of 2004

<sup>252</sup> Act No. 28 of 2002

new order mining rights within five years (i.e. by 1 May 2009), and prospecting rights within two years (i.e. by 1 May 2006). Otherwise, these old order rights would be permanently extinguished. The MPRDA was subsequently amended by virtue of the Minerals and Petroleum Resources Development Amendment Act, 2008<sup>253</sup> which vests the Minister with discretionary powers to afford communities participation privileges in new prospecting and mining ventures and when authorising the conversion of old order mining rights.

481. Government has also launched a Settlement Implementation Support Strategy to provide post settlement support aimed at ensuring sustainability of land reform projects, including restitution projects. The new small-scale fishing policy will ensure the equality of traditional small scale fishers in their access to the marine resources.
482. The *Policy for the Small Scale Fisheries Sector in South Africa* was gazetted in June 2012. The policy aims to provide redress and recognition to the rights of small scale fisher communities in South Africa who were previously marginalised and discriminated against in terms of racially exclusionary laws and policies. The policy entrenches the principles of preferential access to small scale fishing communities who have traditionally depended on marine living resources for their livelihood. It adopts a multiple species approach in allocating fishing rights to small scale fishers, adopts a co-management approach to manage the sector and includes the integration of ecosystems and that the sustainability of the resource is not compromised.
483. Cases of note in the period under review include *Maccsand (Pty) Ltd v City of Cape Town*<sup>254</sup> where the intersection between the MPRDA and National Environmental Management Act, 1998<sup>255</sup> was considered in light of section 24 of the Constitution. The court confirmed the SCA decision that, where mining is not permitted by a zoning scheme, the holder of a mining right or permit cannot start to mine, unless and until the land is rezoned to allow mining. The court held that the MPRDA is intended to promote section 24 of the Constitution.
484. In *Agri South Africa v Minister for Minerals and Energy*<sup>256</sup> the court considered whether or not the commencement of the MPRDA amounted to the expropriation of mineral rights from those who, prior to its enactment, were owners of mineral rights. The Court held that while the MPRDA deprived the applicant of its mineral rights, this deprivation did not amount to expropriation.

## Article 22: Rights to development

485. In 2009, South Africa adopted the Medium Term Strategic Framework (MTSF, 2009–2014) as its five-year statement of intent. The MTSF identifies the development challenges

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<sup>253</sup> Act No. 49 of 2008

<sup>254</sup> 2012 (7) BCLR 690 (CC)

<sup>255</sup> Act No. 107 of 1998

<sup>256</sup> 2013 (4) SA 1 (CC)

facing South Africa and outlines the medium-term strategy for improving living conditions of South Africans. The MTSF base document is meant to guide planning and resource allocation across all spheres of government. There are five strategic objectives that South Africa intends to accomplish at the end of the five-year period: to halve poverty and unemployment; ensure a more equitable distribution of the benefits of economic growth and reduce inequality; improve the nation's health profile and skills base and ensure universal access to basic services; build a nation free of all forms of racism, sexism, tribalism and xenophobia; and improve the safety of citizens by reducing incidents of crime and corruption.

486. President Jacob Zuma appointed the National Planning Commission (NPC) in May 2010 to draft a vision and national development plan for consideration by Cabinet and the country. The NPC is an advisory body consisting of 26 people drawn largely from outside government. After releasing a draft plan in November 2011, the NPC held extensive consultations with South Africans, including government, unions, academics, industry bodies, non-profit organisations, religious associations and the general public. The response was overwhelmingly positive and the inputs have helped to strengthen the proposals made in the plan.
487. The National Planning Commission released their vision for 2030, the National Development Plan (NDP), in order to make recommendations about how South Africa ought to combat poverty, land inequity, and an underperforming economy. The National Development Plan aims to eliminate poverty and reduce inequality by 2030. South Africa can realise these goals by drawing on the energies of its people, growing an inclusive economy, building capabilities, enhancing the capacity of the state, and promoting leadership and partnerships throughout society.

## **Article 23: Rights to peace and security**

### **Legislation and policy measures to combat terrorism and transnational crime**

488. A key development in respect to the right to national and international peace and security since the submission of the First Periodic Report relates to the enactment of the Protection of Constitutional Democracy against Terrorist and related Activities Act, 2004<sup>257</sup> which was assented to by the President on 4 February 2005. Moving in tandem with developments at the international arena especially after the September 11 2001 terrorist attacks in the United States of America, this Act seeks to provide for measures to prevent and combat terrorism and related activities. It provides for the offence of terrorism and other offences associated or connected with terrorist activities. The Act also seeks to give effect to international instruments dealing with terrorist acts in addition to providing a mechanism to comply with United Nations Security Council Resolutions that deal with terrorism.

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<sup>257</sup> Act No. 33 of 2004

489. In addition to enacting the above Act, South Africa became a party to three international instruments relevant to the prevention and combating of terrorism in 2003. These include the International Convention for the Suppression of Terrorist Bombings, the International Convention on the Suppression of the Financing of Terrorism and the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents. We are also party to the Rome Statute of the International Criminal Court (ICC) incorporated into our domestic law through the implementation of the Rome Statute of the ICC Act, 2002.<sup>258</sup>
490. Government has bolstered its efforts to ensure that all people in South Africa enjoy national peace and security. In addition, we have deployed our military personnel in a number of missions in conflict situations on the African continent as contribution towards the attainment of peace and security on the Africa continent and the world in general.
491. More than two decades after the adoption of the Palermo Convention on Transnational Organised Crime, countries, regions and the world in general are still grappling with challenges and threats posed by transnational organised crimes such as terrorism, corruption and money laundering. This is also applicable to South Africa. Although there are still debates in the world regarding the link between terrorism and other illicit crimes, the reality is that these serious crimes pose a threat to societies and economies around the world and require direct and effective responses from the global community.
492. There are global trends in transnational organized crime. During the last 15 years the world has seen an exponential increase in transnational organized crime, thus clearly showing that these crimes know no borders. Furthermore, economic and technological globalization has enabled criminals to move from so-called "low-level" activities like drug trafficking, prostitution and illegal gambling to "corporate" activities, like migrant smuggling, environmental crime, bank fraud, and large-scale insurance fraud. Internationally the globalization of transnational organized crime has been facilitated by factors such as the fading of borders and inadequate guarding thereof, the increasing global economy and free-market movement of goods and increased trade and reduced border checks which provide cover and markets for trafficking illicit products. Unanticipated new technological possibilities in traditional and electronic communication means that organized crime groups are now able to communicate covertly with relative ease and anonymity across jurisdictional boundaries. Technological advances have also facilitated large and rapid cash transactions in the layering stages of money laundering, while cheaper and faster transportation facilitate illicit trafficking.
493. The world has also witnessed emerging crime trends such as cybercrime, illicit trafficking in rhino horns and precious metals, to name but a few. There has also been a significant increase in the sophistication of organised crime syndicates through the use of complex networks and advanced technology. The inherently transnational and accessible nature of the internet fits perfectly into this and aids the conducting of these crimes. South

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<sup>258</sup>Act No. 27 of 2002

Africa views these crime trends as threat against national security and has put in place integrated measures through the JCPS Cluster to help combat them.

494. The issue of human smuggling has become a major security threat to South Africa as thousands of illegal foreign nationals from Africa and the East continue to stream into the country with the help of organised crime syndicates.

#### **Legislative and policy measures to combat trafficking in persons:**

495. Following the call to adopt legislation, policies and other measures to implement the Palermo Convention on Transnational Organised Crime and Protocols thereto, South Africa has promulgated the Prevention and Combating of Trafficking in Persons Act, 2013.<sup>259</sup> The Act is in operation and seeks to fulfil four main objectives, namely to provide for an offence or trafficking in persons and other offences associated with trafficking in persons, prevent and combat the trafficking in persons within and across the borders of the Republic, to provide for measures to protect and assist victims of trafficking in persons and to provide for the establishment of the Inter-sectoral Committee on Prevention and Combating of Trafficking in Persons.
496. This legislation will undoubtedly go a long way as a legal basis to prevent and combat the scourge of trafficking in persons, particularly women and children. The offence, as defined in line with the UN Protocol on Trafficking in Persons, will greatly assist law enforcement agencies to investigate and prosecute those who are suspected and are guilty of having committed such an offence. In addition to creating very specific offences criminalising trafficking in persons, the Act also focus on the plight of victims, by allowing for those convicted of trafficking to be forced to pay compensation to a victim for damages, injuries, both physical and psychological harm suffered and loss of income, amongst others. In an effort to further bolster its anti-human trafficking efforts, the NPA developed directives, presented training and conducted public awareness campaigns. Similarly the SAPS established internal task teams that developed learning programmes for frontline personnel at service centres and ports of entry.

#### **Other legislative and policy interventions to combat crime**

497. Other legislative interventions during the period under review include the Dangerous Weapons Act, 2013<sup>260</sup> which prohibits the possession of dangerous weapons in public and amends related provisions of the Regulation of Gatherings Act, 1993<sup>261</sup> and the Firearms Control Act, 2000.<sup>262</sup>
498. The Criminal Law (Forensic Procedures) Amendment Act, 2013<sup>263</sup> was passed to provide for the storage, maintenance and administration of fingerprints and body prints in a

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<sup>259</sup> Act No. 7 of 2013

<sup>260</sup> Act No. 15 of 2013

<sup>261</sup> Act No. 205 of 1993

<sup>262</sup> Act No. 60 of 2000

<sup>263</sup> Act No. 37 of 2013

computerised or other form with a Division of the SAPS. The legislation also limits the taking of fingerprints, body-prints for the purposes of detecting crime, the investigation of an offence, the identification of missing persons and unidentified human remains or the conducting of a prosecution. It also provides for comparative searches of fingerprints against other databases. This further improves the ability of SAPS in dealing with transnational organised crime.

499. The Directorate for Priority Crimes Investigation (DPCI) (also known as the Hawks) was established as an independent directorate within the South African Police Service in terms of section 17C of the South African Police Service Act, 1995.<sup>264</sup> The Directorate for Priority Crime Investigation is responsible for the combating, investigation and prevention of national priority crimes such as serious organized crime, serious commercial crime and serious corruption.
500. South Africa, with the support of other interested States, has worked on possible responses relating to the connection between organised crime and illicit trafficking in precious metals. Following a number of meetings in the respective countries with an interest in this matter and in the margins of meetings of the Commission on Crime Prevention and Criminal Justice, South Africa tabled a resolution on combating transnational organised crime and its possible links to illicit trafficking in precious metals. In the resolution, South Africa is calling for a comprehensive study to be conducted by UNICRI (United Nations Interregional Crime and Justice Research Institute) in this regard.

#### **Measures to combat corruption**

501. Several efforts have been taken to combat corruption. Internationally there are broadly two types of confiscation methods used to recover the proceeds of crime, namely conviction-based and non-conviction-based forfeiture, often referred to as criminal and civil forfeiture respectively. Conviction-based forfeiture depends on securing a conviction in a criminal trial, but has the advantage that once a conviction is obtained, it is possible in some systems to invoke very wide forfeiture powers. Non-conviction based or civil forfeiture is a purely civil process, independent of a criminal trial or a conviction. The state usually has to prove on a balance of probabilities that the property in question is proceeds or instrumentalities of crime, in other words, property used to commit crime, such as firearms, immovable property or premises, a bank account, or even business, used to launder the proceeds of crime.
502. South Africa is one of a growing number of states having both types of forfeiture. The National Prosecution Authority's Asset Forfeiture Unit (AFU) also made a strategic decision to make more use of the provisions of Chapter 6 of the Prevention of Organised Crime Act, 1998<sup>265</sup> namely, non-conviction based civil asset forfeiture. On application by the National Director of Public Prosecutions, the High Court can make an order forfeiting property to the state that the court, on a balance of probabilities, finds to be "an instrumentality" of a crime, or the "proceeds of unlawful activities". As mentioned, the

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<sup>264</sup> Act No. 68 of 1995

<sup>265</sup> Act No. 121 of 1998



validity of such an order is not affected by the outcome of criminal proceedings. In other words, a suspected criminal can be acquitted in a criminal case, where the state has failed to prove its case beyond a reasonable doubt, but still nonetheless have his property forfeited to the state. This is one of the many benefits of civil forfeiture. It assists in speeding up the finalization of cases and limits costs, thus addressing some of the risks and constraints raised above. It also helps to limit the increased losses that resulted from the focus on high value cases where the prosecution was unsuccessful in an increasing number of cases due to them being much more heavily litigated. The impact of this shift is reflected in the increased proportion of assets frozen through Chapter 6 actions. This measure has drastically increased the amount of assets so frozen.

503. Because the work of the AFU is extremely dependent on key partners, it has developed cooperation frameworks with the SAPS (especially the DPCI), the rest of the NPA, the FIC, the South African Revenue Service (SARS), the state attorney and others. The institutionalised cooperation model developed in the ACTT may also be effective in dealing with serious economic crime (other than corruption) and serious organised crime, for example drug dealing and smuggling, precious metals, etc. This is especially so with the increased involvement of organised crime in “emerging crimes” with high profit and low risk, e.g. abalone smuggling, rhino poaching, illicit mining, copper theft, electricity theft, illicit cigarettes and other grey goods, copyright theft, large frauds on the social security system, etc.
504. With a view to strengthen the fight against corruption, during 2010/11, the AFU became part of Anti-Corruption Task Team (ACTT). The primary mandate of the ACTT is to expedite the effective investigation and prosecution of priority corruption cases through a multi-agency approach. It is coordinated by the Directorate for Priority Crime Investigation (DPCI) that has a multi-disciplinary legal mandate which has been operationalised through the ACTT, with a cross-cutting focus on targeting criminal proceeds at the core. The AFU has focussed much resources and efforts to work more closely with various government agencies, such as the DPCI, the SIU and National Treasury, represented at the ACTT. This has assisted in ensuring that investigations and court preparation in big cases are dealt with more speedily and effectively. This was also done as these cases are a high priority for government.
505. The operational need and international policy obligations has compelled the AFU and the Financial Intelligence Centre (FIC) to revisit its approach in dealing with proceeds of crime in a multi-disciplinary context. This has led to the joint development of an integrated Resolving of Criminal Proceeds Process to co-ordinate and guide proceeds related financial investigations across the Justice, Crime Prevention and Security (JCPS) cluster. The model is based on international research and best practices through which the operational models in other jurisdictions were identified based on similarities of legal framework, operational practices and approaches. The Resolving of Criminal Proceeds Process is being implemented based on the legal mandates of the NPA regarding financial investigations and the Financial Intelligence Centre (FIC) regarding financial intelligence.

## Article 24: The right to a satisfactory environment

### Legislative and policy measures to protect the environment:

506. The preservation and conservation of the environment has remained high in the agenda of the South African government. In this regard, since the submission of the First Periodic report progress has been made in this field especially in relation to the development of norms, standards and institutional mechanisms for the protection of the environment. Three important statutes have been enacted during this period: National Environmental Management: Air Quality Act 2004,<sup>266</sup> the National Environment Management: Integrated Coastal Management Act, 2008<sup>267</sup> and the National Environment Management: Waste Act, 2008.<sup>268</sup>
507. The National Environmental Management Act, 1998<sup>269</sup> ("NEMA") governs integrated environmental management. Environmental impact assessments (EIAs) are the main regulatory tool under this Act, which aims to ensure sustainable development and the prevention of adverse impacts on poor communities and on the environment. The provisions of NEMA governing EIAs are therefore vital to the protection of scarce water resources from mining activities, as well as from a plethora of other industrial activities which impact directly on the health of rural and urban communities.
508. With a coastline that stretches for over 2500km, the Integrated Coastal Management Act, 2008<sup>270</sup> which entered into force on 9 February 2009, provides a normative framework for the conservation and preservation of this coastline. The Act establishes a system of integrated coastal and estuarine policies, in order to promote the conservation of the attributes of coastal landscapes and seascapes, and to ensure that development and the use of natural resources within the coastal zone is socially and economically justifiable and ecologically sustainable.
509. On its part, the Waste Act, 2008<sup>271</sup> seeks to reform the law regulating waste management in order to protect health and the environment by providing reasonable measures for the prevention of pollution and ecological degradation and for securing ecologically sustainable development. In essence, the Waste Act has had the effect of filling the legislative gaps that existed at the time of the submission of the First Periodic Report. In addition, the Act has clarified and allocated responsibilities within Government for pollution and waste management.

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<sup>266</sup> Act No. 39 of 2004

<sup>267</sup> Act No. 24 of 2008

<sup>268</sup> Act No. 58 of 2008

<sup>269</sup> Act No. 107 of 1998

<sup>270</sup> Act No. 24 of 2008

<sup>271</sup> Act No. 58 of 2008

## **CHAPTER 4: SPECIFIC DUTIES**

### **Article 25: Duty to promote awareness of the Charter**

510. South Africa, through the Department of Justice and Constitutional Development, the Department of Basic Education, the Department of Arts and Culture and the SAHRC and CGE, has continued to roll out programmes that aim at raising awareness on rights and freedoms to which individuals are entitled to. The DoJ&CD runs a number of constitutional and human rights awareness campaigns, which focus on the SA Constitution, and human rights instruments in general, while the other government departments focus on constitutionalism and human rights within a context of nation-building and social cohesion.
511. Each year, as is now customary, for South Africa to celebrate the National Human Rights Day on 21 March. March is declared human rights month in South Africa, where celebrations and public awareness campaigns are held throughout the country, culminating into National Human Rights Day on 21 March. Other days of human rights celebration are on the Africa Human Rights Day of 21 October and the International Human Rights Day on 10 December. There are efforts by Government, National Human Rights Institutions and Civil Society Organisation to ensure a wide celebration of the Africa Human Rights Day in South Africa as it is currently not celebrated widely.
512. Since the submission of the First Periodic Report, the number of complaints of human rights violations received by the SAHRC has increased, testifying of the increasing awareness of human rights in the country. In addition to the above-mentioned educational interventions, the SAHRC on 26 January 2009 launched a Human Rights Journal as part of its activities aimed at increasing human rights awareness. The inaugural edition of the Journal covers a number of topical human rights issues in the country including the relationship between the South Africa's constitution and international human rights norms. In addition to the abovementioned education interventions, the SAHRC regularly publishes reports on general human rights issues, as well as annual reports on equality, socio-economic rights, and international human rights developments.
513. Government is working on the Declaration under article 34(6) of the Protocol to the Charter on the establishment of the African Court on the Human and Peoples' Rights to allow individual access to the Court.

### **Article 26: Duty to guarantee the independence of the courts**

514. South Africa has an independent judiciary, subject only to the Constitution and the law. The Constitution is the supreme law of the country and binds all legislative, executive and judicial organs of state at all levels of government. No person or organ of state may interfere with the functioning of the courts, and an order or decision of a court binds all

organs of state and people to whom it applies. Judges in the various courts are appointed by the President in consultation with the Judicial Service Commission, the leaders of parties represented in National Assembly, and, where relevant, the President of the Constitutional Court. The Judicial Service Commission includes the Chief Justice, the President of the Constitutional Court and the Minister of Justice. It is a widely representative body, with the transformation of the judiciary remaining one of government's key priorities.

515. As at the end of 2011, of the 233 judges countrywide, 39 % (91) were white, 40.34% (94) were African, 10.30% (24) were coloured and 10.30% (24) were Indian. Overall 75 (32.19%) were female and 159 (68.24%) were male.
516. Judicial officers in the lower courts are appointed by the Minister of Justice & Constitutional Development on the advice of a Magistrates' Commission, created by statute. Much progress has been made in the transformation of the magistracy. As to the lower courts, of the 1666 magistrates, 43% were white, 41% African, 8% coloured and 9% Indian. Overall 38% were female and 62% were male.
517. The Constitution Seventeenth Amendment Act of 2012 and the Superior Courts Act, 2013<sup>272</sup> were passed by the fourth democratic Parliament. The Constitution 17th Amendment Act affirms the Chief Justice as head of the judiciary who as a consequence thereof becomes responsible for judicial functions performed by judicial officers of all courts, including magistrates. The Superior Courts Act, 2013<sup>273</sup> provides a legislative framework on how the Chief Justice performs the judicial leadership role as well as the management of judicial functions of Superior Courts. Central to these developments was the establishment of the Office of the Chief Justice. These significant reforms which also include the extension of the powers of the Constitutional Court, making it the apex court in our country, occurred during the fourth administration under the leadership of President Jacob Zuma.
518. The South African Judicial Education Institute Act, 2008<sup>274</sup> establishes an education institute for the judiciary so as ensure that the judiciary is properly skilled to implement this right. This reform is intended to establish a separate court administration for the judiciary as a separate branch of government.
519. A number of cases regarding the independence and role of the judiciary were handed down during the period under review.<sup>275</sup>

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<sup>272</sup> Act No. 10 of 2013

<sup>273</sup> Act No. 10 of 2013

<sup>274</sup> Act No. 14 of 2008

<sup>275</sup> *Bato Star Fishing (PTY) LTD v Minister of Environmental Affairs and Others 2004 (4) SA 490 (CC)*: This case dealt with the separation of powers between the judiciary and the executive. *Soller v President of the Republic of South Africa and Others 2005 (3) SA 567 (T)* provides that Judges are required to adjudicate matters fearlessly and are only able to do so if protected against non-meritorious actions.

## **Article 27: Duty of family**

520. The rights to a duty of family are discussed under paragraphs 397 to 416 of this report.

## **Article 28: Freedom from discrimination**

521. The rights to equality and freedom of discrimination are discussed in paragraphs 11 to 30 of this report.

## **CONCLUSION**

522. Since the presentation of the first periodic report, much progress has been made in implementing the provisions of the African Charter. A number of legislative, policy and other measures have been put in place to ensure substantive realisation of civil and political rights, as well as socio-economic rights. Measures are in place to address the levels of crime in our country, especially the level of violence against and abuse of women and children and these measures are beginning to prove successful.

523. As to realisation of economic, social and cultural rights, Government remains committed in addressing the trio challenges of inequality, unemployment and poverty. Our National Development Plan (2030) sets us well on the path of ensuring that we become a safe and prosperous country.

## **PART B: THE PROTOCOL**

### **INTRODUCTION**

1. In July 2003 the African Union Assembly adopted the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (hereinafter referred to as the Protocol) with the objective of enhancing the implementation of women's rights in Africa. The Protocol complements the African Charter and other instruments on women's rights by extending the substantive scope of the law, improving the means of compliance and focusing on the particular circumstances of women in Africa.
2. South Africa signed the Protocol on 16 March 2004. It ratified the Protocol on 17 December 2004. The Protocol thus entered into force in respect to South Africa on 25 November 2005.
3. This is the initial report of South Africa under the Protocol and captures the period 2005 to 2014. It is submitted in accordance with article 26 of the Protocol as read with the Guidelines for State Reporting issued by the African Commission on Human and Peoples' Rights. Given the extensive reporting period and in the interests of putting all relevant information in this initial report, Part B exceeds the recommended number of pages as set out in the Guidelines.
4. In accordance with these Guidelines, this report reflects legislative and other measures taken by the South African Government for the full realization of women's rights as recognized in the Protocol.
5. In preparing this report information was sought from across Government departments; and the views of state institutions involved in human rights promotion and protection and civil society have been solicited and incorporated where appropriate. Consultations during the different stages of the drafting of the report have been undertaken, with Government departments, the South African Human Rights Council (SAHRC), the Commission for Gender Equality (CGE), as well as with civil society organizations.

### **Background information**

6. The Women's Charter, dated 17 April 1954, states in its Preamble that - *"We, the women of South Africa, wives and mothers, working women and housewives, African, Indians, European and Coloured, hereby declare our aim of striving for the removal of all laws, regulations, conventions and customs that discriminate against us as women, and that deprive us in any way of our inherent right to the advantages, responsibilities and opportunities that society offers to any one section of the population."*
7. South African women have come a long way in the struggle for the recognition, promotion, protection and realization of their rights. This struggle was part of the larger struggle against apartheid, the consequences of which are still felt to date. Thus, the empowerment of women and the achievement of gender equality in South Africa also involve dealing with the legacy of apartheid and about the transformation of society, particularly the transformation of power

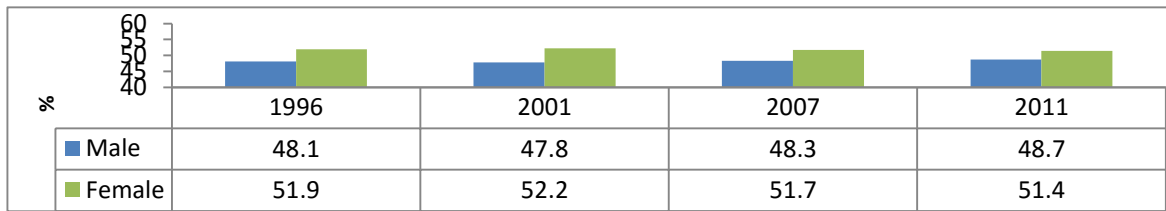
relations between women, men, institutions and laws. It is about addressing gender oppression, patriarchy, sexism, ageism, and structural oppression, and creating an environment that is conducive to women taking control of their lives.

8. In 1994, South Africa became a constitutional democracy founded on the rule of law, the advancement of human rights and the principles of non-racism and non-sexism. Since then, South Africa has taken focused interventions and initiatives to promote and protect the rights of women in accordance with its international commitments, particularly as outlined in the African Women's Protocol.
9. At the core of these efforts is a political commitment at the highest level of governance. Gender issues have consistently, since the dawn of democracy in 1994, featured in the various State of the Nation Addresses.
10. This commitment was further embodied in the President's proclamation<sup>276</sup> which provided for the establishment of a Ministry of Women, Children and People with Disabilities. Vulnerable groups refer to, inter alia, women, children and people with disabilities. These groups constitute a significant proportion of the South African population and will continue to expand in absolute numbers as the population grows.<sup>277</sup>
11. Following the National Elections in May 2014, the President pronounced on a self-standing, dedicated Ministry for Women to be located in the Presidency. The mandate of this Ministry is to promote the socio-economic empowerment of women and the advancement of gender equality. This includes the promotion of women and girls' empowerment; the achievement of substantive gender equality; and the protection of the rights, freedoms and dignity of women. This elevates the promotion of equality for women to Cabinet level and ensures that it features prominently on the agenda of both the public and private sectors. The location of the Ministry at the pinnacle of Government renders it authoritative enough to provide oversight, monitoring and evaluation on the progress made with respect to women's empowerment and gender equality and to ensure that women are socio-economically empowered. It further gives effect to section 9 of the Constitution which outlines the right to equality, as well as its international commitments on the promotion of women's rights.
12. The Census 2011 data indicates that the South African population is predominantly female. Women constitute 51.3% (26 581 769) of the population while men constitute 48.7% (25 188 791). Of the total population of 51 770 560, children (0-18 years) make up 36.8% and people with disabilities constitute 10.3%. **Table 1** below presents a summary of the demography by gender for South Africa from 1996 to 2011, based on the latest Census survey (2011):

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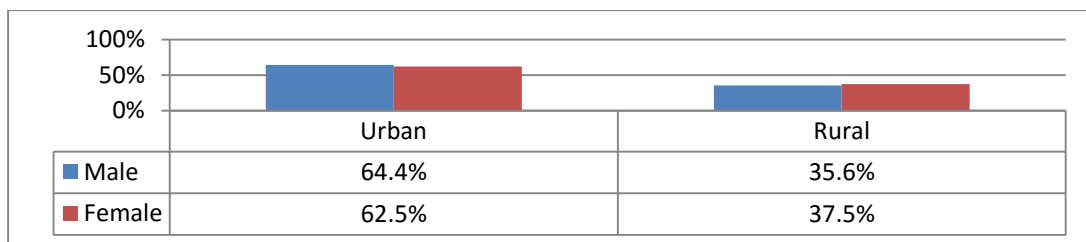
<sup>276</sup> 10th May 2009

<sup>277</sup> Statistics SA: December 2011, Social Profile of Vulnerable Groups in South Africa 2002-2010



13. The South African female population is not a homogenous group. This report therefore seeks to capture, in so far as it is possible, the vast differences between the different members of this population, in terms of their race, language, religion, circumstances, aspirations, geographic location, historic location, historic disadvantages, levels of education, self-esteem, cultural beliefs, values, and access to and control of opportunities and resources.
14. The 2011 Census shows that more people in South Africa are living in urban areas than in rural areas. As shown in **Table 2** below, of the total population in the country, more women can be found in urban areas (62.5%) as compared to 37.5% in rural areas. However, men outnumber women in urban areas while there are more women than men in rural areas. This can be attributed to migratory labour patterns in the country.

**Table 2: Geographic distribution of males and females, 2011**



15. According to Census 2011, 41.2% of households were headed by females in the country. The percentage of female heads of households increased with age, peaking at 60.2% for heads aged 70 years and older. In the 18-34 year age group, there were 34.4% households headed by women, while in the 35-59 year age group there were 40.2% women headed households. In the 60-69 year age group, 47.7% households were headed by women, increasing to 60.2% at the 70+ year age group.
16. Female-headed households generally contain more dependents and have a larger average household size than male-headed households in South Africa. Approximately 10% of female-headed households are “skip-generation” households (where grandparents, especially grandmothers, care for orphaned or grandchildren from absent parents), compared to 3.2% of male-headed households.<sup>278</sup>

<sup>278</sup> Ibid



17. The percentage of “skip generation” households is even larger among older persons (15.1%). Census 2011 also found that extended families comprised 31.8% of female-headed households compared to 18.4% of households headed by males. Women-headed households in general tend to be predominantly responsible for the care of children.
18. Poverty patterns in South Africa continue to be gendered. Female-headed households are consistently more likely to be poor, more likely to have low incomes, more likely to be dependent on social grants, and less likely to have employed members.
19. More than half (51.4%) of female-headed households are poor compared to 29.5% of male-headed households. Some 44.3% of female-headed households were without a single employed member compared to 23.5% of male-headed households.
20. Child-inclusive female-headed households are much more likely to experience hunger and food insecurity than other households. For example, the Living Conditions Survey for 2008/9 found that female-headed households, at the food poverty line (R305 per capita per month in 2009 prices) were almost twice as likely to be poor (22,7% were below the poverty line) than male-headed households (where 11,9% were below the poverty line). At the upper level (R577 per capita in 2009 prices), 49.9% of households headed by women were found to be poor, compared to 30.4% of male-headed households.<sup>279</sup>
21. In the past women were unable to access the same economic resources and opportunities as men. The resulting inequality was, and still is, intensified by additional race-based discrimination and growing inequality in the country. Women are over-represented in informal job market, low-skilled, low-paying jobs and the wage gap between male and female earnings persists, particularly in low and semi-skilled occupations.<sup>280</sup>
22. There is continuous division of labour between women and men, where women’s roles are largely confined to reproductive, care and community roles. Women’s roles are underrated in economic terms and their work is demoted to being domestic and unpaid.<sup>281</sup>
23. As a result of their longer life-expectancy, elderly females are more vulnerable to poverty and food insecurity, quite often compounded by being primary care-givers to grandchildren.
24. Women’s living conditions and quality of life are directly affected by the basic services their households receive. In addition to being responsible for securing basic needs (such as fetching water and fire-wood), women are often primary care-givers to more than just their own children in families. This role is compounded by increasing numbers of child orphans and the HIV and AIDS pandemic. A lack of access to basic services increases poor households’ vulnerability to disease. Larger percentages of household income is often spent on increasingly less diverse and less

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<sup>279</sup>Statistics SA, 2013: Men, Women and Children: Findings of the Living Conditions Survey 2008/9. Pretoria

<sup>280</sup> Ibid: page 62. (And see May, 1998; Bhorat 2009)

<sup>281</sup> Ibid: Page 62

nutritious sources of food, which does not promote the health situation in female-headed households.<sup>282</sup>

25. Overall, many inequalities that are based on gender in South Africa are often deepened by characteristics such as age, disability, violence, harmful cultural practices, patriarchy, negative stereotyping and geographical location.
26. The legislative framework of South Africa is rooted in the Constitution of the Republic of South Africa and encapsulated in Chapter 2 thereof, the Bill of Rights, which affords all South Africans civil and political rights and socio-economic rights, such as the right to housing,<sup>283</sup> healthcare, food, water and social security<sup>284</sup> and education.<sup>285</sup> The Constitution, as the supreme law of the land, provides the normative foundation for the advancement of women's rights in South Africa. It provides for the establishment of one sovereign state, a common South African citizenship and a democratic system of government committed to achieving equality between men and women and people of all races. Moreover, the Constitution provides for the prohibition of racial, gender and all other forms of discrimination. In particular, section 9 of the Constitution stipulates that neither the state, nor any person, may discriminate directly or indirectly on the grounds of gender, sex, pregnancy, marital status or any other ground or combination of grounds listed or unlisted therein.
27. Since the end of apartheid and the advent of a constitutional democracy in South Africa, underpinned by values such as equality and rule of law, our country has endeavoured to put in place legal and policy frameworks that promote and protect the rights of women, in addition to ensuring equality for women.
28. Since the 1990's, empowerment of women has increasingly been incorporated into national development agendas in the country. During the past decade, various quota systems and equity measures and mechanisms, aimed at measuring the levels of participation of women in the economy and decision-making, have been introduced and will be dealt with in more detail in the report.
29. In line with its commitment to gender equality, South Africa developed its National Policy Framework for Women's Empowerment and Gender Equality, which was adopted by Cabinet in 2000, and has been the guiding beacon for the development and advancement of women and girls in the country. Government also developed a Gender Policy Framework for Local Government, as well as the National Strategic Framework for Women's Economic Empowerment, among other sectoral policies and strategies guiding the mainstreaming of gender considerations across the work of government.

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<sup>282</sup> Statistics SA: December 2011, Social Profile of Vulnerable Groups in South Africa 2002-2010: p 62 (And also Altman et al 2009)

<sup>283</sup> S 26

<sup>284</sup> S 27

<sup>285</sup> S 29

30. South Africa has also made a number of key commitments at the sub-regional, continental and international levels on promoting women's empowerment and achieving gender equality. These include the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (ratified in 1995), the Beijing Declaration and its Platform for Action (signed in 1995), the Millennium Declaration and its Development Goals (MDGs) (adopted in 2000), the African Union Heads of States' Solemn Declaration on Gender Equality in Africa (ratified in 2004), the African Women's Protocol (ratified in 2004) and most recently the SADC Protocol on Gender and Development (ratified in 2011).
31. It should be noted that South Africa as a state party to the UN CEDAW presented its combined 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Periodic Report to the UN CEDAW Committee on 19 January 2011.

### **Applicability of the Protocol**

32. Our Constitution has adopted a mixed approach to the incorporation of international law into our domestic law. It assumes a dualist approach in relation to treaties and a monist stance in respect of customary international law.<sup>286</sup>
33. The dualist approach means that international law is not directly applicable domestically. It must first be translated into national legislation before it can be applied by domestic courts.
34. Pursuant to section 231(4) of the Constitution, an international agreement becomes law in South Africa upon its enactment into national legislation.<sup>287</sup> Although the African Women's Protocol has not been enacted into law as such in South Africa, most of its provisions have already been incorporated into a number of national statutes. Details of the national statutes which are in compliance with the Women's Protocol are outlined in the report.
35. Moreover, section 233 of the Constitution compels every court, when interpreting any legislation, to prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with such law. The courts are also obliged to consider international law when interpreting the Bill of Rights.

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<sup>286</sup> Deputy Chief Justice D Moseneke, *"The role of comparative and public international law in domestic legal systems: a South African perspective"* December 2010

<sup>287</sup> S 231: "(1) The negotiating and signing of all international agreements is the responsibility of the national executive.

(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect."

36. South African courts, in accordance with the Constitution, have established the practice of using international human rights treaties as interpretative guidelines when interpreting the Bill of Rights.<sup>288</sup>

### Reservations to the Protocol

37. At the time of ratification, South Africa made three reservations and two interpretative declarations to the Protocol. The reservations were made in respect to article 4(2)(j) which deals with the imposition of the death penalty on pregnant and nursing mothers; article 6(d) on the registration of marriages; and article 6(h) which deals with the equality of parents to pass nationality to their children.

38. The interpretative declarations were made in respect to article 1(f) which defines 'discrimination against women' and article 31 on the status of the Protocol vis-à-vis more favourable domestic provisions. These reservations and interpretative declarations have not in any way undermined the enjoyment by South African women of the relevant rights and freedoms guaranteed in the Protocol. ***On the contrary, they offer more favourable conditions for the enjoyment of those rights and freedoms.***

39. In respect to article 4(2)(j), South Africa stated that the article does not find application in South Africa because the death penalty has been abolished in the country. In relation to article 6(d), South Africa indicated that it would not be bound by the requirement that a marriage shall be recorded in writing and registered in accordance with national laws in order to be legally recognised. This reservation was made to protect women in customary marriages of which many are not registered. Otherwise the application of article 6(d) of the Protocol would exclude many South African women from the protection of the law. Thus, the Recognition of Customary Marriages Act, 1998<sup>289</sup> provides that the non-registration of a customary marriage does not affect the validity of the marriage.

40. South Africa's reservation to article 6(h) was intended to protect the inherent right of a child to citizenship and nationality. Article 6(h) subjugates this right to national legislation and national security interests, in effect providing the possibility for taking away a child's right to take the citizenship and nationality of either or both parents.

41. In respect of article 1(f), South Africa made an interpretative declaration to the effect that the definition of 'discrimination against women' has the same meaning and scope as is provided for in section 9 of the South African Constitution, as interpreted by the Constitutional Court of South Africa from time to time. The Constitutional Court of South Africa has developed a sound and

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<sup>288</sup> In *Bhe and Others v Magistrate, Khayelitsha* 2005(1) SA 580 (CC), the Constitutional Court observed that a number of international instruments, to which South Africa is a party, including the African Women's Protocol, underscored the need to protect the rights of women, and to abolish all laws that discriminate against them. In *Gumede v President of the Republic of South Africa* (2008) ZACC 23, the Constitutional Court cited articles 2, 6, and 7 of the African Women's Protocol to support its position that the eradication of all laws and practices that discriminate against women was not only a constitutional obligation, but that it was also an obligation that flowed from international instruments to which South Africa is signatory.

<sup>289</sup> Act No. 120 of 1998

elaborate normative mechanism for defining what constitutes unfair discrimination. The Court has not only declared several laws and practices to be unconstitutional, but it has also furthered the object and purpose of the Protocol in many of its decisions.

42. In respect to article 31, South Africa stated that since its Bill of Rights contains a limitation clause, it should not be interpreted to offer less favourable protection of human rights than the Protocol, which does not expressly provide for limitations. The South African Bill of Rights is expansive in the rights it guarantees and may well be said to, in many instances, be **more favourable than the Protocol**. The Constitutional Court has developed very strict criteria for justifying any limitation of any of the rights enshrined in the Bill of Rights.

#### **Institutional mechanisms to combat all forms of discrimination against women**

43. In 1994 South Africa established an elaborate National Gender Machinery, composed of an integrated package of structures located at various levels of the state, within statutory bodies that include the Parliament, the Commission for Gender Equality (CGE), the South African Human Rights Commission (SAHRC) and in civil society. The South African National Gender Policy Framework, 2000 provides for the coordination of these structures. The mechanism meets frequently to evaluate the progress in achieving equality for women in all spheres of life, and for planning and coordinating the gender agenda in the country.
44. Government established an Office on the Status of Women in 1996, which was located within the highest level of Government, i.e. the Presidency. The creation of the Ministry of Women, Children and Persons with Disabilities in May 2009, following the general elections, and the proclamation of the Department in July 2009 was also seen as another means to protect and enhance development opportunities for women, children and people with disabilities.
45. However, the strategic evolution of the institutional mechanisms for advancing women was heightened when the President proclaimed a Ministry in the Presidency Responsible for Women and devolved the functions of children's rights and the rights of persons with disabilities to the line function Department of Social Development following the May 2014 general election. In July 2014, the Department of Women was proclaimed. Such a dedicated institutional arrangement for women's empowerment is a clear articulation of the commitment of the country to advancing and developing women.
46. At provincial levels, there are also Offices on the Status of Women located mainly within Premiers' Offices. In some cases, they are located within Provincial Departments of Social Welfare. Gender Focal Points exist in all national and provincial departments, albeit not all at the desired reporting and decision-making rank and level. While there are gender focal points appointed in most major metros in the country, it has not sufficiently cascaded at lower levels in local government sphere. This is a challenge that the country is currently addressing.
47. At the Parliamentary level, a Joint Monitoring Committee on the Improvement of the Quality of Life and Status of Women as well as the Portfolio Committee on Women, Youth, Children and People with Disabilities prior to May 2014 monitored and provided oversight for Government's

progress regarding compliance with international treaties on women's rights, empowerment and gender equality to which South Africa is a party.

48. Following the 2014 elections, Parliament established the Portfolio Committee on Women in the Presidency which oversees the progress of Government on its gender agenda as implemented in the previous mechanisms. There is also a Parliamentary Select Committee on Women in the Presidency as well as a Multi-Party Women's Caucus in Parliament which also work to promote the rights of women in the country. At the provincial level, monitoring of women's rights and empowerment is carried out by various Parliamentary Select Committees in the different provincial legislatures.
49. The Commission on Gender Equality is envisaged under the Constitution as one of the state institutions that strengthen constitutional democracy in South Africa. In terms of section 187 of the Constitution, the Commission is mandated to (a) promote respect for gender equality and the protection, development, attainment of gender equality and (b) to monitor, investigate, research, educate, lobby and report on issues concerning gender equality. Its composition, powers and functions are provided under the Commission on Gender Equality Act, 1996.<sup>290</sup>
50. Since its inception in 1997, it has been working towards achieving a South African society that is free from gender oppression and all forms of inequality. In this regard, it receives complaints, monitors gender equality issues, undertakes research and public education, engages in policy development and legislative initiatives, and it also engages in litigation. The Commission has formulated the Framework for Transforming Gender Relations, which although intended particularly for policy-makers and trainers, seeks to educate the general public on gender equality.
51. The SAHRC is another state institution that is aimed at entrenching constitutional democracy in South Africa. Its constitutional mandate is three-fold: to promote respect for human rights and a culture of human rights, to promote the protection, development and attainment of human rights, and to monitor and assess the observance of human rights in the country. The operation of the Commission is provided for under the Human Rights Commission Act, 1994.<sup>291</sup>
52. The Commission has established the Equality Unit, which is committed to the achievement of social justice through the promotion of human rights and in particular the right to equality as enunciated in section 9 of the Constitution. Each year the SAHRC publishes its Equality Report in line with section 25(2) of the Human Rights Commission Act.

### **Budget for Women**

53. Since the advent of constitutional democracy, South Africa has implemented various measures that seek to ensure financing for women's empowerment at all levels of government. This has entailed the integration of gender considerations in the preparation and implementation of the national and other budgets to become responsive to the needs of women. The process also seeks

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<sup>290</sup> Act No. 39 of 1996

<sup>291</sup> Act No. 54 of 1994

to ensure that where possible, resources are deployed as a positive measure to equalize opportunities between men and women. As a result, a substantial portion of the budget is increasingly being invested in services that advance women.

54. In 1995, the Gender and Economic Policy Group of the Joint Standing Committee on Finance was established to produce, in conjunction with NGOs, annual women's budgets. Since then, the Policy Group has issued research reports that have informed budgeting for women.
55. The South African Women's Budget Initiative has from its inception been an alliance forged among those parliamentarians who, entering parliament for the first time in 1994, were eager to continue their work on gender and other forms of discrimination. Parliamentarians and members of the Joint Standing Committee on Finance came together with two NGOs who had the expertise and time necessary to collect information, undertake the research and produce the analysis. For their part, the parliamentarians were able to provide access to information, focus in terms of key political issues and a strong advocacy voice.<sup>292</sup> The initial goals of the South African Women's Budget Initiative, were to develop an alternative set of values and principles which begin to prioritise the socio-economic needs of poor women, to provide a critical tool to monitor spending, to empower the Standing Committee to oversee government spending, to empower government to take responsibility for drawing up gender sensitive budgets and to empower civil society.<sup>293</sup>
56. The Fiscal and Financial Commission is tasked to make recommendations to Parliament, provincial legislatures, organised local government and other organs of state on financial and fiscal matters as envisaged in the Constitution and other national legislation. In 2012, the Fiscal Commission had also undertaken an analysis of gender responsive budgeting at the local government level.<sup>294</sup> The Commission examined gender budgeting in the South African local government sector. The Integrated Development Plans (IDPs) of 30 municipalities were reviewed for their gender sensitivity. In addition, the gender responsiveness of local government budgets was evaluated using case studies of seven selected municipalities. The findings indicated that gender budgeting in the local government sector is limited. There must be a committed implementation for women's advancement, development and gender equality at this level, where most sustainable effects in this regard can be felt by women on the ground.
57. While many challenges were experienced with respect to the full implementation of gender responsive budgeting in South Africa over the years, the initiative has found renewed energy in the country. Under the stewardship of the Minister of Women, Children and People with Disabilities, the country is consolidating gender-responsive budgeting interventions and processes which began in 1995. One of the envisaged tasks is that of forging an alliance with the Department of Finance to ensure integration of the principles of gender responsive budgeting in Government's planning and budgeting cycle.

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<sup>292</sup> Budlender, D, 2000

<sup>293</sup> "Gender Budgets Make Cents" Budlender *et al*, 2002

<sup>294</sup> "Gender Budgeting: Translating Government Gender Equality Commitments into Reality," October 2012

58. Over the past 21 years some examples of good practices on gender responsive budgeting within government include, amongst others, the Department of Trade and Industry which is able to budget for women in trade, broadly including SMME's and the Department of Health is able to budget for maternal and child mortality and HIV and AIDS with a considerable annual increase in the budget. This has resulted in a reduction in mother-to-child transmission of HIV and AIDS from 71% in 2009 to 99% in 2013. The Department of Environmental Affairs has set aside R800 million for green economy initiatives, a percentage of which is earmarked for women in businesses and entrepreneurs in environmental issues. The Department of Social Development has increased social grants for children of single mothers, which is alleviating child poverty by 17%. Social grants for the elderly are mostly taken up by women.
59. While these budgets are responding to women's needs they cannot be said to have been analysed in a systematic manner using gender responsive budgeting principles. Furthermore, in 2013 the Department of Women, Children and People with Disabilities, working with a NGO known as the Motsepe Foundation, has undertaken an analysis of the national budgets of four national departments namely the Departments of Energy, the Department of Health, the Department of Agriculture, Forestry and Fisheries and the Department of Trade and Industry. These are departments which have line-functions that directly impact on the lives of women, particularly those in rural areas.
60. The gender responsible budgeting work on gender-based violence has been mainly undertaken by civil society organizations that undertake this as part of broader research and advocacy. The overall aim of the work is to promote improved implementation of key legislation such as, amongst others, the Domestic Violence Act, 1998<sup>295</sup> and Sexual Offences Act, 2007.<sup>296</sup> This has been done by researching and reporting on the resources allocated as well as on the experiences of women who attempt to access the services provided for in the different pieces of related legislation. The work has contributed to a growing knowledge base on facts and figures in South Africa.

### **Gender mainstreaming**

61. The South African National Gender Policy Framework provides the blueprint for gender mainstreaming, a process which began in South Africa in 1995 following the adoption of the Beijing Platform for Action. The result has been the institutionalization of gender mainstreaming within state organs and government departments. At a minimum, gender focal points have been established in all national departments.
62. In South Africa, gender mainstreaming is envisaged as the responsibility of every government official. In order to accelerate gender mainstreaming in the Public Service, a training manual on gender mainstreaming for the public service was developed in 2004 by the former Office on the Status of Women in the Presidency in partnership with the Public Administration Leadership and Management Academy (PALAMA), which is the training academy for the South African

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<sup>295</sup> Act No. 116 of 1998

<sup>296</sup> Act o. 32 of 2007



Government. PALAMA is mandated to provide leadership training across the Public Service, including training on gender mainstreaming for senior management officials. The training programme was developed and institutionalized from 2005. To date some 2000-4000 public officials have been trained on this manual.

63. PALAMA has since October 2013 been renamed the National School of Government to assume the responsibility of leading public sector learning and development of programmes and related services, Government departments are using the gender mainstreaming approach, of the many, a few examples include:

- The Department of Justice and Constitutional Development has a Gender Directorate, which is responsible for gender mainstreaming in the Department. In 1998, the Department adopted a Gender Policy Statement, which places gender mainstreaming as an official operational paradigm upon which all decisions, plans and activities performed within the Department's mandate should be based.
- The South African Police Services has established a women's network to advocate for gender equality.
- The Department of Correctional Services has undertaken an audit to integrate gender equity into the Department's strategy to accelerate the appointment of staff.
- The Department of Cooperative Governance and Traditional Affairs, formerly known as the Department of Provincial and Local Government, has also mainstreamed gender into its operations. In 2007, the Department launched the Local Government Gender Policy Framework. This comprehensive policy is crucial in ensuring that the provisions relating to gender equality and equity find practical expression in local government core policies, planning processes, programmes, projects and budgets. The policy proposes mainstreaming as a strategy for promoting gender equality and women's empowerment in the local government sphere. Furthermore, it advances a monitoring and evaluation framework to track progress.

64. The Local Government: Municipal Systems Act, 2000<sup>297</sup> also provides for mainstreaming gender in participation within municipal structures and provides the core principles, mechanisms and processes that are necessary to enable municipalities to move progressively towards the social and economic upliftment of local communities, and ensure universal access to essential services that are affordable to all.

65. Despite the many gains that have been made in this regard, challenges still exist. The Public Service Commission undertook an audit of gender mainstreaming in the Public Service in 2006. One of the findings shows that gender mainstreaming is not being fully implemented within the Public Service and furthermore that officials do not know how to mainstream gender into their day to day work.

66. The intervention to address the gender mainstreaming challenges should be the full implementation of existing legislation that protect and promote women's rights, empower women and promote gender equality which are already in place. The legislation is also resourced

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<sup>297</sup> Act No. 32 of 2000

and enforced. Measures to maximize the implementation and monitoring the implementation of these legislations should be considered with the Department of Women working in collaboration with Departments mandated with the implementation.

### **Audit of Gender laws**

67. The General Law Fourth Amendment, 1993<sup>298</sup> was specifically enacted to repeal or to amend provisions that differentiated between men and women. It repealed discriminatory laws regarding, *inter alia*, citizenship, attendance at trials, dismissal of female employees on marriage, and the prohibition of women from performing dangerous work or night shifts.
68. Shortly after the 1994 democratic elections, South Africa embarked on elaborate law reform aimed at aligning its laws with the values that underpin a constitutional democracy. In 1998, the CGE concluded a comprehensive study that identified laws which discriminated against women, either directly or indirectly. On the basis of this study, South Africa further embarked on an elaborate law reform programme that has seen the repeal and amendment of statutes and provisions that discriminated directly or indirectly against women.
69. The Black Administration Act, 1927<sup>299</sup> which was reminiscent of past divisions and discrimination in general, and regarded women as minors who could not own property or conclude contracts in their own right, was repealed by the Repeal of the Black Administration Act and Amendment of Certain Laws Act, 2005<sup>300</sup>
70. In the public service sector, a comprehensive review with the aim of eradicating all discriminatory practices resulted in the passing of the Public Service Act, 1994<sup>301</sup> the provisions of which are all recast in non-sexist language. In addition to repealing or amending discriminatory laws, South Africa has also ensured that gender considerations are mainstreamed into new laws and in generic instruments in areas such as education, skills development, broadcasting, mining, and land redistribution.

## **MEASURES OF IMPLEMENTATION OF SPECIFIC PROVISIONS OF THE PROTOCOL**

### **ARTICLE 2: ELIMINATION OF DISCRIMINATION (Equality / Non-Discrimination)**

71. The promotion of equality / non-discrimination is a constitutional imperative in South Africa. Section 9(3) of the Constitution prohibits discrimination on a number of grounds including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability religion, conscience, belief, culture, language and birth.

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<sup>298</sup> Act No. 132 of 1993

<sup>299</sup> Act No. 38 of 1927

<sup>300</sup> Act No. 28 of 2005

<sup>301</sup> Proclamation 103 of 1994

72. The Promotion of Equality and Prevention of Unfair Discrimination Act, 2000,<sup>302</sup> (hereinafter referred to as the Equality Act), provides the framework for implementing section 9 of the Constitution. It seeks to promote achievement of equality and prevent and prohibit unfair discrimination on the grounds of, inter alia, gender, sex, and pregnancy.
73. The Equality Act also broadly defines discrimination as any act or omission, including a policy, law, rule, practice, condition, or situation which directly or indirectly (a) imposes burdens, obligations or disadvantage on; or (b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds. In specific reference to discrimination against women, section 8 of the Equality Act provides a range of prohibited practices that constitute discrimination on the basis of gender, the specifics of which are discussed in this Report under the relevant provisions of the Protocol.
74. The SAHRC is mandated under section 25 of the Equality Act to investigate and report on allegations of abuse. This information forms part of the research collated by the SAHRC for the Equality Report to be published annually as stipulated by section 28 of the Human Rights Commission Act, 1994. The Equality Review Committee, established in terms of section 32 of the Equality Act, advises the Minister of Justice and Constitutional Development about the operation of the Act and other pieces of legislation that impact on equality.
75. The Equality Act further provides for the designation of Equality Courts. Equality courts are specialised courts designated to hear matters relating to unfair discrimination, hate speech and harassment. In terms of the Equality Act all High Courts are equality courts for their area of jurisdiction. The Department of Justice and Constitutional Development has also designated all magistrates' courts to serve as equality courts in all the 9 provinces. Although the equality court is a formal court sitting, the rules and procedures are more relaxed than in normal courts e.g. the court room itself is usually not as intimidating as an ordinary court, the proceedings are held in a room that is arranged in boardroom style where the complainant and the respondent sit on either side. Normal rules of the magistrates' court apply but the presiding officer does not apply them in a rigid manner when conducting the proceedings. The SAHRC and the CGE assist complainants in lodging complaints in the equality courts.
76. While the Constitution acts as the normative foundation for the advancement of women's rights in South Africa, several pieces of legislation provide the building blocks. **Table 3** below provides a list of the most relevant legislation on women's rights and a brief summary of their respective objectives.

**Table 3: Summary of legislation pertaining to women's rights**

Legislation	Brief summary of legislation
Choice of Termination of Pregnancy Act, 1996 (Act No. 92 of 1996)	Provides for the circumstances and conditions under which pregnancy may be terminated.

<sup>302</sup> Act No. 4 of 2000

Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007)	Seeks to protect women and children by criminalising a wide range of acts of sexual abuse and exploitation.
Domestic Violence Act, 1998 (Act No. 116 of 1998)	Seeks to afford the victims of domestic violence the maximum protection from domestic abuse that the law can provide
Children's Act, 2005 (Act No. 38 of 2005)	Provides a broad framework for the protection of children's rights including those of the girl child.
Employment Equity Act, 1998 (Act No. 55 of 1998)	Seeks to promote equal opportunity and fair treatment in employment through the promotion of affirmative action and the elimination of unfair discrimination.
Basic Conditions of Employment Act, 1997 (Act No. 75 of 1997)	Protects labour rights including those that are specific to women workers.
Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000)	Provides a framework for preferential treatment of historically disadvantaged groups (such as women) in procurement transactions. The Act provides specific targets for women and people with disabilities.
Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998)	Recognises and protects women in customary marriages, including those in polygamous marriages.
Maintenance Act, 1998 (Act No. 99 of 1998)	Protects children (including the girl child) during the dissolution of the marriage, or of children borne out of wedlock, or to absentee fathers.
Prevention and Combating of Trafficking in Persons Act, 2013 (Act No. 7 of 2013)	Protects women and children from trafficking

77. South Africa has also adopted a series of policies that seek to ensure equality for women and elimination of gender discrimination. The National Policy Framework for Women's Empowerment and Gender Equality (2000) (hereinafter referred to as the National Gender Policy) outlines South Africa's vision for gender equality and how it intends to realise this ideal. It enumerates the overarching principles for integration by all sectors into their own sectoral policies, practices and programmes.

78. Other relevant policies include, amongst others, the White Paper on Transformation of the Public Service 1995, and the White Paper on Affirmative Action, 1998. The former established the policy framework for guiding the introduction and implementation of new policies and legislation aimed at transforming the South African Public Service. The latter policy's main goal was to establish a policy framework for speeding up the creation of a representative and equitable Public Service

and to build an environment that supports and enables those who have been historically disadvantaged by unfair discrimination to fulfil their maximum potential. It refers to women as one of the designated groups targeted for affirmative action.

79. Many cases brought by women have succeeded under the Equality Act. These include cases such as *Mpanza v Cele*<sup>303</sup> and *Gender Justice Network v Malema*.<sup>304</sup>

80. **Table 4** below presents a summary of some of the landmark decisions made the Constitutional Court, Supreme Court of Appeal and the High Courts that have been rendered since the advent of constitutional democracy in South Africa.

**Table 4: Landmark cases on the rights of women**

	Case	Summary
<b>Violence against women</b>		
1	<b>S v Jackson, 1998 (4) BCLR 424 (SCA)</b>	The common law cautionary rule in cases of sexual violence was abolished since it was based on discriminatory, irrational and outdated perceptions.
2	<b>S v Baloyi, 2000 (1) BCLR 86 (CC)</b>	Constitutional Court declined to declare unconstitutional the reverse onus of proving absence of guilt on a person charged with breach of a family violence interdict.

<sup>303</sup> This case is also referred to as the Umlazi T-Section case. In 2008, informal male leaders in Umlazi, a township outside of Durban, issued an edict that prohibited women from wearing trousers in the community. The Ndunas argued it was not traditional for women to wear trousers, and that doing so contributed to moral degeneration and incidences of rape. Shortly thereafter, a resident of Umlazi, Zandile Mpanza, was chased by a mob of men who assaulted her, stripped her pants off, and made her walk home partially naked for violating the "code" prohibiting women from wearing pants. She was not the only woman who had been subjected to violence and harassment for wearing pants in violation of the supposed code. With legal representation provided by the Commission for Gender Equality, Mpanza took her complaint against the men who instituted the ban to the Equality Court. The magistrate overseeing the case ruled in favour of Mpanza, and ordered the removal and prohibition of the ban on women wearing pants because it unfairly discriminated against women under the Act. The Court ordered that the Umlazi police were to convene a community meeting to notify T-Section residents of the court order, and to notify the Commission on Gender Equality on pending or reported cases involving the ban. Lastly, two of the respondents were ordered to unconditionally apologize for implementing the ban. The four men who attacked Mpanza faced criminal charges in the criminal courts for assault, malicious damage to property, intimidation, and indecent assault.

<sup>304</sup> The matter was brought before the Equality on the 29<sup>th</sup> January 2009. The respondent was called upon to answer for his conduct because of a speech that he made, while addressing members of the public on the 22<sup>nd</sup> January 2009, at the Cape Peninsula Technikon in Cape Town. The Court was to decide whether his comments amounted to hate speech and or harassment as per the definitions found within the framework of the Promotion of Equality and Prevention of Unfair Discrimination Act, Act 4 of 2000. The Court held that the utterances complained of did amount to hate speech and harassment. The respondent was ordered to issue a public apology within two weeks from date of judgment in the form of a press release and to pay People Opposed to Women Abuse (POWA) an amount of R 50 000 within one month of date of judgment.

3	<b>Carmichele v Minister of Safety &amp; Security &amp; Another, 2001 ZACC 22</b>	Constitutional Court upheld an application by a woman to have the state held liable for her brutal attack by a man, who at the time, was awaiting trial for having attempted to rape another woman and had been released without bail despite his history of sexual violence.
4	<b>Ntsabo v Real Security, 2003 4 ILJ 2341 (LC)</b>	The Court held that an employer is liable in damages for the sexual harassment of an employee if he fails to investigate allegations of such harassment
5	<b>Van Eeden v Minister of Safety &amp; Security, 2003 1 SA 398 (SCA)</b>	Supreme Court of Appeal upheld an appeal by a woman who sought damages from the state following her sexual assault, rape and robbery by a known criminal who had escaped from police custody.
6	<b>S v Ferreira, 2004 4 All SA 373 (SCA)</b>	Taking into account the grim complexities of battered women's choices, the Supreme Court drastically reduced the sentence of a woman who had hired killers to murder her domestic partner after enduring years of abuse from the partner.
7	<b>Grobler v Naspers BPK en 'n Ander, 2004 (4) SA 220 (C)</b>	The Court held an employer vicariously liable for damages caused by sexual harassment of its employee.
8	<b>Masiya v Director of Public Prosecutions Pretoria &amp; Another, 2007 (8) BCLR 827</b>	Constitutional Court extended the definition of rape to include non-consensual anal penetration of the anus of females, which was until then not provided for in the statutory definition of rape.
<b>Succession</b>		
9	<b>Amod v Multilateral Motor Vehicle Accidents Fund, 1999 (4) SA 1319 (SCA)</b>	The Supreme Court of Appeal upheld a widow's compensation claim relating to the loss of a breadwinner following the death of her husband, to whom she had been married in terms of Islamic sharia law.
10	<b>Bhe &amp; Others v The Magistrate, Khayelitsha, 2005(1) SA 580 (CC)</b>	The Constitutional Court declared unconstitutional and invalid the African customary rule of male primogeniture, which allows an oldest male descendant or relative to succeed to the estate of a Black person.
11	<b>Gumede v President of South Africa, 2008 ZACC 23</b>	Constitutional Court held that a woman who entered into a customary marriage before the commencement of the Recognition of Customary Marriages Act was still entitled to a share of the matrimonial property upon the dissolution of the marriage.
12	<b>Shilubana &amp; Others v Nwamitwa, 2008 (9) BCLR 914 (CC)</b>	The Constitutional Court held that the practice of traditional practice of appointing males as chiefs could be developed. In this case, the court

		did so in order to allow for the appointment of a woman as a chief in line with right to equality.
13	<b>Hassam v Jacobs NO, 2009 ZACC 19</b>	Constitutional Court declared invalid provisions of the Intestate Succession Act 81 of 1987 which excluded widows of polygamous Muslim marriages from the protection of the Act.
<b>Socio-economic rights</b>		
14	<b>Minister of Health &amp; Others v TAC, 2002 (10) BCLR 1075</b>	Constitutional Court held that a restriction on the public availability of Nevirapine, an antiretroviral drug that reduces HIV mother-to-child-transmission during pregnancy, was unreasonable.
<b>Nationality and immigration</b>		
15	<b>Dawood &amp; Another v Minister of Home Affairs, 2000 (8) BCLR 837</b>	Constitutional Court upheld an application to declare unconstitutional provisions of the Aliens Control Act restricting foreign spouses from joining their South African spouses in South Africa.
16	<b>Booyesen &amp; Others v Minister of Home Affairs &amp; Another, 2001 (7) BCLR 645 (CC)</b>	Constitutional Court confirmed an order declaring unconstitutional and invalid provisions of the Aliens Control Act which required an application by a foreign spouse for a work permit to be only made while the applicant is still outside the country.
17	<b>Minister of Home Affairs and Others v Watchenuka and Others, 2004 1 All SA 21 (SCA)</b>	Asylum seekers were granted the right to work.

### ARTICLE 3: THE RIGHT TO DIGNITY

81. The Constitution provides for the right to dignity, in other words the right to have one's dignity respected and protected. This is a non-derogable right enshrined in the Bill of Rights in the Constitution. Various measures, both legislative and administrative, are in place to prohibit exploitation or degradation of women and to ensure the protection of every woman's right to dignity and protection against all forms of violence. Some of the measures include the following:

## Adult Prostitution

82. Adult prostitution<sup>305</sup> is a highly contested issue in which societal opinions are often highly polarized. In this regard, the perspective ranges from the constitutional protection of human rights and human dignity to that of enforcing particular moral or religious values.
83. The existing legal position in South Africa regarding prostitution is that it is totally criminalized or prohibited through the Sexual Offences Act, 1957<sup>306</sup> and the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007.<sup>307</sup> Municipal by-laws apply both to prostitution in brothels and prostitution conducted from the street.
84. The challenge lies in establishing whether the current legal position on adult prostitution violates the rights of sex workers in light of the context of a Constitution committed to advancing human rights, social justice and human dignity. Another challenge is that the current legal framework on prostitution and sex work often results in criminalization against the seller (most often women) and impunity for buyers (most often men).
85. In *S v Jordan*<sup>308</sup> the majority of the Court rejected arguments that a law that criminalised sex work but left the clients unpunished, unfairly discriminated against women. The appellants in this case, a brothel-owner, a brothel employee and a prostitute or sex worker, were convicted in the Magistrates' Court of contravening the Sexual Offences Act, 1957.<sup>309</sup> They appealed to the High Court, arguing that the relevant provisions were unconstitutional. The High Court found that the section of the Act which criminalises carnal intercourse for reward (the prostitution provision) was unconstitutional, but dismissed the appeal in respect of the sections of the Act which criminalise keeping or managing a brothel (the brothel provisions). The appellants then appealed to the Constitutional Court, arguing that the brothel provisions should be found to be unconstitutional. They also argued that the High Court order invalidating the prostitution provision should be confirmed. The state opposed the appeal on the brothel provisions and also opposed confirmation of the order invalidating the prostitution provision.
86. The Constitutional Court unanimously upholds the High Court's finding that the brothel provisions were valid, but was divided (six to five) on the prostitution provision. The judgments have been written Ngcobo J for the majority and by O'Regan and Sachs JJ for the minority. Both judgments make it clear that the decision as to how to regulate prostitution is a matter primarily for the Legislature. Open and democratic societies around the world have chosen from a wide range of options to regulate prostitution. It is for Parliament, within the constraints of the Constitution, to decide which of these options suits South Africa best.

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<sup>305</sup> Prostitution and sex work are, strictly speaking, not the same concept. Prostitution is viewed as coerced sex work where women have no choice in the matter and is necessarily demeaning and women are victims. Sex work, on the other hand, allows for women's decision making power in capitalist thinking on issues of prostitution. (Commission for Gender Equality, "Decriminalising Sex Work in South Africa", 2013)

<sup>306</sup> Act No. 23 of 1957

<sup>307</sup> Act No. 32 of 2007

<sup>308</sup> 2002 (6) SA 642

<sup>309</sup> Act No. 23 of 1957



87. South Africa is in the process of looking at whether or not sex work should be decriminalized. In this regard the South African Law Reform Commission produced a comprehensive Discussion Paper in 2009 entitled "Project 107: Sexual Offences – Adult Prostitution". In its Discussion Paper the SALRC found that adult prostitution has been the subject of considerable public debate in South Africa. The topic remains an emotive one. In South Africa the socio-economic determinants of prostitution suggest that prostitution is driven by a complex intersection of social and economic factors in which poverty and inequality are key drivers. Therefore despite the current criminalisation of the selling and buying of sexual services and the criminalisation of the living off of the earnings of prostitution, a growing number of people, for a range of different reasons, are doing so.
88. Within this context the Commission posed four alternative legal options in its Discussion Paper that might be employed in South Africa in respect of adult prostitution. The four options are non-criminalisation, regulation, partial criminalisation and total criminalisation.
89. The Discussion Paper was widely published and distributed. This process is at an advanced stage and the final report of the Law Reform Commission will be formally presented to the Minister of Justice and Correctional Services shortly. Once it has been finalised, public engagement will have to take place and various role-players as well as the public will have the opportunity to be involved in this process.
90. The South African National Aids Council (SANAC) continues to do excellent work in the area ensuring the health of sex workers and their client. The South African National Strategic Plan (NSP) on HIV, STIs and TB 2012-2016, implemented through SANAC, raises the importance of providing HIV prevention, care and treatment to key populations, including sex workers. The provision of services to key populations is seen as one of the highest priority interventions, and the NSP makes it very clear that sex workers need a comprehensive response. This includes treatment, prevention, access to justice, addressing violence and harassment often meted out to them, and the culture of substance abuse amongst sex workers. The estimated 153 000 sex workers in South Africa are highly vulnerable not only to HIV, but to other sexually transmitted infections (STIs). This is due to multiple factors, including many sex partners, unsafe working conditions and barriers to the negotiation of consistent condom use. Sex workers often have minimal control over these factors because of social marginalisation and the restricted legal framework under which they are forced to work. Alcohol and drug use, and violence further exacerbate their vulnerability and risk.
91. It is SANAC's responsibility is to ensure that the objectives of the NSP are met. A big part of this is ensuring effective oversight, coordination and management of the programme. The objectives of the national programme are to:
- Provide services to sex workers through peer education. This will include providing condoms and lubricant, education services, and psychosocial support. This will strengthen the social capital of the sex work community which we know to be protective for HIV.

- Smooth the way for sex worker access to health services – particularly STI treatment, HIV testing and ART provision. In order to ensure this, it is critical to deal with stigma in health services.
- Deal with the human rights abuses and violence from partners, clients and the police.
- Educate clients of sex workers on the importance of using condoms, the rights of sex workers not to be assaulted and to be paid for their services.
- Challenge legal barriers to reaching sex workers with services. There is a lack of a legal framework in which the programme for sex workers can operate optimally in South Africa.
- Provide skills development and income-generating capacity for sex workers who want to leave sex work and address the social and economic factors that force many women into sex work.

### **Sexual orientation and gender identity**

92. The legislative framework provides for equality and rights of the lesbian, gay, bisexual, transsexual and intersex (LGBTI) community, as well as their protection under the law. The legislation includes the Constitution and the Bill of Rights, the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000,<sup>310</sup> the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007,<sup>311</sup> the Domestic Violence Act, 1998<sup>312</sup> and the Civil Union Act, 2006.<sup>313</sup>
93. South Africa's democratic transition proved to be a watershed period for rights around sexual orientation in the country. The Constitution guarantees equality for all and prohibits discrimination based on, amongst others, gender, sex, race and sexual orientation. It further provides for the protection of all persons, including gays and lesbians. In 1998 Parliament of South Africa passed the Employment Equity Act, 1998<sup>314</sup> protecting persons against workplace discrimination on the basis of sexual orientation. In the same year, the Constitutional Court ruled that the law prohibiting homosexual conduct between consenting adults in private was unconstitutional.<sup>315</sup> South Africa is the fifth country in the world and the first in Africa to recognize same sex marriages.
94. Despite the legal framework, homophobia, discrimination and prejudice still exist. By May 2009 there were 20 documented cases of murder of lesbians in South Africa. Since then there has been an increase in the number of murders of lesbians due to hate crimes and "corrective rape". In 2011, the court was able to successfully prosecute four men for such an act and each sentenced

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<sup>310</sup> Act No. 4 of 2000

<sup>311</sup> Act No. 32 of 2007

<sup>312</sup> Act No. 116 of 1998

<sup>313</sup> Act No. 17 of 2006

<sup>314</sup> Act No. 55 of 1998

<sup>315</sup> National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others (CCT11/98) [1998] ACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 (9 October 1998)

to a jail term of eighteen years. In South Africa lesbians remain vulnerable to attack. Notably black lesbians are subjected to violence in townships and some urban settings. Consequently these women face issues such as disempowerment, stigmatization, rejection, ignorance and isolation. Some reasons for the continued marginalization of lesbians and the LGBTI community in general include the misperception that homosexuality is “un-African” or that lesbians and gays cannot be afforded the same constitutional protections and rights provided to the rest of society. It also includes the misperception that homosexuality should be criminalized and religious and cultural intolerance resulting from what is “correct behaviour” or not.<sup>316</sup>

95. LGBTI persons are often the victims of hate crimes. Hate crimes are identity crimes, directed not only at the identity of the victim but also of the group to which they belong. A victim is thus often a symbol of a broader group of people. Although hate crimes can be perpetrated against anyone, it is often the more marginalised groups that are targeted.
96. The Department of Justice and Constitutional Development has established a National Task Team (NTT) to develop a National Intervention Strategy on LGBTI issues. This was done by the former Minister of Justice and Constitutional Development, Minister Jeff Radebe, after receiving a number of petitions from civil society organisations. The aim of the National Intervention Strategy is to address so-called “corrective rape” and other forms of violence against LGBTI persons. The Department initiated engagements with key government departments and institutions to develop the National Task Team. The NTT was constituted by government departments, chapter 9 institutions and civil society organisations that specialise in issues related to LGBTI persons.
97. The DoJ&CD significantly strengthened the participation of NGOs and civil society in the NTT through a process of consultative workshops in all provinces. A rapid response team was also established to track the pending cases in the criminal justice system, as well as to respond as soon as possible, to cases of violence being reported. An inter-sectoral communication plan outlining a number of public education and communication initiatives has also been developed. This seeks to popularise inter-sectoral interventions aimed at addressing the violence committed against LGBTI persons, to promote partnerships amongst government, civil society, business and the media in the fight against gender based violence and to encourage communities to report these crimes. A television advert was made to convey a national message to South Africans to promote equality, dignity and freedom protected under the Constitution. The television advert was first flighted during the launch of the LGBTI Programme in April 2014. With SABC, 13 million people were reached through the LGBTI TV advert, a further 10 million people through eTV and community radio reached a further 6.1 million people.
98. The National Intervention Strategy followed a multi-sectoral approach. It included government and civil society and related organisations and addresses sexual orientation-based violence and gender-based violence against LGBTI persons through two programme areas, namely Prevention and Response, on a national level. The ultimate aim is for national, regional and municipal policies,

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<sup>316</sup> Human Sciences Research Council (HSRC): 2010: THE COUNTRY WE WANT TO LIVE IN – hate crimes and homophobia in the lives of Black lesbian South Africans; Occasional Paper 1 by the Policy Analysis and Capacity Enhancement Research Programme, Pretoria

strategies, plans, budgets and legislation to have an integrated, mainstreamed approach to eradicating sexual orientation-based violence.

99. The key motivations for the proposed changes to the law are included in a draft policy framework. At the moment, for the crimes of murder, assault and rape against specific persons or groups, the applicable law still provides for murder as murder and rape as rape and so forth. But is it important to stress that our courts are proactively, and even in the absence of specific hate crimes legislation, beginning to address hate crimes.<sup>317</sup>
100. In this regard, it is important to address the misconception that, in the absence of specific hate crimes legislation, those who commit hate crimes will get away with it. They do not get away with it - they still face the full might of the law. Our courts are, more and more, handing down appropriate sentences and where prejudice, hatred or bias is established, this is often found to be an aggravating factor, used to impose a harsher sentence.
101. The Department of Justice and Constitutional Development has made significant progress with a policy framework on combating hate crimes, hate speech and unfair discrimination.
102. The Department is envisaging a bill on the issue of hate crimes and it is in the early stages of being drafted.

### Sexual harassment

103. Sexual harassment is prohibited and punishable in South Africa. The Equality Act, 2000<sup>318</sup> in section 11 prohibits harassment which is defined as *'unwanted conduct which is persistent or serious and demeans, or humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences and which is related to (a) sex, gender or sexual orientation, or (b) a person's membership or presumed membership of a group identified by one or more of the prohibited grounds or a characteristic associated with that group.* The Equality Courts are thus empowered to deal with cases of sexual harassment. Sexual harassment in the workplace is prohibited under the Employment Equity Act, 1998<sup>319</sup> and the Labour Relations Act, 1995.<sup>320</sup> In this regard, the Code of Good Practice on the Handling of Sexual Harassment has been issued in terms of the Labour Relations Act, 1995.<sup>321</sup> In schools, sexual

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<sup>317</sup> In the recent case involving the conviction and sentence of the man who murdered Duduzile Zozo, Judge Tshifiwa Maumela acknowledged the problem of hate-crimes in South Africa. He sentenced the man responsible for killing Duduzile Zozo, a young lesbian from Thokoza, to an effective 30 years in prison. Judge Maumela said a harsh sentence for the 23-year-old would serve as a warning to those who threatened the vulnerable and he told the perpetrator to reconsider his attitude towards gay people while he served his sentence. "Lead your life and let gays and lesbians be," he said.

<sup>318</sup> Act No. 4 of 2000

<sup>319</sup> Act No. 55 of 1998

<sup>320</sup> Act No. 66 of 1995

<sup>321</sup> Act No. 66 of 1995

harassment is addressed under the Employment of Educators Act, 1998<sup>322</sup> and the South African Schools Act, 1996,<sup>323</sup> both of which make sexual harassment a serious misconduct.

104. Our courts have also handed down various ground-breaking judgments on the issue of sexual harassment.<sup>324</sup>
105. In a bid to strengthen the protection of victims of harassment, the Protection from Harassment Act, 2011<sup>325</sup> was passed in Parliament. The Act affords the victims of harassment an effective remedy against harassment. A victim of harassment can approach the magistrates' courts in terms of the Act to obtain a protection order against any person who is harassing them. A person who breaches a protection order may be criminally charged and, if found guilty, held liable to a fine or imprisonment. Harassment in this regard means directly or indirectly engaging in conduct that causes harm or inspires the reasonable belief that harm may be caused to the complainant or a related person by unreasonably—(a) following, watching, pursuing or accosting of the complainant or a related person, or loitering outside of or near the building or place where the complainant or a related person resides, works, carries on business, studies or happens to be; (b) engaging in verbal, electronic or any other communication aimed at the complainant or a related person, by any means, whether or not conversation ensues; or (c) sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant or a related person or leaving it where it will be found by or given to, or brought to the attention of, the complainant or a related person.
106. The process for applying for a protection order is uncomplicated and inexpensive. The clerks of the court are obliged to explain the procedure to all applicants and are trained to assist applicants and guide them through the process.

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<sup>322</sup> Act No. 76 of 1998

<sup>323</sup> Act No. 84 of 1996

<sup>324</sup> In 2003, the Labour Court in Cape Town handed down its judgment in *Ntsabo v Real Security CC (2004) 1 BLLR 58 (LC)*. In this case, the applicant was working for the respondent as a security officer. Her supervisor sexually harassed her on a regular basis. She reported the incidences to the supervisor on numerous occasions and the respondent did not take any action. The Court held that an employer is liable in damages for the sexual harassment of an employee if he fails to investigate allegations of such harassment. Similarly, in *Grobler v Naspers BPK 2004 (4) SA 220 (C)*, it was held that where sexual harassment resulted in a tangible employment action such as employment, dismissal, failure to promote, change in working conditions or a material change in benefits for the person harassed, the employer was liable unless the employer could prove that reasonable care had been taken to prevent or stop sexual harassment and to deal with its impact. Thus, employers are under a duty to take reasonable measures to ensure that women in their employ are protected from sexual harassment.

<sup>325</sup> Act No. 17 of 2011

## ARTICLE 4: THE RIGHT TO LIFE, INTEGRITY AND SECURITY OF THE PERSON

### Protection of Women from violence

107. Sections 11 and 12 read with Section 9 of the Constitution protect every woman's rights to life, freedom and security. The death penalty has been abolished in South Africa and there are number of laws to protect every woman's rights to integrity and security.
108. South Africa has put in place and implemented a comprehensive legislative framework that looks at addressing violence against women and girls in all its manifestations and in its myriad of forms. Priority has been accorded to sexual offences and domestic violence, and considerable attention has been given to crimes such as trafficking in women and children and child pornography. Some specific areas targeted by the law include issues of bail, sentencing, victim empowerment and integrated responses to gender based violence.
109. The legislative framework aimed at combating, preventing, eliminating and eradicating all forms of violence against women includes the following:
- The Criminal Procedure Act, 1997<sup>326</sup>
  - The Criminal Procedure Second Amendment Act, 1995<sup>327</sup> deals with, amongst others, bail guidelines that cover violence against women.
  - The Film and Publications Act, 1996<sup>328</sup> provides for the establishment of the Film and Publication Board whose role includes combating child pornography and the negative stereotyping and representation of women.
  - The Criminal Procedure Second Amendment, 1997<sup>329</sup> tightens bail provisions relating to serious crimes, including violence against women.
  - The Domestic Violence Act, 1998<sup>330</sup> seeks to strengthen protection against domestic violence. The Act broadens the scope of cover of what constitutes domestic relationships and domestic violent actions. It defines violence against women as including in addition to physical violence, other forms such as emotional, economic, threatened violence and stalking. The main strength of the legislation lies in protection orders against perpetrators and the possibility of imprisonment of recidivist offenders.
  - The Promotion of Equality and Prevention of Unfair Discrimination Act, 2000<sup>331</sup> defines discrimination on the ground of gender to include gender-based violence.
  - The Firearms Control Act, 2000<sup>332</sup> enables the State to remove illegally possessed fire arms from society, control supply, possession, storage and transportation and use of firearm and to detect and punish the negligence and criminal use of firearms.

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<sup>326</sup> Act No. 51 of 1997

<sup>327</sup> Act No. 75 of 1995

<sup>328</sup> Act No. 65 of 1996

<sup>329</sup> Act No. 85 of 1997

<sup>330</sup> Act No. 116 of 1998

<sup>331</sup> Act No. 4 of 2000

<sup>332</sup> Act No. 60 of 2000

- The Children's Act, 2005<sup>333</sup> gives effect to certain rights of children as contained in the Constitution and sets out principles relating to the care and protection of children.
- The Older Persons Act, 2006<sup>334</sup> provides for the protection of older person from violence of all forms including from intimate partners, abuse and neglect.
- The Criminal Law (Sentencing) Amendment Act, 2007<sup>335</sup> provides that certain circumstances shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence when a sentence must be imposed in respect of the offence of rape.
- The Criminal law Amendment (Sexual Offences and Related Matters) Act, 2007<sup>336</sup> seeks to protect women and children by, inter alia, criminalizing a wide range of acts of sexual abuse and exploitation. It repeals the common law offence of rape and replaces it with a new expanded statutory offence of rape, applicable to all forms of sexual penetration without consent, irrespective of gender. It also repeals the common law offence of indecent assault and replaces it with a new offence of sexual assault, which contains a wider range of acts of sexual violation without consent. Moreover, the Act targets for punishment sexual predators that prey on children and people with disabilities. It criminalizes sexual exploitation or grooming of children and people with disabilities, exposure or display of child pornography or pornography to children and the creation of child pornography.
- The Protection from Harassment, 2011<sup>337</sup> aims to protect victims of harassment (including sexual harassment), in order to put into effect the right of all people in South Africa to be free from all forms of violence from either public or private sources.
- The Prevention and Combating of Trafficking in Persons Act, 2013<sup>338</sup> protects women and children from trafficking and related unlawful acts. The legislation fulfils the objectives to provide for an offence of trafficking in persons and other offences associated with trafficking in persons to prevent and combat the trafficking in persons within or across the borders of the Republic; to provide for measures to protect and assist victims of trafficking in persons; and to provide for the establishment of the Intersectoral Committee on Prevention and Combating of Trafficking in Persons and the criminalization of practices resulting in forced and early marriages and harmful cultural and traditional practices such as Ukuthwala. It has also the effect of domesticating the UN Protocol to Prevent, Suppress, and Punish Trafficking in Persons.

110. South Africa has adopted an integrated approach to the management of violence against women and children. It has established an Inter-Departmental Management Team (IDMI) which is a multi-disciplinary expert team, established in 2005 to design and implement programmes aimed at addressing gender-based violence. Its programmes were integrated in the objectives of the National Crime Prevention Strategy, which, with evolution of crime approaches, resulted in the adoption of the Justice Crime Prevention Strategy. This strategy has several components, including

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<sup>333</sup> Act No. 38 of 2005

<sup>334</sup> Act No. 13 of 2006

<sup>335</sup> Act No. 38 of 2007

<sup>336</sup> Act No. 32 of 2007

<sup>337</sup> Act No. 17 of 2011

<sup>338</sup> Act No. 7 of 2013

programmes to address sexual violence as a priority, interdepartmental initiatives to improve criminal justice processes, education and awareness programmes, partnership with civil society and victim empowerment.

111. In a bid to integrate gender equality and prioritize the prosecution of crimes committed against women, the Sexual Offences and Community Affairs (SOCA) Unit was established within the National Prosecuting Authority in 1999. SOCA focuses primarily on sexual offences, domestic violence, trafficking in persons, enforcement of child maintenance, managing of young offenders and other issues involving the victimization of women and children. Their role is to formulate policy, build capacity, increase sensitization and provide scientific and functional training of officials who prosecute these crimes. It also facilitates research and training for prosecuting sexual offences, domestic violence and maintenance cases, and managing young offenders; as well as developing and implementing community awareness programmes and plans for the participation of NGOs in these processes and procedures. Since 2008, SOCA has organized an annual Sexual Offences Indaba, a conference that brings together stakeholders that are involved in the prevention and management of sexual offences.
112. Sexual Offences Courts have been created to particularly deal with cases involving sexual offences. The first Sexual Offence Court was introduced in South Africa as an innovative measure to improve the prosecution and adjudication of sexual offences. This was a pilot project aimed at responding to rape cases as well as minimizing secondary trauma experienced by victims within the criminal justice system. The pilot proved a huge success as it maintained a conviction rate of up to 80% over a period of a year.
113. We have recently re-established the sexual offences courts. These dedicated services use intermediaries, audio-visual equipment and specialised training, among other measures. In June 2012, the former Minister of Justice and Constitutional Development established the Ministerial Advisory Committee on Adjudication of Sexual Offences Matters (MATTSO) to investigate the feasibility of re-establishing sexual offences courts (SOC's). The investigation led to the recommendation for the re-establishment of the SOC's, and in Aug 2013, the 1<sup>st</sup> SOC was launched by the former Minister in August 2013. Some **33** regional courts have since been upgraded into sexual offences courtrooms.
114. Our courts have played an instrumental role in fighting violence against women. Court decisions have informed a revision of the legislative and policy framework on gender-based violence such as - In *S v Chapman*<sup>339</sup> the Supreme Court of Appeal (SCA) held that rape constituted "*a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim....*" and that women were entitled to the protection of these rights which were basic to the ethos of the Constitution and to any defensible civilization. The SCA went on to say that "*the courts are under a duty to send a clear message to the accused and to other potential rapists and to the community that we are determined to protect equality, dignity and freedom of all women and we shall have no mercy to those who seek to invade those rights*".

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<sup>339</sup> 1997 (3) SA 341



115. In *S v Jackson*<sup>340</sup> the cautionary rule, an antiquated rule of evidence that encouraged courts to treat the evidence of rape victims with circumspection, was declared unconstitutional, leading to its abolition. In *Masiya v Director of Public Prosecutions Pretoria*<sup>341</sup> the Constitutional Court extended the definition of rape to include non-consensual anal penetration of females, which was until then not apparent in the statutory definition of rape.
116. In *Carmichele v Minister of Safety and Security*<sup>342</sup> the Constitutional Court held that the state is obliged by the Constitution and international law to prevent violence against women and to protect the dignity, freedom and security of women. As such, it upheld a female applicant's application to have the Ministers of Justice and of Safety and Security held liable for her brutal attack by a man who, at the time, was awaiting trial for having attempted to rape another woman and had been released on the recommendation of the investigation officer and prosecutor, despite his history of sexual violence. In another case, *Van Eeden v Minister of Safety and Security*<sup>343</sup> the Supreme Court of Appeal upheld an appeal by a young woman who sought damages from the state following her sexual assault, rape and robbery by a known dangerous criminal who had escaped from police custody. The Court held that the state had a duty of care to victims of sexual violence in particular and of violent crime in general.
117. The effectiveness of the legislation and policies have been seen in landmark court decisions in the examples of sentencing handed down for prosecutions of sexual offences, for example:

- i) The matter of the **State versus Kili**, involved the rape and killing of a 48 year old woman from Lesseyton, Queenstown in her home during the day. The deceased's boyfriend had left their home to go to his parental homestead, when the accused accosted her. He raped her and cut her throat. The Judge handed down a **life sentence** on the murder count and ten years on the rape and refused leave to appeal.
- ii) In **State versus Nofemele** the accused abducted and raped twelve children between the ages of two and eight years. He also killed one of the little girls. The accused was convicted of 12 counts of rape, 12 counts of abduction and one count of murder. The Western Cape High Court sentenced him to **11 life sentences** and ten years for abduction.
- iii) In the matter of the **State versus Rodolo** which stems from Kenton-on-Sea, the accused went on a rampage during the course of one night, first breaking into the house of the deceased to rob and kill him and thereafter breaking into the house of an elderly female whom he held up at knife point and raped. The accused was arrested in possession of the deceased's cell phone and this was the only evidence linking him to the murder scene. The accused was given a **life sentence** on the murder trial and a further 22 years effectively on the other charges.

<sup>340</sup> 1998 (1) SALR 470 SCA

<sup>341</sup> 2007 (5) SA 30 (CC)

<sup>342</sup> 2001 (4) SA 938 (CC)

<sup>343</sup> 2003 (1) SA (389)(SCA)

- iv) The South Gauteng High Court convicted and sentenced the accused in the matter of **State versus Rikhotso**. The accused was convicted of multiple charges of kidnapping, rape, and robbery. During a reign of terror in the Soweto area, 12 victims were raped. The accused was subsequently sentenced to **17 life sentences** and an additional 161 years imprisonment, to run concurrently.
- v) The much publicised trial of the so-called "**Sunday Rapist**", Jacobus Steyn, commenced in the South Gauteng High Court during July 2012. On 19 September 2012 the accused was convicted and sentenced to **five terms of life imprisonment, and a further 170 years imprisonment**.
- vi) In **State versus LL Gagu**, the accused was charged with seven counts of rape, one count of sexual grooming and three counts of exposing children to pornography. The complainants were aged between 10 and 15 years and were young girls who attended a dance school operated by the accused. The accused was convicted of sexual grooming and exposing children to harmful pornography. He was sentenced to four years imprisonment on the sexual grooming count and to five years imprisonment for each count of exposure to pornography. These sentences will run concurrently with the **three life sentences** imposed by the Western Cape High Court in respect of the seven rape convictions.

## Domestic violence

118. Domestic violence is one of the prominent forms of violence against women in South Africa. In response to this vice, the Domestic Violence Act, 1998<sup>344</sup> was enacted to afford the victims of domestic violence the maximum protection from domestic abuse that the law can provide. The Act defines domestic violence in broad terms to include physical, sexual, emotional, verbal and psychological abuse, economic abuse, intimidation, harassment, stalking, damage to property, entry into the complainant's residence without consent, where the parties do not share the same residence, and any other controlling or abusive behaviour where such conduct harms or may cause imminent harm to the safety, health or wellbeing of the complainant. The Act applies to a range of relationships and covers both heterosexual and same sex relationships.
119. The Act imposes a range of duties on police officers in relation to the protection of victims of domestic violence. Failure to comply with these duties constitutes misconduct and the South African Police Service's National Commissioner is required to submit six-monthly reports to Parliament on the extent of compliance with these statutory obligations by the police and the disciplinary action taken against non-compliance. Police failure to discharge these duties should also be reported to the Independent Police Investigative Directorate (IPID).
120. The courts play a significant role in addressing domestic violence in South Africa. The Act provides that a victim of domestic violence may apply for a protection order to, *inter alia*, stop the abuse and to stop the abuser from entering the mutual home, the victim's residence, or the victim's place of employment. The courts have handed down landmark decisions on matters pertaining to

<sup>344</sup> Act No. 116 of 1998

domestic violence. In *S v Ferreira*<sup>345</sup> the Supreme Court of Appeal acknowledged the grim complexities of abused women's choices and grappled with how this needed to be incorporated into legal decision-making. The Court reduced the sentence of the accused who had hired killers to murder her domestic partner after enduring years of abuse from the partner. In *S v Baloyi*<sup>346</sup> the Constitutional Court declined to declare unconstitutional the reverse onus of proving absence of guilt on a person charged with breach of a family violence interdict.

121. In 2008, government developed and launched a set of guidelines for handling domestic violence cases called the *Guidelines for the Implementation of the Domestic Violence Act for Magistrates*. The compilation of these guidelines was undertaken by the Family and Gender Service Delivery Task Team, a sub-committee of the Lower Court Management Committee (LCMC). The LCMC is a forum comprising of all Regional Court Presidents and Chief Magistrates in South Africa. The guidelines have been circulated widely. In 2009, a review of the implementation of the Domestic Violence Act, 1998<sup>347</sup> was finalised.
122. Government, in conjunction with the National Prosecuting Authority (NPA), has also been running the Ndabezitha<sup>348</sup> Project, which seeks to train traditional leaders and court clerks on domestic violence matters in rural areas. The Government has also been running awareness campaigns (through the media, booklets, pamphlets, etc) aimed at sensitising the public on domestic violence services. The SAPS has also been conducting public education campaigns, with a focus on domestic violence, under its Social Crime Prevention Programme.
123. Early in November 2013, forms prescribed by Regulations for the Domestic Violence Act have been translated into all 11 official languages, and distributed to all lower courts in the country. This is to ensure greater language accessibility, less dependency of applicants on the court staff, and ultimately less queues in courts.
124. Electronic forms and systems have been developed and approved to be piloted at two Magistrates' Courts after which they will be rolled out to all Magistrates' Courts' service points in order to improve handling of domestic violence cases. Government is also in the process of developing a booklet called "No More Violence" which is aimed at teaching the role-players at service points, as well as victims, how to manage and improve in alleviating domestic violence matters and the impact of such crimes.
125. As part of commemorating the 16 Days of Activism for No Violence against Women and Children, a Domestic Violence Safety Plan booklet was launched in November 2013 as part of government's endeavours to empower victims of violence. The Safety Plan is a ground-breaking preventative initiative which seeks to assist victims to enhance their safety and that of their families against domestic violence. It is also aimed at encouraging victims to plan for their safety whilst leaving an abusive relationship.

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<sup>345</sup> (2004) ZASCA 29

<sup>346</sup> 2000 (2) SA 425 CC

<sup>347</sup> Act No. 116 of 1998

<sup>348</sup> Ndabezitha means "Your Highness"- a term used when Zulu and other Nguni tribes want to acknowledge respect to an Nguni royal

126. Government facilitated the establishment of shelters for abused women in South Africa and developed a Shelter Strategy that served as a guideline for service providers rendering services to abused women. Ninety seven (97) shelters have been established in South Africa. Minimum standards for service delivery in shelters were also developed to standardise services in shelters. Furthermore, there is a programme which has been conceptualised as “white and green door” safe houses. These are shelters provided by ordinary people, approved and funded by government, to serve as shelters for women and children who are victims of violence and abuse. At this stage the programme is being rolled out in the province of Gauteng and the Eastern Cape, and rollouts to other provinces are under way.
127. Some studies conducted on domestic violence in South Africa have concluded that statistics estimating the prevalence of domestic violence are likely to be under-inclusive since acts of domestic violence are often not reported. There are several factors that contribute to domestic violence, such as poverty and the subsequent stress,<sup>349</sup> alcohol use,<sup>350</sup> and a history of violence.<sup>351</sup> The risk factors of being a victim of domestic violence include violence in childhood<sup>352</sup> and conflict over alcohol use.<sup>353</sup>

### **Stereotyping and prejudice**

128. South Africa is cognisant that gender-based stereotyping and prejudice is rooted in the gender discourses of masculinity and femininity with concomitant prescribed behaviours, norms and attitudes that ultimately lead to discrimination and gender-based violence. It is an articulation of, or an enforcement of, power hierarchies and structural inequalities that are informed by belief systems, cultural norms and socialization processes.
129. Violence could take the form of trafficking in women and girls for sex trade, forced prostitution, domestic and forced labour and sex tourism. Although violence is a traumatic experience for any human being, gender-based violence is preponderantly inflicted by men on women and girls, including other vulnerable people – such as people with disabilities, children and the elderly. It both reflects and reinforces inequalities between men and women and compromises the health, dignity, security and autonomy of its victims and survivors.

### **Statistics on violence against women**

130. Women with abusive and controlling partners are at increased risk of contracting HIV and other sexually transmitted diseases due to an inability to negotiate safe sex or condom use. A survey conducted among 1366 South African women showed that women who were beaten by their partners were 48% more likely to be infected with HIV than those who were not, and those women living in abusive relationships were often unable to seek voluntary testing and counselling services

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<sup>349</sup> R Jewkes (2002) *‘Intimate Partner Violence: Causes and Prevention’* Lancet 359 1423 at 1424.

<sup>350</sup> R Jewkes op cit. note 3 at 1425.

<sup>351</sup> Ibid

<sup>352</sup> Jewkes, R, Levin J & Penn-Kekana, L at 1612.

<sup>353</sup> Ibid at 161

as they risk long term ill health if they are unable to disclose their HIV status to their abusive partner, or seek or comply with medical treatment.<sup>354</sup>

131. Statistics for rape incidents in the country show that for the period 2009-2012, per 100 000 of the population, there was a decrease by 2.9 percentage points over a three year period, with a 3.7 percentage point decrease recorded for 2011-2012. This category includes rape, compelled rape, and acts of consensual sexual penetration with certain children (12-16 years). For every 100 000 people in South Africa, there were 94.9 reported cases of rape for 2011-12. **Table 5** below shows the number of female adult victims' (adult women 18 years and older) selected contact reported crime figures.<sup>355</sup>

**Table 5: Female adult victims of selected contact crimes**

<b>Crime Category</b>	<b>2006/7</b>	<b>2007/8</b>	<b>2008/9</b>	<b>2009/10</b>	<b>2010/11</b>	<b>2011/12</b>	<b>% decrease</b>
Murder	2602	2544	2436	2457	2594	2286	-11.9
Attempted murder	3362	3016	2966	3008	2842	2416	-15
All sexual offences	34 816	31 328	30 124	36 093	35 820	31 299	-12.6
Common assault	100 390	94 286	91 390	94 176	89 956	87 191	-3.1
Assault GBH	69 132	64 084	61 509	62 143	60 630	57 345	-5.4
<b>Total</b>	<b>210 302</b>	<b>195 258</b>	<b>188 425</b>	<b>197 871</b>	<b>191 842</b>	<b>180 537</b>	<b>-5.9</b>

132. The table above highlights that the greatest number of reported cases by adult women is common assault, followed by assault with grievous bodily harm (GBH), and all sexual offences. The Crime Report does not provide for disaggregated data in terms of domestic violence such that it stands to reason that common assault is high because cases of domestic violence reported to the police is being recorded under this category and assault with GBH.
133. Assault and sexual offences are difficult to capture in any household survey conducted because of their sensitivity, and as a result they are normally under-reported. The Victims of Crime Survey results show that most perpetrators were known people from areas other than the area of residence of the victim (selected individuals). Nearly a third (29.9%) of the victims of assault were

<sup>354</sup> DWCPD: Draft Concept Document for the Establishment of the National Council Against Gender-Based Violence, 2012

<sup>355</sup> South African Police Service Crime Report: 2010/11-2011/12

attacked by a known community member in their area, their spouse or partner (20.9%), while only 10.5% stated that the perpetrator(s) was an unknown community member. When it comes to sexual offences, 38, 4% of victims were victimized by a known community member(s) in the area of residence.<sup>356</sup>

134. In 2010, most incidents of assault (35.7%) occurred at home, while 18.6% occurred in the streets outside offices/shops. A third (33,6%) of sexual offences (including sexual assault, rape and domestic sexual abuse) occurred in a field or in parks, followed by 29,8% that took place at home. It was recorded that 18.5% of sexual offences took place at someone else's home. One fifth (20,6%) of the victims who were assaulted thought that the motive was jealousy; a further 17.4% thought money or other financial motives or sudden personal anger motivated the assault, whilst 12.1% asserted that they were assaulted because of long-term personal anger. Other motives mentioned by a negligible proportion of victims were attempted rape, racial, ethnic or political motivation that led to the assault, and outstanding debt. More than 90% of the perpetrators of sexual offences used physical force, followed by using a gun (31.5%) and a knife (24.5%).

135. **Table 6: Gender and Age Distribution: Selected Contact Reported Crime Figures – 2011/12.**<sup>357</sup>

Crime	Children		Adult Women		Adult Men		Total
	No	%	No	%	No	%	No
Murder	793	5.1	2286	14.6	12 530	80.3	15 609
Attempted Murder	758	5.1	2416	16.3	11 685	78.6	14 859
Assault GBH	10 630	5.5	57 345	29.8	124 676	64	192 651
Common Assault	12 645	7	87 191	48	81 834	45	181 670
Sexual Offences	25 862	40.1	31 299	48.5	7353	11.4	64 514
<b>Total</b>	<b>50 688</b>	<b>10.8</b>	<b>180 537</b>	<b>38.5</b>	<b>238 078</b>	<b>50.7</b>	<b>4693</b>

136. The table above shows that while for men there are more reported incidences of murder, attempted murder and assault with GBH, for women and children sexual offences are the leading crimes reported, with that for women being the highest incident rates.

<sup>356</sup> Statistics – SA Victims of Crime Survey (2011)

<sup>357</sup> South African Police Service Crime Report: 2010/11-2011/12

### **Measures to prevent and eliminate violence against women**

137. The National Prosecuting Authority highlights that in 2010/2011 there was an increase in capacitation of prosecutors with a total of 180 prosecutors trained on the comprehensive manual on maintenance matters in line with the Maintenance Act, 349 prosecutors were trained on the Child Justice Act, 102 prosecutors on integrated Domestic Violence Skills manual training and 79 prosecutors were trained on human trafficking related subjects.
138. In order to capacitate police officers in handling of sexual offences, 1 117 police officers were trained in the Sexual Offences First Responders course during 2010/11 aimed at first responders to sexual offences, which include community service centre personnel, emergency police service personnel and detectives. There are currently 803 police stations in 9 provinces with victim support rooms. Victim Support Rooms are rooms at police stations that police officers are using for interviews, statement taking and consultations with victims of sexual offences, child abuse and domestic violence. There are currently 90 Victim Support Rooms. Furthermore, there are 163 Family and Child Protection units re-established and fully operational across the country in the South African Police Service.
139. In line with the provisions of Section 234 of the Constitution, a Service Charter for Victims of Crime in South Africa (known as the Victims Charter) was developed in 2007 to ensure that victims remain central to the justice process in South Africa, to eliminate secondary victimization, to clarify the standard of service to be accorded to victims and to provide for recourse when these standards are not met.
140. By October 2009, at least 6 provinces had One-Stop Service Centres of Abuse in South Africa and currently, there are overall 109 shelters throughout the country accommodating and rendering psychosocial services to women and their dependent children who are victims of abuse. These are Government funded facilities with a shelter associated with it and the Minimum Standards for Shelters for Abused Women are developed by the Department of Social Development. During 2010, 13 of the existing shelters were strengthened to accommodate victims of human trafficking.

### **Public educational material and measures**

141. Government has rolled out initiatives and campaigns that seek to dismantle sex stereotypes. The National Education Curriculum has particularly been reviewed to eliminate gender stereotyping and other forms of bias and discrimination. In this regard, a Manifesto on Values, Education and Democracy was released in 2000. The Manifesto contains strategies designed to promote the values of democracy, equity, non-racism, non-sexism, human dignity, accountability, the rule of law, respect and reconciliation.
142. Other strategies employed to address gender stereotyping include the 16 Days Activism Campaign and the 365-Day National Action Plan, launched in 1997, against gender-based violence. Awareness campaigns have been conducted particularly through the media. To sensitise society on the prevention and stemming of sexual violence, South Africa launched, in 1999, the 16 Days

of Activism Campaign to End Violence against Women and Children; it also represents an annual campaign to address the scourge. This campaign has been run successfully on an annual basis, increasing yearly in the number of people that it is able to reach. The campaign includes road shows to farm dwellers and fundraising activities. The fundraising is done for the benefit of civil society organizations that provide services to women victim of violence. Various organizations across the country have been assisted through fundraising to build community centres and shelters for abused women and children. Inclusion of men as partners in the campaign has been important. In 2007, the 365-Day Action Plan to end Gender Violence was launched to ensure that sensitisation of the society on gender based violence runs throughout the year.

143. The country is scaling up the prevention of violence against women programmes through awareness raising and advocacy with different stakeholders including business, religious based organizations and parliamentarians. One such campaign identified the 2014 launch of social media campaign titled "Count me in: Together moving a non-violent South Africa Forward". Government in partnership with CrimeLine activated the #365 Days of no violence against women in 2014. In addition the 2014 Activism Campaign on 16 Days of No Violence against Women and Children focused primarily on reaching out to men and boys to become active partners in fighting the scourge of gender based violence in the country as well as to play a role in advancing women's empowerment and gender equality.
144. The Commission on Gender Equality and the South African Human Rights Commission have equally been involved in educational programmes that seek to combat sex stereotyping through public education and material production.
145. The courts have also played a critical role in transforming societal beliefs and attitudes through some of their landmark decisions that have fundamentally changed customary and religious practices that violate women's rights.
146. Civil society plays a fundamentally important role in raising awareness, advocating and educating on the rights of women and the fight against gender based violence. For example, since 2003, activists have been spearheading a focus on the lives of black lesbians, living in working-class and poor neighbourhoods. A campaign called "The Rose has Thorns" was started - this looks at chronicling the lives of black, lesbian women, mostly in Alexandra township, and provided on-going legal and social support to those who had been raped and assaulted. There was also the One-in-Nine campaign, a campaign designed to advocate against misogyny and homophobia. In 2005, Sonke Gender Justice, an NGO, addressed how the role of men and boys is critical in advancing women and started the One Man Can campaign.

### **Support to victims of violence**

147. An important component of South Africa's response to sexual violence is the support offered to the victims of such crimes. In this regard, the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007<sup>358</sup> establishes the legal framework for the adequate and effective protection of victims of sexual violence.

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<sup>358</sup> Act No. 32 of 2007



148. In terms of the Act, victims of sexual offences are entitled to Post Exposure Prophylaxis (PEP). They are also entitled to apply for an order that the alleged offender be tested for HIV and that the results thereof be disclosed to the victim. The Domestic Violence Act, 1998<sup>359</sup> imposes a duty on the SAPS to render such assistance as may be required by victims of domestic violence. Such assistance may include finding suitable shelter and obtaining medical treatment for victims. The IPID is mandated to monitor whether members of the SAPS discharge this duty as required by law.
149. In order to implement the provisions of the various pieces of legislation on victim protection, South Africa adopted, in 2009, the National Policy Guidelines for Victim Empowerment. The priority target groups for victim empowerment under the Policy Guidelines include women, victims of domestic violence, victims of sexual assault and rape, victims of human trafficking, and abused children. In this regard, it seeks to ensure sound inter-departmental and inter-sectoral collaboration and the integration of effective institutional arrangements for a multi-pronged approach in managing victim empowerment. The Policy Guidelines are based on the concept of restorative justice which revolves around the promotion of a victim-centred approach to criminal justice.
150. The National Policy Guidelines for Victim Empowerment complement the National Policy Guidelines for the Handling of Victims of Sexual Offences adopted in 1998 and the Service Charter for Victims of Crime (Victims Charter) in South Africa adopted in 2004. Pursuant to the Victims Charter, victims of crime are entitled to the following rights at a minimum: the right to be treated with fairness and with respect for dignity and privacy; the right to offer information; the right to receive information; the right to protection; the right to assistance; the right to compensation; and the right to restitution. Training on the Victims Charter has been on-going since its adoption.
151. South Africa, under the auspices of the National Prosecuting Authority's Sexual Offences and Community Affairs Unit, established Thuthuzela Care Centres (TTCs) for rape victims and victims of sexual and domestic violence. These centres, which are 24-hour one-stop centres assist victims of sexual offences by offering a victim-friendly environment that helps eliminate secondary victimization. At these centres rape victims have access to all services such as the police, counselling, doctors, court preparation and prosecution.
152. The number of TTCs in the country has increased from 10 in 2007-2008, 17 in 2008-2009, 28 in 2009-2010, and about 35 fully operational sites during 2012 -2013 year. **Table 7** below indicates the activities of the TTCs over a period of four financial years.

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<sup>359</sup> Act No. 116 of 1998

**Table 7: Activities of TCCs 2008/2009- 2011/2012 financial years**

Year	2008/2009	2009/2010	2010/2011	2011/2012
Matters reported at TCC site	10 213	13 756	20 496	28 557
Cases received at court	2 912	6410	9 716	10 949
Cases finalized	596	1 088	1 761	2 180
% of conviction rate	61.2	64.45	63	60.7

153. Since these centres were established, the process of reporting and prosecuting sexual offences has improved remarkably. Secondary trauma to victims of sexual offences has also been reduced significantly. In 2011, the UN Secretary-General, Mr. Ban Ki Moon, recognized the Thuthuzela model as a world best practice model in the field of gender violence management and response.
154. In the 2013/14 financial year, at the 51 TCCs providing services, a total number of 30 706 matters were reported of which 2769 are trafficking, domestic violence or Children's Act matters; the remaining number of 27 947 were sexual offences related.
155. For the same financial year, the National Prosecuting Authority produced an average conviction rate for TCC-cases of 65.9 percent, which was the best conviction rate over a period of 5 years. Of the 2357 cases finalised with a verdict, 1554 (65.9%) resulted in a conviction. This is also an improvement of 13.3% compared to the 2012/13 financial year. During the 2013/14 financial year the TCC-cases per accused and per offence, which resulted in convictions included amongst others 151 sentences of life imprisonment, 132 sentences of 20-25 years imprisonment and 455 sentences of between 10 and less than 20 years imprisonment.
156. Thuthuzela's integrated approach to rape care is one of respect, comfort, restoring dignity and ensuring justice for victims of sexual violence. The management of TCC-model and roll-out falls within the responsibility of the NPA. The success of it is based upon effective and efficient stakeholder cooperation such as between the Departments of Justice, Health, Education, Treasury, Correctional Services, Social Development, the SAPS and designated civil society organisations.
157. The TCC-model is specifically focussed on being victim-friendly and court directed with prosecutor-guided investigations and stakeholder cooperation. The ultimate goal is to minimise secondary victimization, reduce the cycle period for the finalisation of cases and to increase the conviction rates of these cases. When reporting a crime, the victim is removed from an environment such as a police station, to a more victim-friendly environment before being transported by police or an ambulance to the Thuthuzela Care Centre at the hospital. The person also receives crisis counseling. If the medical examination happens within 72 hours of the incident, post-exposure prophylaxis is given. The investigating officer on call at the center will take the person's statement. The person will receive appropriate medication and is given a follow-up date for further medical treatment, before being transported home or a place of safety. A referral letter will be given or an appointment made for long-term counseling.

158. Before the trial, as part of the TCC-model, a case manager will oversee the prosecutor-guided investigation and will ensure that the case is trial and court ready. The case manager is a legally qualified official with specific additional expertise in dealing with gender-based violence matters.
159. With regards to the trial, consultations with a specialist prosecutor will take place before the case goes to court and court preparation by a victim-assistant officer will be undertaken. The person must also be given an explanation of the possible outcome and regular updates of the trial process by the case manager. The Thuthuzela model is an outstanding example of interdepartmental cooperation.
160. The Court Preparation Programme is a realistic and practical programme aimed at preparing witnesses to effectively testify in court. In order to attain this aim, Court Preparation Officers have to be equipped to identify and address the individual needs of witnesses. Witnesses are informed of the court environment, legal processes and legal terms. The fears and concerns of witnesses about testifying are addressed and the programme aims to reduce secondary victimisation. The witness is provided with skills and information to cope with the stress of giving evidence through the use of a specific model. Furthermore, the merits of the case are not discussed during the court preparation process.
161. Ke Bona Lesedi, which means "I see the light", is a court preparation programme designed to address fears and concerns of child witnesses going to court. It is intended to contribute towards the effective implementation of the Criminal Law (Sexual Offences and Related Matters) Amendment Act<sup>360</sup> and to assist prosecutors to have effective, non-traumatised and credible witnesses. The programme contributes towards successful convictions and a reduction in the withdrawal of cases.
162. In a bid to sensitize society on the rights of victims, South Africa launched the Victims' Rights Week in September 2010. During this week, which is held annually in September, government departments within the criminal justice system, coordinated by the Department of Social Development, seek to raise public awareness about victim rights. The public are provided with information about what interventions and services are provided by government departments to victims of crime. In addition to providing information, the week provides government departments with an opportunity to respond to issues faced by the public and crime victims, in a coordinated manner.

## ARTICLE 5: ELIMINATION OF HARMFUL PRACTICES

163. Harmful practices, which negatively affect the fundamental rights of women and girls, are expressly prohibited in South Africa. In this regard, the Equality Act, Section 8 (d), stipulates that unfair discrimination on the ground of gender includes *"any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality*

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<sup>360</sup> Act No. 32 of 2007

*between women and men, including the undermining of the dignity and well-being of the girl child.”*

164. “Ukuthwala” is a form of abduction that involves kidnapping a girl or a young woman by a man and his friends or peers with the intention of compelling the girl or young woman’s family to endorse marriage negotiations. Ukuthwala was traditionally intended for people of the same age group who, in the normal course of events, would have been expected to marry each other and never intended to apply to minor children. However, forced marriage of girls as young as 12 to adult men, is still practiced in some remote villages in in the country. In most circumstances, victims maintain silent acceptance and tolerance of the practice. The Commission for Gender Equality commissioned a study on *“Ukuthwala in KwaZulu-Natal: an investigation into state prevention and responses”* in 2012. The CGE in its concluding remarks commended the Office of the Premier for initiating research into the extent of harmful traditional practices in the province, as well as the Department of Social Development’s outreach and awareness interventions, including their response to individual cases and support for victims of Ukuthwala. The CGE also acknowledged the positive measures put in place by the Department of Education and commend Provincial Cabinet Leadership for its endeavours in calling for collaboration between departments and civil society organizations to support children at risk.
165. In February 2012 a man was brought before the Wynberg Regional Court, in the Western Cape, and charged with rape, human trafficking and assault because of an ukuthwala kidnapping. This case was finalized early 2014 where it recognised this practice as harmful to women and young girls, including trafficking and rape of the minor girl. The 22 year sentence handed down shows that the country will no longer tolerate such adverse practices that violent women’s rights and dignity.
166. Other cultural practices include virginity testing and the practice of female genital mutilation amongst certain populations. The approach that is adopted is an overarching advocacy strategy, awareness raising, rights education and awareness of legal measures that can be taken. The strategy also incorporates an investigative element to determine the extent of the problem. The South African Law Reform Commission has been requested to investigate and recommend advice on legislation that will prohibit these practices.
167. Female genital mutilation and virginity testing is expressly prohibited and regarded as a form of gender discrimination in South Africa. The relevant legislation in this regard is the Equality Act, 2000<sup>361</sup> and the Children’s Act, 2005.<sup>362</sup> The Children’s Act, 2005 prohibits virginity testing of children under the age of 16. A child older than 16 may undergo virginity testing on three conditions: (a) she has given consent to the testing in the prescribed manner; (b) after she has been properly counselled; and the testing is conducted in the manner prescribed. The results of virginity testing may not be disclosed without the consent of the child. In addition, the body of the child who has undergone virginity testing may not be marked.

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<sup>361</sup> Act No. 4 of 2000

<sup>362</sup> Act No. 38 of 2005

168. South Africa's efforts to curb female genital mutilation and virginity testing are impaired by the lack of empirical information on their prevalence. Moreover, these practices are culturally ingrained and as such, they are difficult to root out. In most circumstances, victims maintain silent acceptance and tolerance of the practices.

### **Trafficking in women and girls**

169. South Africa fully recognises the existence of human trafficking and smuggling activities. These crimes are mostly perpetuated by transnational syndicates, hence the calls from many states for regional and international cooperation as well as the introduction of aligned legislation and immigration procedures.
170. It is clear that although there are overlaps between the two issues of smuggling of migrants and human trafficking, they remain worldwide multi-dimensional social phenomena that are growing daily and that no country, developed or developing, has managed to escape. These phenomena are perpetuated by socio-economic challenges facing populations which make them vulnerable to recruitment as well as the exploitative use of individuals, whether in forced labour or the commercial sex industry. They are also lucrative global criminal enterprises causing severe hardship to the poor and the vulnerable.
171. South Africa, as a source, transit route and final destination, is aware of the growing trends in trafficking in women. In recognition of the grave consequences of this phenomenon, as already indicated above, there is legislation for the prevention, combating and punishment of trafficking in persons. The Prevention and Combating of Trafficking in Persons Act, 2013 was put into operation in August 2015. Prior to the putting into operation of the Act, South Africa relied on several pieces of legislation to address the problem of trafficking in persons including the Sexual Offences Act, 2007,<sup>363</sup> Prevention of Organized Crime Act, 1998<sup>364</sup> and the Children's Act, 2005.<sup>365</sup> Part 6 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007<sup>366</sup> contains transitional provisions relating to trafficking in persons for sexual purposes. Similarly, chapter 18 of the Children's Act, 2005<sup>367</sup> addresses the phenomenon of child trafficking. The Act prohibits trafficking in children and any behaviour that facilitates such crime, whether committed by a natural or juristic person. It attributes a vicarious liability on an employer or principal whose employee or agent commits trafficking in children within the scope of his employment, apparent authority or with the express or implied consent of a director, member or partner of the employer or principal. The Act also provides for the mechanism of assisting victims of child trafficking. It requires the Department of International Relations and Cooperation to assist in the return into South Africa of child victims of trafficking who are South Africans and the repatriation of child victims of trafficking found within South Africa but are not South Africans.

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<sup>363</sup> Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007

<sup>364</sup> Act No. 121 of 1998

<sup>365</sup> Act No. 38 of 2005

<sup>366</sup> Act No. 32 of 2007

<sup>367</sup> Act No. 38 of 2005

172. As mentioned above, comprehensive legislation addressing trafficking in persons has been passed. To give effect to South Africa's obligation to the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Person, especially women and children, South Africa has now promulgated the Prevention and Combating of Trafficking in Persons Act, 2013.<sup>368</sup> The Act deals comprehensively with human trafficking in all its various forms and in particular provides for the protection of and assistance to victims of trafficking. Persons engaged with trafficking will be liable on conviction to a severe fine or imprisonment, including imprisonment for life, or such imprisonment without the option of a fine or both.
173. Extra-territorial jurisdiction is an important feature of the Act and South African courts will have jurisdiction in respect of acts committed outside South Africa if those acts would have been an offence under the Act had they been committed in South Africa. The Act also enables the state to prosecute traffickers and confiscate their assets. In addition, it will provide mechanisms to the Department of Social Development in the eradication of "latter-day" slavery.
174. The Act further provides for social service professionals to play a role in the reporting, identification and assessment of a person who is a victim of trafficking. Once this is confirmed the victim is entitled to be placed under an approved programme and child victims are to be placed in temporary safe care. Such programmes will offer accommodation, counselling and rehabilitation services as well as aim to reintegrate the victim back into their families and communities. The programme also offers education and skills development training for adults. Child victims of trafficking will fall under all the protective measures of the Children's Act, whilst organisations that provide services to adult victims must be accredited and must comply with certain norms and standards and must offer specific programmes to victims of trafficking. A set of guidelines have furthermore been developed to ensure that minimum norms and standards are in place when dealing with child and adult victims of trafficking. This will ensure the treatment of victims of trafficking with the dignity as enshrined in the Constitution.
175. The Act also provides for the establishment of the Inter-sectoral Committee on Prevention and Combating of Trafficking in Persons.

### **Measures to protect women most at risk to this form of violence**

176. Institutionally, South Africa has established a multi-sector alliance to combat trafficking. The alliance draws membership from government departments and relevant agencies, the IOM, NGOs both national and international and various UN and identified foreign missions in South Africa. A Trafficking in Persons Inter-sectoral Task Team has also been established. The Task Team has formulated a strategy to effectively address trafficking in persons. Elements of this strategy include – information sharing, capacity building and development; victim assistance and integration; policy and legislation development; liaison and consultation; and monitoring and evaluation.

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<sup>368</sup> Act No. 7 of 2013

177. The “Tsireledzani programme”,<sup>369</sup> which means “Let us protect each other” in Tshi-Venda - one of the country’s official languages, is the name given to the initiative to combat trafficking in persons and to comply with international commitments. The programme was initiated in 2007, and relied on the input of a wide range of partners both within Government, civil society and international partners.
178. The “Tsireledzani Programme” consists of various pillars of which the International Organization for Migration (IOM) was responsible for the area that focused on capacity building and its aim was to provide government officials with the necessary skills to adequately identify and respond to incidences of both, internal and international, trafficking in persons in South Africa. The IOM provided technical capacity building support through a designed, developed and tested curricular/ training modules tailored to selected government departments. The training modules are accredited by the South African Qualifications Authority (SAQA). As part of the Tsireledzani programme, the IOM also compiled a ‘Handbook on Counter-Trafficking for South African Government and Civil Society’. South Africa has signed a 3-year funding agreement with the European Union in June 2006 to support the implementation of this strategy.
179. In the law enforcement sector, the National Prosecuting Authority’s SOCA Unit is responsible for the prosecution of persons accused of human trafficking. In anticipation of the legislation being passed the National Prosecuting Authority (SOCA Unit) in December 2012 established a Trafficking in Persons Task Team. The Task Team has since developed comprehensive policy directives, annexures to charge sheets, training manuals and data collection tools. The NPA has also during the 2013/14 financial year conducted 10 training sessions for prosecutors; which were attended by 193 prosecutors. During the 2014/15 financial year they conducted a further 6 training sessions; attended by 109 prosecutors. They have also trained police investigators on the new legislation, with 30 SAPS (Hawks) TIP co-ordinators attending the training.
180. The South African government increased its efforts to ensure that trafficked victims had access to protective services. Government has accredited 13 multi-purpose shelters in 2011 to host trafficked victims and trained personnel to assist trafficked victims. These shelters provided services to 59 trafficking victims referred by government – the only body authorized by judicial authorities to refer crime victims to private shelters. Government identified 22 additional shelters that could potentially care for trafficking victims and began their assessment for accreditation. It also began provision of a nine-week rehabilitation program to address the psycho-social well-being of trafficked victims in the care of these shelters.

### **Measures for prosecution of perpetrators of trafficking**

181. In recognition of the fact that human trafficking is a transnational crime, South Africa has ratified international and regional instruments that facilitate trans-national collaborative measures aimed at combating trafficking in women and children. These instruments are: the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; and the UN Convention against Trans-national Organized Crime. South Africa is also in the process of

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<sup>369</sup> This Programme, initiated by the National Prosecuting Authority, was funded by the European Union and started in 2007. It ran until the end of 2011 after which the South African government continued the anti-trafficking efforts with its partners (Input from the National Prosecuting Authority, January 2015)

concluding memoranda of understanding on cooperation to combat trafficking in persons and assisting victims of trafficking with the following countries: Angola, Brazil, Indonesia, Malaysia, Mozambique, Nigeria, and Thailand.

182. In the UNDOS GTIP *Report 2012: Forced Labour Prevails*, it is reported that South Africa is a source, transit, and destination country for men, women, and children subjected to forced labour and sex trafficking. Children are trafficked mainly within the country, from poor rural areas to urban centres such as Johannesburg, Cape Town, Durban, and Bloemfontein. Girls are subjected to sex trafficking and domestic servitude; boys are forced to work in street vending, food service, begging, criminal activities, and agriculture.
183. Government is demonstrating increased efforts to address human trafficking through conviction of offenders. Our courts have also handed down severe sentences in trafficking cases. For example, in *S v Aldina Dos Santos* a sentence of life imprisonment for trafficking in persons for sexual exploitation of children was handed down in 2011. In *S v Jezile* the accused was sentenced to 20 years in January 2014 for trafficking for sexually exploiting a child. The full bench on appeal confirmed the conviction and sentence. And there are many other cases.<sup>370</sup>
184. In February 2012 a successful raid on a brothel led to the rescue of 16 females – including eight children, some as young as 13 – and the arrest of four offenders with sex trafficking and drug and prostitution offenses. In October 2011, Western Cape police arrested two police officers and one additional suspect in Nelspoort for the alleged sex trafficking of South African girls between the ages of 12 and 15.
185. The NPA's SOCA unit seeks to implement best practices and policies in the area of human trafficking cases. SOCA seeks to achieve improved conviction rates, to actively protect vulnerable groups and reduce secondary victimisation. SOCA continued to lead anti-trafficking efforts through its six provincial task teams, which enabled police, prosecutors, and NGO staff to work together to investigate potential cases. Between April and December 2011, the NPA trained 116 prosecutors on the use of existing legislation to prosecute trafficking cases. In December 2011, the Department of Home Affairs provided training on trafficking and the identification of victims to 350 officers from the South African National Defence Forces, who assumed the role of immigration management at all South African airports. Foreign embassies in South Africa reported that when they reported cases of abuse of their nationals to law enforcement, both police and prosecution authorities responding seriously by vigorously investigating the allegations, though this varied from one province to another.
186. In 2014/15 six training sessions on trafficking in persons, attended by 104 prosecutors, were conducted. The SOCA unit participated in the roundtable discussion on trafficking in persons in

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<sup>370</sup> In *S v Nahima Allima* the accused was sentenced to life imprisonment for trafficking in persons for sexual exploitation in June 2014. In *S v Foster Simelane* a sentence of 30 years for trafficking for sexual exploitation of a child was handed down in August 2014. In *S v Gwambe* the accused was sentenced to 15 years in 2013 for trafficking for sexual exploitation of children. In *S v Vukile Shembe* the accused was sentenced to 23 years in 2012 for trafficking for sexual exploitation. In *S v Lloyd Mabuza* the accused was sentenced to 8 life sentences for trafficking.



Pretoria, where several relevant stakeholders, including SOCA, presented on the legislation, training, and the international perspective on TIP. Most departments reported on their readiness to implement the Prevention and Combating of Trafficking in Persons Act, 2013. Victims of trafficking also shared their experiences and how recruiters prey on potential victims' weaknesses, substance abuse and poverty. Based on the training delivered by the NPA (SOCA and NPS) and directives developed, the NPA is ready to implement the above-mentioned Act once it comes into operation.

187. As indicated above, South Africa has since enacted the Prevention and Combating of Trafficking Persons Act, 2013 and put it into operation. In preparation of the coming into operation of the Act, the following steps were taken:

- The combating of trafficking and the smuggling of persons has been made a priority in the Government's National Development Plan.
- Extensive training of the personnel of the National Prosecuting Authority, members of the South African Police Service, social workers from the Department of Social Development, the Judiciary and officials from Immigration and Home Affairs has already been undertaken,
- General awareness campaigns to sensitise communities on these issues were dealt with by governmental departments in partnership with civil society,
- A multi-agency programme to coordinate strategic action against trafficking has been established. This includes the setting up of Provincial Task Teams which include all relevant stakeholders in the Criminal Justice System,
- An integrated and holistic Immigration Policy is receiving attention, and
- The Justice Crime Prevention and Security Cluster Departments have made the combating of trafficking of persons a priority in the Cluster's priority activities to ensure all persons in South Africa Are and Feel safe. In this regard a multi-disciplinary, interdepartmental Priority Committee has been established within the Cluster to coordinate activities relating to the combating of trafficking in and smuggling of persons.

188. In the region and on the continent the prevention and combating of trafficking is also receiving attention. Prosecutors in Africa face daunting challenges in responding to these complex crimes. Collaboration between member states in prosecutorial matters is vital in alleviating some of these challenges through providing forums for prosecutors to share resources and best practices in combating crimes. The trans-boundary nature of trafficking and smuggling require responses that are not confined to national borders. Together with the International Office for Migration, the SOCA unit developed and presented a training programme for prosecutors from Africa on TIP, in Addis Ababa, Ethiopia in 2014/15. It was attended by 18 delegates from various countries in Africa. The curriculum focused on, amongst others, the South African legal perspective, current legislation, case law, possible challenges and international perspective on trafficking. This training initiative was delivered at the request of Africa Prosecutors Association. International cooperation in the area of prosecutions is vital.

## ARTICLES 6 AND 7: RIGHTS RELATED TO MARRIAGE

189. The marriage institution in South Africa is governed under civil law, religious laws, and customary laws. The Marriage Act, 1961<sup>371</sup> governs civil marriages. Prior to 1994, the Act was not applicable in the whole of South Africa. This changed with the enactment of the Marriage Extension Act, 1997<sup>372</sup> that extended the operation of the Marriage Act to the whole of South Africa.
190. The solemnisation and registration of civil marriages, customary marriages and civil unions are managed by the Department of Home Affairs. Civil marriages are governed by the Marriage Act, 1961<sup>373</sup> and regulations issued in terms of the Act. South Africa also recognizes customary marriages through the Recognition of Customary Marriages Act, 1998<sup>374</sup> which became effective in November 2000. Civil unions are recognised in terms of the Civil Union Act, 2006.<sup>375</sup>
191. There are two kinds of civil marriages i.e. (i) marriage in community of property and (ii) marriage out of community of property. The proprietary consequences of these marriages are governed by the Matrimonial Property Act, 1984.<sup>376</sup> In a marriage in community of property, spouses pool their assets into a joint estate. Upon dissolution of the marriage each is entitled to a half /equal share of the joint estate. Marriages out of community of property are divided into three distinct types and all are preceded by an ante-nuptial contract: The first category is a marriage out of community of property with communal sharing, and in such a union both parties keep their pre-marital estates separate but form a communal estate as a married couple, and upon dissolution share in the joint communal estate amassed during the subsistence of the union. The second type of marriage is a marriage out of community of property but with the accrual system. In this union, the partners' relative financial value is assessed upon dissolution and paid a balance based on this worth. The third type of marriage out of community of property is a marriage without profit sharing, where upon dissolution of the marriage each party is entitled to what they personally had at the time of marriage, and anything that they earned or acquired during the marriage.
192. The Civil Union Act, 2006<sup>377</sup> provides for the solemnization and registration of same-sex marriages. Therefore, same-sex couples are entitled to the same rights and benefits as heterosexual spouses. The enactment of the Civil Union Act, 2006 and the recognition of same-sex marriages in South Africa followed the decision of the Constitutional Court in *Fourie v Minister of Home Affairs*<sup>378</sup> in which it was held that the definition of marriage as a union between a man and a woman in the Marriage Act was unconstitutional insofar as it excluded the recognition of the union of same-sex partners.

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<sup>371</sup> Act No. 25 of 1961

<sup>372</sup> Act No. 50 of 1997

<sup>373</sup> Act No. 25 of 1961

<sup>374</sup> Act No. 120 of 1998

<sup>375</sup> Act No. 17 of 2006

<sup>376</sup> Act No. 88 of 1984

<sup>377</sup> Act No. 17 of 2006

<sup>378</sup> 2006 (1) SA 524 (CC)

193. Four kinds of religious marriages are recognised in South Africa: (i) Christian, (ii) Islamic, (iii) Hindu, and (iv) Jewish marriages. In *Amod v Multilateral Motor Vehicle Accidents Fund*<sup>379</sup> the Supreme Court of Appeal upheld a widow's compensation claim relating to the loss of a breadwinner following the death of her husband, to whom she had been married in terms of Islamic law, in a car accident. The impact of this decision was the legal recognition of monogamous Muslim marriages. Although the Court recognised that Muslim women in a monogamous marriage could be considered a "wife" or "spouse", the court did not pronounce on the legality of the marriage in respect of Islamic law.
194. In *Daniels v Campbell NO & Others*<sup>380</sup> the Constitutional Court held that women married under Islamic law could inherit, claim maintenance from and be appointed as administrators of their deceased husbands' estates. In *Hassam v Jacobs NO*<sup>381</sup> the Constitutional Court declared that the Intestate Succession Act, 1987, does in fact and should recognise that a woman married in a polygamous marriage have the right to be a beneficiary in respect of her deceased husband's estate regardless of the fact that the marriage was polygamous. In *Govender v Ragavayah NO*<sup>382</sup> the Court was requested and decided on whether a woman married in terms of Hindu rights in a monogamous marriage qualified as a spouse in respect of the Intestate Succession Act, 1987. The Court granted the relief sought. However, it did not pronounce on the issue of the validity of the marriage.
195. **Table 8** shows the various statutes pertaining to religious marriages.

**Table 8: Selected statutes recognizing religious marriages**

	Act of Parliament	Relevant provision
1	<b>Civil Proceedings Evidence Act, 1965 (Act No. 25 of 1965)</b>	Section 10A recognises religious marriages for the purposes of the law of evidence.
2	<b>Criminal Procedure Act, 1977 (Act No. 51 of 1977)</b>	Section 195(2) recognises religious marriages for the purposes of the compellability of spouses as witnesses in criminal proceedings.
3	<b>Pension Funds Act, 1956 (Act No. 25 of 1956)</b>	Definition of "dependents" under section 1(b)(ii) includes dependents in religious marriages
4	<b>Special Pension Act, 1956 (Act No. 69 of 1956)</b>	Definition of "dependents" under section 31(b)(ii) includes dependents in religious marriages.
5	<b>Government Employees Pension Law, 1996 (Act No. 21 of 1996)</b>	Definition of "dependents" under section 1(b)(ii) and definition of "spouse" under Schedule 1 item 1.19

<sup>379</sup> 1999 (4) SA 1319 (SCA)

<sup>380</sup> 2004 (7) BCLR 735 (CC)

<sup>381</sup> (2009) ZACC 19

<sup>382</sup> (2008) ZAKZHC 86

		include dependents and spouses in religious marriages respectively.
6	<b>Demobilisation Act, 1996 (Act No. 99 of 1996)</b>	Definition of "dependent" under section 1(vi)(c) includes dependents in religious marriages.
7	<b>Valued Added Tax Act, 1991 (Act No. 89 of 1991)</b>	Notes 6 and 7 to item 406.00 of schedule 1 recognise religious marriages for the purposes of tax exemption in respect of goods imported to South Africa.
8	<b>Transfer Duty Act, 1949 (Act No. 40 of 1949)</b>	Section 9(i)(f) read with the definition of "spouse" in section 1 exempts from transfer duty property inherited by the surviving spouse in a religious marriage.
9	<b>Estate Duty Act, 1955 (Act No. 45 of 1955)</b>	Section 4(q) read with the definition of "spouse" in section 1 exempts from estate duty property accruing to the surviving spouse in a religious marriage.

196. The Recognition of Customary Marriages Act, 1998<sup>383</sup> provides for the recognition and registration of customary marriages. During the apartheid regime, customary marriages were not fully recognised as valid marriages. They were tolerated only as 'unions', a status which was inferior to that of civil marriages. In addition to placing customary marriages on an equal footing with civil marriages, the Recognition of Customary Marriages Act, 1998 provides for the equality of spouses in customary marriages. This is a radical departure from the past in which a wife in a customary marriage was regarded as a perpetual minor.
197. The Act elaborately provides for the effect of customary marriages on property relations. In this regard, the proprietary consequences of a customary marriage entered into before the commencement of the Act continue to be governed by customary law. Spouses in such a marriage may jointly apply to the court for leave to change the matrimonial property system which applies to their marriage. Any other wife to the marriage, if any, must be joined in such proceedings. On the other hand, a customary marriage entered into after the commencement of the Act in which a spouse is not a partner in any other existing customary marriage, is a marriage in community of property, unless such consequences are specifically excluded by the spouses in an ante-nuptial contract. It is worth noting that a husband in a customary marriage who wishes to enter into a further customary marriage with another woman must make an application to the court to approve a written contract which will regulate the future matrimonial property system of his marriages.
198. The courts have played a significant role in eradicating customary proprietary practices and rules that discriminate against women. In *Gumede v President of the Republic of South Africa*<sup>384</sup> the Constitutional Court held that a woman who entered into a customary marriage before the

<sup>383</sup> Act No. 120 of 1998

<sup>384</sup> (2008) ZACC 23

commencement of the Recognition of Customary Marriages Act was still entitled to a share of the matrimonial property upon the dissolution of the marriage. The courts have gone a step further to protect the inheritance rights of children born in customary marriages. In *Bhe v Magistrate, Khayelitsha*<sup>385</sup> the Constitutional Court declared unconstitutional and invalid the African customary rule of male primogeniture which only allows an oldest male descendant or relative to succeed the estate of a deceased man.

### Marriage and nationality

199. South African laws grant equal rights to women and men in respect of acquisition, transmission and changing of citizenship. The South African Citizenship Act, 1995<sup>386</sup> provides that marriage does not affect citizenship in the sense that a married person is capable of acquiring or losing citizenship in all respects as if he or she were unmarried, and that no person can acquire or lose citizenship by reason merely of a marriage contracted by him or her.
200. South African laws have also been reformed to remove barriers that previously undermined the unification of foreign spouses with their South African spouses of either sex. These reforms were prompted by the Constitutional Court's decision in *Dawood, Shalabi & Thomas v Minister of Home Affairs*<sup>387</sup> and *Booyesen v Minister of Home Affairs*.<sup>388</sup> The *Booyesen* case was an application for confirmation of the declaration of invalidity of two sections of the Aliens Control Act, 1991<sup>389</sup> which deal with applications for work permits by foreign spouses of South African citizens or permanent residents. The applicants were four couples consisting of a South African married to a non-South African. The first section concerned the obligation of such spouses seeking to work in South Africa to apply for a work permit while outside the country and then not to enter the country until the permit has been issued. The second section related to the provision that work permits would only be issued to spouses of South African citizens if they do not pursue an occupation for which a sufficient number of persons are available in South Africa. Van Heerden J in the Cape High Court declared that the provisions were inconsistent with section 10 of the Constitution which guarantees the right to dignity. She held that the provisions failed to give proper recognition to the importance of family life, particularly the reciprocal rights and duties of the spouses to cohabitation and to financial support. In a unanimous decision written by Sachs J, the Constitutional Court confirmed the orders of invalidity.

### Marriage and names

201. Under South African common law, which found codification in the Births and Registration Act, 1992,<sup>390</sup> a wife assumed her husband's 'rank and dignities'. She could neither retain her surname nor pass it on to her children. Once she was married, the Department of Home Affairs automatically changed her surname to that of her husband's. She was legally prevented from

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<sup>385</sup> 2005 (1) SA 563 (CC)

<sup>386</sup> Act No. 88 of 1995

<sup>387</sup> 2000 (3) SA 93

<sup>388</sup> 2001 (4) SA 485

<sup>389</sup> Act No. 96 of 1991

<sup>390</sup> Act No. 51 of 1992

using her maiden name. These common law provisions as reflected in the Births and Registration Act discriminated against women. Thus, in 2002, the Births and Deaths Registration Amendment Act, 2002<sup>391</sup> was enacted to remove the discriminatory laws and practices. In terms of this Act, a woman has the right to retain her surname upon marriage. She is also equally entitled to pass her surname to her children.

### **Minimum age of marriage**

202. The minimum age for consent to marriage in South Africa is 18 years for both men and women, and this has been extended to customary marriages through the Recognition of Customary Marriages Act, 1998.
203. If one of the parties is a minor (younger than 18 years) in the care of their parents or a legal guardian, only the parents'/guardian's written consent is required. If a parent whose consent is legally required but either cannot be found to grant consent, or is legally incompetent to do so, then an application may be made to a Commissioner of Child Welfare for consent to the marriage. If the parents and/or a Commissioner of Child Welfare refuse to grant consent for the marriage, a party may apply to a judge of the High Court for consent. The judge will not grant consent unless there is sufficient evidence that the marriage is in the interest of the minor and that prior consent has been unreasonably refused. Boys under the age of 18 and girls under the age of 15 may require the consent of the Minister of Home Affairs. The Minister may, on application, condone a marriage which required his/her consent but was contracted without such consent.

### **Registration of marriage**

204. The Marriage Act, 1961<sup>392</sup> provides for the registration of civil marriages. The registration of a marriage serves as a *prima facie* proof of the existence of the marriage, although non-registration does not affect the validity of the marriage. The Department of Home Affairs keeps the marriage register, which is signed by the marriage officer, the parties, and two competent witnesses.
205. In terms of the Marriage Act only marriage officers authorised in terms of the Act to perform marriages, may do so. Presently civil marriages are solemnised at offices of the Department of Home Affairs and at churches (by authorised marriage officers). A marriage must be conducted in the presence of at least two witnesses in a church or another building used for religious services, in a public office or private house, with open doors and, in the case of serious illness or injuries, the marriage may take place in a hospital or any concerned facility.
206. The Civil Union Act, 2006<sup>393</sup> provides for the registration of same sex relationships. In this regard, section 12 of the Act provides that prospective civil union partners must individually and in writing

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<sup>391</sup> Act No. 1 of 2002

<sup>392</sup> Act No. 25 of 1961

<sup>393</sup> Act No. 17 of 2006

declare their willingness to enter the civil union with one another by signing the prescribed document in the presence of two witnesses.

207. Customary marriages are registered pursuant to section 4 of the Recognition of Customary Marriages Act, 1998.<sup>394</sup> In this regard, it is stipulated that the spouses in a customary marriage have a duty to ensure that their marriage is registered. However, the failure to register a customary marriage does not affect the validity of the marriage.

### **Protection of women in polygamous marriages**

208. Polygamous customary marriages are recognised in South Africa through the Recognition of Customary Marriages Act, 1998.<sup>395</sup> As already indicated above, women in polygamous marriages are afforded full and equal protection of the law. They have equal status with their spouses, the capacity to acquire assets and dispose of them, enter into contracts and litigate, and the right to all legal entitlements upon the dissolution of the marriage.
209. In case of *Mayelane v Ngwenyama*<sup>396</sup> before the Constitutional Court, the applicant disputed that her husband of 24 years ever entered into a second marriage with the respondent. The wife claims that the first she had ever heard of this second marriage was when informed of it by the Department of Home Affairs and argues that there could not have been a marriage between her husband and Ngwenyame because no contract governing matrimonial property was ever certified by a court. She claims that she would have had to consent to this second marriage in terms of Tsonga custom. The Recognition of Customary Marriages Act, 1998 provides that a court-certified ante-nuptial contract is necessary in a polygamous marriage. Two NGOs asked the Constitutional Court to order that a man who wants to marry a second wife can only do so if his first wife agrees – irrespective of the African culture involved. The argument was that the constitutional rights to equality and dignity demand that first wives must give consent before their husband takes a second wife. The NGOs argued that the customary or traditional African law in South Africa is still characterized by patriarchy and that polygamy can be criticized for embracing a form of patriarchy. Hence the NGOs contended that the consent of the first wife should be made a requirement of law, regardless of any factual situation that may exist among the Tsonga, the Xhosa or Zulu people.
210. After the hearing, the Constitutional Court called for further evidence on the content of Tsonga customary law. In May 2013 the Constitutional Court handed down the judgment. In a majority judgment penned by Froneman J, Khampepe J and Skweyiya J, with whom Moseneke DCJ, Cameron J and Yacoob J concurred, the Constitutional Court upheld the appeal. The majority held that, at the time of the conclusion of the purported marriage between the first respondent and the deceased, Tsonga customary law required that the first wife be informed of her husband's subsequent customary marriage. The first respondent's marriage was found to be invalid because the applicant had not been informed.

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<sup>394</sup> Act No. 120 of 1998

<sup>395</sup> Act No. 120 of 1998

<sup>396</sup> 2013 (4) SA 415 (CC)

211. The majority was of the opinion that, in accordance with this Court's obligations to develop living customary law in a manner that is consistent with the Constitution, Tsonga customary law had to be developed to include a requirement, to the extent that it does not yet do so, that the consent of the first wife is necessary for the validity of her husband's subsequent customary marriage. This development stems from the fundamental demands of human dignity and equality under the Constitution. The import of the judgment is that, from now on, further Tsonga customary marriages must comply with the consent requirement in order to be valid.

### **Separation, Divorce and Annulment of Marriage**

212. Separation, divorce or annulment of marriage in South Africa can only be done in accordance with the law and effected by a judicial order. The Marriage Act, 1961<sup>397</sup> the relevant provisions of which apply mutatis mutandis to civil unions, religious, and customary marriages, generally provides for the dissolution of marriages. Section 8(1) of the Recognition of Customary Marriages Act, 1998<sup>398</sup> provides that a customary marriage may only be dissolved by a court by a decree of divorce on the ground of the irretrievable breakdown of the marriage.
213. In South Africa, marriage, divorce, cohabitation and separation are key events in the formation or dissolution of families and can have a strong and lasting impact on women's living arrangements, their access to resources, their opportunities and responsibilities. Marital status is positively related to age in South Africa. The relationship status of females and males by age group<sup>399</sup> is as follows: In the "never married" category, 67.3% women in the 18-34 age group; 22.6% in the 35-59 age group; and 8% in the 60+ age group and in the "separated or divorced" category: 2.1% women in the 18-34 age group as compared to 0.9% men; 8.6% women in the 35-59 age group as compared to 5.1% men; and 6.1% women in the 60+ age group as compared to 4.7% men in this same group.
214. These statistics are pointing to a phenomenon of women living independently of men which in all probability can be ascribed to their emancipation, empowerment, socio-economic and educational status as well as the choices they can make regarding how many children, the spacing of children and whether to have them or not. However these statistics also point to an increasing burden on women as head of households and families, and points to the increasing levels of poverty of such households.

### **Protection of Children in the family**

215. The Divorce Act, 1979<sup>400</sup> aimed to amend the law relating to divorce. Three pieces of legislation impacting on the provisions of this Act were enacted between 2004 and 2007, namely the Mental

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<sup>397</sup> Act No. 25 of 1961

<sup>398</sup> Act No. 120 of 1998

<sup>399</sup> Statistics South Africa: 2011: Social Profile of Vulnerable Groups in South Africa – 2002-2010

<sup>400</sup> Act No. 70 of 1979



Health Care Act, 2002,<sup>401</sup> the Children's Act, 2005<sup>402</sup> and the Civil Union Act, 2006.<sup>403</sup> This Act needed to be amended to bring it in line with these three pieces of legislation.

216. The Mediation in Certain Divorce Matters Act, 1987<sup>404</sup> was to provide for mediation in divorce proceedings and to safeguard the interests of children arising from such proceedings, and which provided for the consideration by a court of the report and recommendations of a family advocate before granting a decree of divorce or other relief. The role of the family advocate is provided for in the Children's Act, 2005.<sup>405</sup>
217. The Maintenance Act, 1998<sup>406</sup> provides the framework for monitoring and implementing maintenance orders. It provides for 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. The Isondlo Project helped to alleviate the problem of tracing defaulters through the training of maintenance investigators. This project has delivered better maintenance services.
218. In order to protect minor children the Department of Justice and Constitutional Development has over the past 20 years been committed to ensuring the protection of children in our society. One of the areas which have a profound impact on the lives of children is that of maintenance.
219. In an effort to address the neglect of children and youth in society, child maintenance has been identified as one of its key priorities. It receives more than 200 000 new applications annually. The number of maintenance enquiries has increased by 50% from 2011/12 to 2012/13, while the number of maintenance orders granted has increased by 56% over the same period. Parents are jointly responsible to maintain their children, yet today the responsibility of financially maintaining children often rests on the shoulders of single mothers who in many instances do not receive the financial support from the biological father. These single mothers then face laborious court applications to bring these fathers to book.
220. The Department continuously puts steps in place to improve the maintenance system. The strategies contain both proactive and reactive measures. Proactive measures target the making of orders prior to default. The defaulter will now pay the beneficiary directly into their bank account. It was further felt that increasing the efficiency and effectiveness of the use of recovery measures would ensure that there was an increased success rate in the payment of outstanding maintenance to beneficiaries. A zero tolerance approach has been adopted when dealing with maintenance defaulters. This includes the attachment of pensions for maintenance.

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<sup>401</sup> Act No. 17 of 2002

<sup>402</sup> Act No. 38 of 2005

<sup>403</sup> Act No. 17 of 2006

<sup>404</sup> Act No. 24 of 1987

<sup>405</sup> Act No. 38 of 2005

<sup>406</sup> Act No 99 of 1998

221. The maintenance programme was designed to minimise the time spent on queues, strengthen the investigation process used in tracing maintenance defaulters, and improve the payment system to ensure that rightful beneficiaries are paid on time. This strategy has had great success in bringing thousands of maintenance defaulters to book. Many defaulters have been arrested and brought to court, resulting in hundreds of maintenance beneficiaries receiving regular pay-outs. The strategy has reduced the loopholes in the system and introduced tighter mechanisms to enforce payments. Government is determined to reduce the turnaround time of maintenance payments by ensuring that garnishee payments are made directly to maintenance beneficiaries. These direct payments assist maintenance beneficiaries as the money is received directly from the garnishee, instead of waiting for funds to clear in court's bank account. An electronic fund transfer system (EFT) was created so that beneficiaries have quick and safe access to the funds.
222. Government has also appointed maintenance investigators and complaints managers in all regions to manage maintenance services complaints.
223. There are certain challenges in the practical implementation which necessitates a comprehensive review of the Act. This is currently underway. A Maintenance Amendment Bill was tabled in the National Assembly by the Minister of Justice and Constitutional Development in November 2014.
224. The aim of the Maintenance Amendment Bill, 2014 is to amend the Maintenance Act, 1998<sup>407</sup> in order to improve the maintenance system pending the finalisation by the South African Law Reform Commission of the review of the Act. The Bill seeks to further regulate the lodging of complaints relating to maintenance and the jurisdiction of maintenance courts and the investigation of maintenance complaints. It seeks to further regulate the securing of witnesses for purposes of a maintenance enquiry and to regulate maintenance enquiries in order to make provision for the granting of interim maintenance orders. It aims to regulate the circumstances in which maintenance orders may be granted by default and to further regulate the granting of cost orders and also to regulate the reporting of a maintenance defaulter to any business which has as its object the granting of credit or is involved in the credit rating of persons. Finally it aims to further regulate the attachment of emoluments, to increase the penalties for certain offences, to create certain new offences and to further regulate the conversion of criminal proceedings into maintenance enquiries.
225. **Table 9** below refers to the civil processes for maintenance matters.

**Table 9: Maintenance Matters - Civil Process**

Reporting Period	New App Received	Enquiries Received	Orders Granted	Orders by consent	Orders by default	Orders varied
2012/2013	174 875	334 218	90 343	86 592	8 562	20 180
2013/2014	176 485	225 634	55 227	82 811	6 242	17 352
% Change	0.92	-32.49	-94.26	-4.37	-27.10	-14.01

<sup>407</sup> Act No. 99 of 1998

226. **Table 10** below refers to the criminal processes for maintenance matters. Once a court has granted a maintenance order and the respondent does not comply, it may become a criminal matter – Section 31 of the Maintenance Act, 1998.

**Table 10: Maintenance Matters - Criminal Process (Section 31 of the Maintenance Act)**

Financial Year	Cases Forward	Brought	New Cases	Finalized			Removed from Roll					Cases Disposed of	Outstanding Cases
				Guilt y	Not guilty	Other: Finalised	Struck of roll	of Transferr ed	Warra nt of arrest	Withdraw n	Other: Remove d from the roll		
2012/2013			14 384	1 017	339	1 025	2 383	12	1 787	5 755	36	12 354	3179
2013/2014	3179		10 952	1 051	294	707	2 165	36	1 603	6 130	125	12 111	1 603
% Change			-23.9	3.3	-13.3	-31	-9.1	200	-10.3	6.5	247.2	-2.0	-49.6

227. As at the end of 31 March 2014, 12 111 matters were outstanding.

228. The Children's Act, 2005<sup>408</sup> was enacted into law, ushering in a new legal dispensation for the protection and promotion of children's rights in the country. The Act sets out principles relating to the care and protection of children. It provides that the best interest of the child should always be a paramount consideration when dealing with children's issues. It defines parental responsibilities and rights in addition to making provision for adoption.

229. Following the end of apartheid and the establishment of a new democratic dispensation in 1994, the post-apartheid Government instituted various policy and legislative reforms aimed at, among other things, the realignment of the country's institutions, in order to transform the South African society. However, the family is not explicitly addressed in many of these policies. Rather it is usually inferred and, in consequence, most socio-economic benefits indirectly filter down to the family. For example, the five major social assistance policies in the country focus only on specific individuals, namely: older persons (The State Old Age Pension), people with disabilities (the Disability Grant), and children (the Child Support Grant, the Foster Care Grant, and the Care Dependency Grant).

230. The absence of a specific policy framework on the family in South Africa has, over the years, been identified by policymakers, academics, civil society, and concerned citizens as a critical shortcoming that needed to be urgently addressed. The approach in the White Paper on Families (2012) was to take into account the legislative and policy framework as well as a rights-based approach; a strengthening perspective; a life-cycle approach; a systems approach and a social development approach. This recognizes that the family is the basic unit of society and plays a key role in the survival, protection and development of children. Its rationale is that families should be supported and their capabilities have to be strengthened for the purpose of meeting the needs of members, needing a range of supportive services to promote family life and development.

<sup>408</sup> Act No. 38 of 2005

Other needs also include additional supportive services so that they can solve problems in human relations such as conflict, communication, parenting, substance abuse, family violence as well as addressing problems arising from life changes and events.

231. The White Paper is thus governed by three strategic priorities: promotion of healthy family life; family strengthening; and family preservation, and is envisaged in an inter-sectoral, inter-dependent coordination and implementation mode, involving several key and related government sector and other stakeholders.

## ARTICLE 8: ACCESS TO JUSTICE AND EQUAL PROTECTION BEFORE THE LAW

232. The Constitution<sup>409</sup> guarantees everyone's right to access the courts in pursuit of justice. South African women are guaranteed equal protection before the law. In this regard, section 9(1) of the Constitution provides that 'everyone is equal before the law and has the right to equal protection and benefit of the law'.
233. The courts have made ground-breaking decisions that have seen women taking key leadership positions within traditional governance settings. In *Shilubana v Nwamitwa*<sup>410</sup> the Constitutional Court held that tribal chiefs have the power to develop customary law to allow the appointment of a woman as a tribal chief on the ground that a customary practice which prohibited women from being chiefs was discriminatory and contrary to the Constitution. Both men and women have the right to institute legal proceedings and to enter into contract in their own name.
234. Another fundamental change with regard to equality before the law in civil matters has been the recognition of the full legal status of women under customary law. Under section 11(3)(b) of the Black Administration Act, 1927<sup>411</sup> a black woman in a customary marriage was deemed to be a minor and the husband as the guardian. This archaic provision ceased to apply upon the repeal of the Black Administration Act, 1927. The Recognition of Customary Marriages Act, 1998<sup>412</sup> provides for the equal status and capacity of women in customary marriages. In particular, section 6 of the Act provides that *'a wife in a customary marriage has, on the basis of equality with her husband and subject to the matrimonial system governing the marriage, full status and capacity, including the 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 may have at customary law'*.
235. In order to ensure that the right of access to justice for women, Legal Aid South Africa, an autonomous statutory body, renders or makes available legal representation to indigent persons at state expense. It provides legal aid services at all criminal courts in the country through a

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<sup>409</sup> S 34

<sup>410</sup> (2008) ZACC 9

<sup>411</sup> Act No. 38 of 1927

<sup>412</sup> Act No. 120 of 1998

national footprint of 62 justice centres and 55 satellite offices. Legal Aid South Africa has designated women as one of its special focus groups. In this regard, it takes proactive steps to reach and meet the legal representation needs of women who cannot afford legal representation. It also engages in specialist or impact litigation through the provision of legal representation in cases with a special focus on women.

## **ARTICLE 9: RIGHT TO PARTICIPATION IN THE POLITICAL AND DECISION-MAKING PROCESS**

236. South Africa has made great strides in ensuring women's involvement in political and decision-making processes. The Electoral Act, 1998<sup>413</sup> requires every registered party and candidate to respect the rights of women and to communicate freely with parties and candidates, to facilitate full and equal participation of women in political activities, to ensure free access for women to all public meetings, marches, demonstrations, rallies and other public events and take all possible steps to ensure that women are free to engage in political activities. The Local Government: Municipal Structures Act, 1998<sup>414</sup> makes provision for the equal representation of women and men in political party lists and ward committees.
237. According to the Electoral Commission of South Africa, more women (54.9%) compared to men (45.1%) registered to vote during the 2009 National Elections. Of the 25.39 million registered voters for the 7 May 2014 election, 55% were women. Statistics for the May 2014 elections further showed that turnout among female voters was substantially higher – at 76% compared to the 70% of their male counterparts.<sup>415</sup>
238. The Traditional Leadership and Governance Framework Act, 2003<sup>416</sup> require at least 30% of members of the National House of Traditional Leaders to be women. The Act provides for measures for parity of representation between female and male traditional leaders in district and local municipalities, and is explicit about the promotion of gender equality and non-sexism. The preamble states that - *'A traditional community must transform and adapt to customary law and customs relevant to the application of this Act so as to comply with the relevant principles contained in the Bill of Rights in the Constitution; in particular by preventing unfair discrimination; promoting equality; and seeking to progressively advance gender representation in the succession to traditional leadership positions'*. The Institution of Traditional Leadership has established a Portfolio Committee on Gender, Youth, Children and People with Disabilities that helps to monitor cultural practices and customs that undermine gender equality. It also keeps the gender debate going within the Traditional Leadership Institution.
239. At the political level, the African National Congress (ANC) adopted a voluntary 30% quota for women in 2002. In 2007, they raised it to 50% at both national and local level. The ANC also adopted a 50/50 quota for national elections in 2009. It is currently the only party that has a

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<sup>413</sup> Act No. 73 of 1998

<sup>414</sup> Act No. 117 of 1998

<sup>415</sup> "Promoting free and fair elections," Mosotho Moepya, 2014

<sup>416</sup> Act No. 41 of 2003

voluntary quota for women. Since 1994, women's representation has steadily increased, primarily due to the ANC's quota. Women's representation in parliament has risen from 28% after the 1994 elections, to 30% in 1999, 33% in 2004 and 44% after the 2009 elections.<sup>417</sup>

240. South Africa's national and provincial legislatures are among the world's most representative in terms of gender. South Africa is currently the second highest in the Southern African Development Community and is among the world's top 10 countries to have significant numbers of women in Parliament, according to 2014 Inter-Parliamentary Union statistics. Of the final 830 candidates sworn in as representatives of the national and provincial legislatures after the 2014 elections, approximately 42% were women, with the Limpopo Legislature showing the highest proportion of women representatives, at 47%; the lowest being 38% in the Western Cape Legislature. This is a far cry from pre-democracy levels and shows significant improvement from 1994 and 1999, when women accounted for just 26.76% of the candidates, and 2004 when 30.65% of the candidates were women.<sup>418</sup>
241. The Employment Equity Act, 1998<sup>419</sup> provides for employment equity and for matters incidental thereto.
242. Since the democratic elections in 1994, South Africa has seen a number of women taking up leadership positions in areas previously dominated by men. One of the success stories of our democracy is that of the representation of women in political and decision-making positions. Involving women in governance processes constitutes one of South Africa's globally acclaimed success stories. The election of Dr Nkosazana Dlamini-Zuma in July 2012 as the first woman in Africa to chair the African Union Commission; the appointment of Dr. Phumzile Mlambo-Ngcuka, former Deputy President of the country, as the Under-Secretary-General and Executive Director of UN Women; and the positioning of other South African women such as Ms. Geraldine Frazer-Moleketi, Special Gender Envoy to the African Development Bank; Ms Rashida Manjoo, Special Rapporteur on Violence against women, its causes and consequences; and Judge Navi Pillay as the former High Commissioner for Human Rights and formerly as a judge in the International Criminal Court (ICC) is an indication of the impact that women in decision-making have in winning the trust and confidence of citizens in South Africa, on the continent and internationally.
243. Women have held positions such as the Commissioner of Police, the Public Protector, CEO of the Johannesburg Stock Exchange, the Independent Electoral Commission, Governor of the Reserve Bank, the South African Law Reform Commission and others. Women have also held the office of Deputy President such as Dr Phumzile Mlambo-Ngcuka from 2005-2008 and Ms Baleka Mbete from 2008-2009 respectively. The first Speaker of the National Assembly was a woman, Dr Frene Ginwala, followed by Ms Baleka Mbete in 2004-2009 who was re-elected following the 2014 elections. We have also had women as Deputy Speakers in the National Assembly during the 20 year period.

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<sup>417</sup> "South Africa: Snubbing quotas for women, snubs transformation," Katherine Robinson, 2014 (<http://www.genderlinks.org.za/article/south-africa-snubbing-quotas-for-women-snubs-transformation-2014-02-07>)

<sup>418</sup> "Promoting free and fair elections," Mosotho Moepya, 2014

<sup>419</sup> Act No. 55 of 1998

244. Women are making inroads into business leadership and heading up global giants in the country such as the head of ABSA Bank. Women own conglomerates in the country with some business women being millionaires in their own right. Women also can be found as chairpersons of corporate boards in the country, while others are entering and leading in previously male dominated territories, for example, the head of the Paleontology Department in the University of Cape Town is a woman, and the South African Airways (SAA) now has women pilots, some flying international bound flights. Women are in the defence force, navy and air force in South Africa. In fact women make up almost 40% of the Senior Management Service in the public service and overall women comprise more than 50% of employees in the Public Service.
245. Women Ministers have, during the two decades of freedom, held important portfolios previously held by men such as: Basic Education; Small Business Development; Defence; Environmental Affairs; Water Affairs and Sanitation; Home Affairs; Correctional Services; Public Services and Administration; Public Enterprise; Human Settlement; International Relations and Cooperation; Transport; Labour; Energy; Science and Technology; Mineral Resources; Social Development; and the women's agenda. In fact under the stewardship of the Minister for Science and Technology, who is a woman, South Africa has won the bid for the Square Kilometre Array (SKA) project.
246. As at August 2012 there were 15 (42%) women Ministers in Cabinet; 14 (43%) women Deputy Ministers; 5 (55%) women Premiers; one woman Deputy Speaker in National Parliament; 44% women holding seats in National Parliament and 16 (33%) women in the National Council of Provinces.
247. After the 2014 national elections, there are 15 women Ministers and 18 Deputy Ministers. Of the 400 seats in the National Assembly, 166 Members (41,5%) are female. Of the 54 seats in the National Council of Provinces, 19 (35,2%) are female.

### Women in Cabinet

248. There has been a steady growth in the representation of women at Cabinet level since the first democratic elections held in 1994. South Africa reached the target of 30% representation of women in political decision-making positions in line with the SADC target in 2003. In 2005 South Africa adopted the 50% gender parity principle in line with the AU Commission target, and in 2008 with the SADC Protocol on Gender and Development. The representation of women in Cabinet level currently stands at 41%.
249. **Table 11** below highlights the trends in the pattern of representation of women Cabinet Ministers from 1994 to 2014:

	1994	1996	2003	2004	2009	2014
<b>No. of Women Ministers</b>	3	4	9	12	14	15

<b>No. of Male Ministers</b>	24	21	18	16	20	19
<b>Total No. of Ministers in Cabinet</b>	27	25	27	28	34	34
<b>% representation of Women Ministers</b>	<b>11%</b>	<b>16%</b>	<b>33.3%</b>	<b>42.8%</b>	<b>41%</b>	<b>41,5%</b>

### Women Deputy Ministers

250. After the 2014 elections, the representation of women Deputy Ministers is 47%. The representation of women in this decision-making level is generally consistent, even attaining parity in 2003-2004. Following the 2009 elections the number of women Deputy Ministers declined to 39%, but this figure changed following the reshuffling of Cabinet in early 2012. **Table 12** below shows the number of women Deputy Ministers from 1994 to 2014.

	<b>1994</b>	<b>1996</b>	<b>2003</b>	<b>2004</b>	<b>2009</b>	<b>2014</b>
<b>No. of Women Ministers</b>	3	8	8	10	11	18
<b>No. of Male Ministers</b>	9	5	8	10	17	20
<b>Total No. of Ministers in Cabinet</b>	12	13	16	20	28	38
<b>%age representation of Women Ministers</b>	<b>25%</b>	<b>62%</b>	<b>50%</b>	<b>50%</b>	<b>39%</b>	<b>47%</b>

### Women in Parliament

251. The representation of women in Parliament increased from 27.8% in 1994 to 44% in 2012 and decreased slightly to 42% after the 2014 elections. Kwazulu-Natal had the lowest representation of women in 1994 at 13.6%, but has since shown an increase to 37.5% representation of women in the provincial legislature in 2009. On the other hand, the Western Cape has shown a decrease in 2009, so much so, it is now the province with the least women representation at Provincial Legislatures in the country. Indeed, following the 2009 elections, all provinces exceeded the 30% target and are on track towards 50/50 representation of women at the political decision-making level.

252. After the 2014 elections, of the final 830 candidates sworn in as representatives of the national and provincial legislatures, approximately 42% were women, with the Limpopo Legislature showing the highest proportion of women representatives, at 47%; the lowest being 38% in the



Western Cape Legislature. In the National Assembly 47% of the ANC's seats are filled by women, the Democratic Alliance has 28% and the Economic Freedom Fighters 32%.<sup>420</sup>

**Table 13** below indicates the representation of women members of parliament and provincial legislature over the five elective periods.<sup>421</sup>

	1994	1999	2004	2009	2014
	%	%	%	%	%
<b>Parliament</b>	27.8%	30%	32.8%	43.3%	41%
<b>Provincial Legislatures</b>	23.5%	27.7%	31.7%	41.5%	37%
<b>Total</b>	<b>25.4%</b>	<b>29.2%</b>	<b>32.5%</b>	<b>42.4%</b>	<b>39%</b>

### Women in Local Government

253. At local government level there is steady progress in the representation of women. Following the 2011 Local Government Elections, the representation of females in Local Government Councils is at 38.4% compared to 28.2% in 2000.

254. **Table 14** below indicates the trends in the representation of women members of local government councils.

	1995	2000	2006	2009	2011
	%	%	%	%	%
<b>Proportional representation</b>	28%	38%	42%	42.4%	43.3%
<b>Ward</b>	11%	17%	37%	36.6%	32.9%
<b>Overall</b>	<b>19%</b>	<b>28,2%</b>	<b>40%</b>	<b>39.7%</b>	<b>38.4%</b>

255. According to the South African Local Government Association (SALGA), the number of women councillors increased from 29% to 42% between 1994 and 2006 due to its 50/50 campaign that contributed significantly to this increase. As the country continues to advocate for equity, women in local government levels have formed the SALGA Women's Commission.

<sup>420</sup> "Gender representation in Parliament: Beyond the numbers," Peoples' Assembly, May 2014 (<http://www.pa.org.za/blog/gender-representation-parliament-beyond-numbers>)

<sup>421</sup>The Presidency, RSA: 2012: South Africa Development Indicators 2012, Pretoria

256. **Table 14** above highlights the steady progress made over the first three local government elections, with women's representation increasing from 19% in 1995 to 29% in 2000. Following the adoption by the ANC of the 50/50 quota at a party level in 2006, this figure rose dramatically to 40% in the 2005 Local Government Elections. There is, however, a slight decline in the representation of women in ward seats to 33% in 2011, as well as a corresponding overall 2 percentage point decline of women representation.

### Women and Elections in South Africa

257. In the 2014 elections, women comprised 56% of the total number of registered voters, compared to 55% in 2009. According to the Electoral Commission of South Africa, more women (54.9%) compared to men (45.1%) registered to vote during the 2009 National Elections. Of the 25.39 million registered voters for the 7 May 2014 election, 55% were women. Statistics for the May 2014 elections further showed that turnout among female voters was substantially higher – at 76% compared to the 70% of their male counterparts.<sup>422</sup>

### Women in Foreign Service

258. Diplomatic appointments of women have increased dramatically. In 2001, only 8 women, constituting 17.4% of the total number, were serving as Heads of Missions abroad. This number increased to 24.2% in 2005. In 2008, women accounted for 26% of appointed Ambassadors, High Commissioners and Consul-Generals, increasing to 29.13% in August 2012 and to 29.3% in 2013. As at November 2014, this figure remains at 29%.

### Women in the Judiciary

259. South Africa has also taken steps to ensure that women are represented equally in the judiciary and law enforcement organs. The path towards this feat has been long and arduous. Women were first allowed to enter legal practice in South Africa in 1923. The first woman judge - a white woman - was appointed to the judiciary in 1969 and was, at the dawn of democracy in 1994, still the only female judge on the bench.<sup>423</sup> The first black woman judge joined the judiciary in 1995, after the end of apartheid.<sup>424</sup>
260. Since then, the entry of women into the judiciary has been somewhat accelerated. In 2005, women constituted 13.52% of the 207 judges in the country, one of whom was a Deputy Judge President. By 2008, the number of women judges had risen to 30% of the total number of judges in the country, increasing to approximately 34% in 2014.

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<sup>422</sup> "Promoting free and fair elections," Mosotho Moepya, 2014

<sup>423</sup> Judge Leonora van den Heever was appointed as a judge in the Northern Cape Division in 1969. She was appointed as a judge in the Cape Provincial Division in 1979 and in 1991 she was the first female judge to be permanently appointed to the Appellate Division of the Supreme Court.

<sup>424</sup> The first black female High Court judge was Judge Lucy Mailula who was appointed to the Witwatersrand Local Division in 1995.

**Table 15: Percentage representation of Women Judges from 2011-2014**

Court	September 2011				September 2012				September 2013				June 2014			
	Male	Female	Total	% of female	Male	Female	Total	% of female	Male	Female	Total	% of female	Male	Female	Total	% of female
Constitutional Court	7	3	10	30%	9	2	11	18%	8	3	11	27%	8	2	10	20%
Supreme Court of Appeal	18	7	25	28%	18	8	26	30.7%	17	8	25	32%	18	7	25	28%
Provincial Divisions	129	50	179	27%	136	55	186	28.6%	130	61	191	32.6%	131	72	203	35%
Labour Court					8	4	11	36%	7	3	10	30%	8	3	11	27%
Competition Appeal Court	-	-	-	-	-	-	-	-	-	-	-	-	1	0	1	00%
<b>Total</b>	<b>154</b>	<b>60</b>	<b>214</b>	<b>28%</b>	<b>171</b>	<b>69</b>	<b>234</b>	<b>28.7%</b>	<b>162</b>	<b>75</b>	<b>237</b>	<b>32%</b>	<b>166</b>	<b>84</b>	<b>250</b>	<b>33.6%</b>

261. As at the second half of 2014 of South Africa's 250 judges 84 are female. And although the racial diversity of the Constitutional Court in 20 years of democracy has gone from seven white judges and four black judges to the current bench, where the majority of the judges are black and two are white, the same has not been achieved in terms of gender, as the number of women on the Constitutional Court has remained unchanged: two in 1994 and two in 2014.
262. Significant progress has been made in respect of the gender transformation of the magistracy. **Table 16** below shows a summary of permanent women Magistrates as at 31 August 2012 according to population groupings.

Post Class	African		Coloured		Indian		White		Total	%
	Male	Female	Male	Female	Male	Female	Male	Female		
Regional Court President	3	1		1				1	6	50%
Regional Magistrate	74	42	13	8	8	17	109	36	307	33.55 %
Chief Magistrate	6	3	1	1	1	2	3	2	19	42.11 %

<b>Senior Magistrate</b>	41	9	2	2	1	3	22	18	98	32.65 %
<b>Magistrate</b>	317	211	61	42	52	67	334	190	1274	40.03 %
<b>Grand Total</b>	<b>441</b>	<b>266</b>	<b>77</b>	<b>64</b>	<b>62</b>	<b>89</b>	<b>468</b>	<b>247</b>	1704	<b>39.08 %</b>

263. Further progress has since been made. As at the end of 2014, the number of female magistrates has further increased to 667 currently. This means an increase of 134% in the total number of female magistrates since 1998. There were only 62 African female magistrates in 1998, today there are 285. This means an increase of 359%. Of the 285, 2 are Regional Court Presidents and nearly 50 are Regional Magistrates. The other percentage changes in our magistracy since 1998 show that the number of Indian females have increased by 363%, Coloured females by 1120% and white females by 17%.
264. For the first time in the history of the magistracy we had, in 2014, more women than men at the level of Chief Magistrate. Of the 18 Chief Magistrates, 10 were female (6 African females, 2 Indian females, 1 Coloured female and 1 White female). Of the 9 Regional Court Presidents, 4 were female at the time of developing this report.

### Women in the Public Sector

265. A recent international study<sup>425</sup> showed that, in 2014, South Africa ranked 4<sup>th</sup> in the world, after Canada, Australia and the UK, respectively, with regards to women in leadership roles across the public sector. The study showed that South Africa is one of only four countries in the G20 that have one-third or more women in leadership roles across the public sector.
266. The South African Public Service comprises a Senior Management Service (SMS) which is made up of four categories ranging from levels 13 at the entry level to SMS i.e. Director; to level 16, at the topmost level i.e. Directors-General or Heads of Departments, also commonly known as Accounting Officers.
267. Currently there is 40% representation of women in Senior Management Service in the Public Service. **Table 17** below indicates trends in representation of women within management positions in government from 2005 to 2014, with an average of approximately 1 percentage point increase annually.

<sup>425</sup> EY's *Worldwide Women Public Sector Leaders Index, 2014* ([www.ey.com/government/womenleaders](http://www.ey.com/government/womenleaders))

**Table 17: Trends in the percentage representation of women in Senior Management Service in Government: 2005-2014**

YEARS	PERCENTAGE REPRESENTATION OF WOMEN IN SMS LEVELS
December 2005	30%
December 2008	34.3%
March 2009	34.8%
March 2010	36%
March 2011	37%
March 2012	38.1%
March 2014	39.8%
June 2014	40%

268. **Table 18** below indicates the representation in actual numbers and percentage of women in senior management by race and gender as at June 2014. African females make up 28.91% of the total SMS membership.

Race	Gender		Total	% women per population group	% women per total SMS members
	Female	Male			
African	2728	3980	6708	40.66%	28.91%
Asian	240	348	588	40.81%	2.54%
Coloured	293	493	786	37.27%	3.10%
White	520	832	1352	38.46%	5.51%
<b>Total</b>	<b>3781</b>	<b>5653</b>	<b>9434</b>		<b>40.07%</b>

269. The figures in **Table 19** below indicate that women in the senior management service of government tend to be aggregated at the entry level of management (i.e. level 13) at 41.01%, and tapers, in line with the typical global trends and patterns, towards the more senior decision-making positions in the public service (i.e. level 16) at 27.33%. This level represents where Directors-Generals and Heads of Departments are located.

**Table 19: Representation of SMS levels by gender as at June 2014**

Salary Level	No of women	No of Males	Total No	% of women
13	2722	3915	6637	41.01%
14	792	1252	2044	38.74%
15	226	377	603	37.48%
16	41	109	150	27.33%
<b>Grand Total</b>	<b>3781</b>	<b>5653</b>	<b>9434</b>	<b>40.07%</b>

270. Out of the 9 434 SMS positions filled as at June 2014, 3 781 (40.07%) were filled by women and 5 653 (59.93%) were filled by men. **Table 20** below indicates that of the total number of African females at the senior management level (i.e. 2728 or 28.91%), majority of them (i.e. 1969 or 72.18%) are located

within the entry level of the management levels (i.e. level 13), while 33 (i.e. 3.85%) out of the total of 2728 are at the top-most level of management.

Level	Male				Female				Male Total	Female Total	Total
	White	Asian	Coloured	African	White	Asian	Coloured	African			
13	597	221	319	2778	379	174	200	1969	3,915	2,722	6,6037
14	155	90	130	877	106	49	68	569	1,252	792	2,044
15	64	31	37	245	31	17	21	157	377	226	603
16	16	6	7	80	4	0	4	33	109	41	150
<b>Grand Total</b>	832	348	490	3980	520	240	293	2728	5,653	3,781	9,434
%									59.93%	40.07%	100%

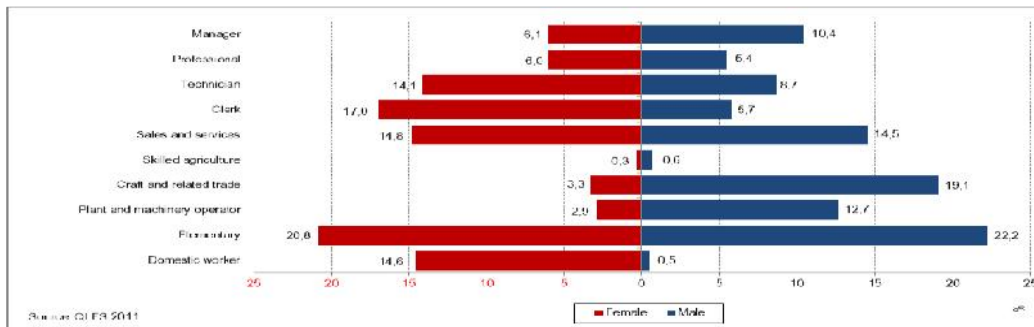
### Women in the Private sector

271. The representation of women in decision-making positions such as corporate boards and as Chairpersons of Boards or CEOs of corporate companies in South Africa is obtained from the South African Women in Leadership Census conducted by the Businesswomen's Association (BWA). In 2012, the 8<sup>th</sup> Women in Leadership Census provides a comprehensive analysis of women on boards, and in executive management of companies in the private sector in South Africa, especially Johannesburg Stock Exchange listed companies, as shown in **Table 21** below.

**Table 21: Women in Corporate Positions: 2008- 2012**

Representation of Women in Corporate Positions	2008	2009	2010	2011	2012
Chief Executive Officers / Managing Directors	3.9%	3.6%	4.5%	4.4%	3.6
Chairpersons	3.9%	5.8%	6.0%	5.3%	5.5
Directorships	14.3%	14.6%	16.6%	15.8%	17.1
Executive Managers	25.3%	18.6%	19.3%	21.6%	21.4

272. As illustrated in **Table 22** below, the Gender Statistics in South Africa, 2011 Report released in 2013 by Statistics South Africa highlights that the percentage distribution of women aged 15-64 years by occupational category indicates that 6% of women are in the professional category as compared to 5.4% males but 6.1% females are in the managerial category as compared to 10.4% males, suggesting that men are more likely to be decision-makers in their jobs compared to women.



273. A “board-ready women” database was launched in South Africa, in partnership between the Business & Professional Women South Africa (BPWSA) and Government, through the Department of Trade and Industry. It is the first database of its kind in South Africa of trained senior businesswomen - from which both the public and private sector can access potential non-executive board members. Women represent a significant part of the work force and of the customer base of most companies. Yet, with a few notable exceptions, their representation on boards is lacking. Broadening the gender diversity of boards not only helps increase the size of the candidate pool and therefore the quality of potential board members, but it also helps broaden the perspectives and experience of an entire team.
274. During November 2010 and February 2011 respectively, the CGE held public hearings with selected government departments and private sector companies on measures they have put in place to ensure a 50/50 representation of women in decision making positions as well as achieving the 2% target in employment of persons with disabilities. The selection was based on the finding from the South African Women in Leadership Census and the “worse performing” companies were selected. The major findings of the public hearings included that the private sector companies resist the implementation measures to achieve gender equality. Instead they rather opt to pay a fine as sanctions in line with the Employment Equity Act, 1998.<sup>426</sup>
275. In 2014, approximately 26% of South Africa’s senior management position in the private sector are filled by women.<sup>427</sup>

## ARTICLE 10: THE RIGHT TO PEACE

### Women’s participation in peace processes

276. South African women play an important role in peace and security. Government is committed to initiatives to promote a non-sexist society. Norms and values promoting gender mainstreaming, as enshrined in the Constitution, inform its foreign policy, and particularly promote gender mainstreaming as a significant element of participation in peace missions.
277. South Africa’s attempts to centralise gender mainstreaming in peace missions is also premised on both the United Nations Security Council Resolution 1325 on Women, Peace and Security, the African

<sup>426</sup> Act No. 35 of 1998

<sup>427</sup> Grant Thornton, International Business Report – Women in Business, 2014.

Union's constitutive elements of a Post Conflict Reconstruction and Development(PCRD) framework that seeks to consolidate women's gains made during conflict and rebuilding public institutions that are responsive to women's needs. South Africa's engagement in international peace missions is informed by the White Paper on South African Participation in International Peace Missions, adopted by Parliament in October 1999, which commits the country to supporting initiatives of the United Nations and the Organisation of African Unity, where applicable, aimed at the Prevention, Management and Resolution of international conflicts.

278. South Africa revised its White Paper on Participation in International Peace missions in 2008. This was a collaborative venture between the Departments of Foreign Affairs (known now as International Relations and Cooperation), Defence, Correctional Services, the South African Police Services and other government institutions.
279. The National Office for Coordination of Peace Missions is an interdepartmental committee whose mandate is to coordinate various departments' activities pertaining to South Africa's participation in peace missions. One of its chief objectives is to emphasize the role of women in peace missions abroad as well as mainstreaming of gender into such missions. The country has put in place a draft Plan of Action on implementing UN Security Council (UNSC) Resolution 1325.
280. Key objectives of the UNSC Resolution 1325 are increased participation and representation of women at all levels of decision-making, attention to specific protection needs of women and girls in conflict, gender perspective in post-conflict processes, gender perspective in UN programming reporting and in SC missions, and gender perspective and training in UN peace support operations.

#### **Appointment of women as Special Envoys and Special Representatives**

281. Over the past 13 years, South Africa has deployed several women to participate at operational levels in the UN and the AU-sponsored peacekeeping missions as members of the South African National Defence Force. Measures have been put in place with regard to strengthening the role of women and ensuring their involvement in decision-making related to peace-keeping, preventative diplomacy and related activities.
282. A number of senior women, including the Minister of International Relations and Cooperation, have been involved in peace-keeping and preventative diplomacy related to decision-making on the African continent, on a regular basis. In addition, in January 2005, the South African Government approved the deployment of South African Police Service members in Sudan as part of the AU Civilian Police. The members deployed consisted of both males and females. Equity targets for this deployment were maintained at the ratio of 60% males and 40% females. One of the objectives of the deployment was to provide assistance to women and children, i.e. "internally displaced people".
283. South Africa has, through the Spousal Office and the Office on the Status of Women, both in the Presidency and the Department of Defence, spearheaded programmes that seek to assist women from conflict-ridden countries in Africa to contribute to the culture of peace on the continent and beyond. This goal is achieved through facilitating dialogue among these women with the South African Women in Dialogue (SAWID). SAWID has played a major role in facilitating dialogue between women from



opposing camps, for example the dialogue with women of the DRC (March 2003) and Burundi (July 2004).

284. An active solidarity movement has been developed whereby South African women in addition to engaging in their struggles are also reaching out to provide space for women in conflict and post-conflict areas to express their own concerns and hopes for the future. SAWID led a multi-party delegation to the Sudan in 2007 to participate in a Conference on Sudanese Women in Politics, and both attended and hosted conferences on Women, Peace and Prosperity in Tunisia and South Africa in March and April 2007. The women of South Africa have therefore seized the opportunities that exist and have taken an active role as political, business and civil society leaders to contribute towards the resolution of conflicts and for the full attainment of socio-economic development within the country and the continent.
285. A delegation from Gabon visited the SAMHS in August 2009, during which a Memorandum of Agreement was drafted to facilitate future cooperation. The SAMHS continued its involvement and participation in the International Congress on Military Medicine. A first International Military Nurses Conference took place in August 2009. Liaison and networking with the nursing fraternity of ten SADC countries, namely Botswana, the Democratic Republic of Congo, Lesotho, Malawi, Mozambique, Namibia, Swaziland, Tanzania, Zambia and Zimbabwe, were formalized.
286. The SA Military Health Service (SAMHS) hosted the 10th SADC Military Health Annual General Meeting in December 2009, during which South Africa was allocated the chairpersonship. The establishment of a SADC Military Health Secretariat and the process to develop a joint military health doctrine for the SADC countries was initiated by the SAMHS. Enhanced cooperation in the military health field is taking place through the Military Health Workgroup of the Interstate Defence Security Committee.
287. The Military Police Division was involved in external and internal deployments throughout the year 2010. A total of 197 members were deployed in the Democratic Republic of the Congo (DRC), Burundi and the Sudan, while 122 were deployed internally during operations and exercises. Ten female Military Police members, of whom two were commanders, were deployed in the DRC.
288. In terms of gender representation, the Defence Force in South Africa has witnessed an increase in the number and percentage of female employees from 21 822 (27.8%) in 2011/12 to 22 195 (28.2%) 2012/13 fiscal years. This trend auger well for the mainstreaming of gender equity into peace-keeping and conflict resolution operations that South Africa undertakes on the continent. As at March 2013, there has been a total of 10 females represented in the 34 top management positions and 86 females represented in the total of 367 senior management positions. In terms of external deployments, as at October 2014, of the total number of 6 348 members of the South African Defence Force deployed to Op-Mistral, Op-Copper and Op-cordite, 14% were females.
289. At the Peace Mission Training Centre of the SANDF, the gender specialist is responsible to ensure that gender imperatives are integrated into the curriculum of all courses provided by the Training Centre. These courses include Gender for Instructors and Gender Advisors Course and were attended by 89 males and 51 females. Further preparations for deployment to the conflict areas PMTC also present Disarmament, Demobilisation and Reintegration; introduction to Peace Mission for Commanders,

Peace Mission for Staff Officers as well as Military Observers. Gender Advisors Course provides participants with the knowledge, skills and attitude to be in the position to address gender related issues in the conflict areas. Women from SADC Member States also attend these courses.

290. The SANDF has also deployed women in uniform for border safeguarding, responsible for apprehending illegal immigrants, arresting criminals, recovering stolen cars, weapons, livestock, copper cables and confiscating drugs. The Anti-Rhino Poaching Operations in the Kruger National Park form part of the border safeguarding operations that are being executed along the RSA/Mozambique border within the Kruger National Park. The deployment of the SANDF resulted in a number of poachers arrested as well as the confiscation of hunting rifles, including AK47 assault rifles.
291. In 2013, South Africa contributed troops which included women, together with the Republic of Malawi and the United Republic of Tanzania, to the SADC led Intervention Brigade in the Eastern Democratic Republic of the Congo under the UN mandated peace mission (MONUSCO) to end the military attacks and violation of human rights perpetrated by the M23 rebels against the civilian population. This intervention resulted in the M23 renouncing the rebellion and agreeing to enter into negotiations with the DRC government. South Africa also contributed to conflict resolution on the continent through its role as a member of the AU ad hoc high-level committee on the resolution of the Libyan crisis and as a member of the AU high-level panel.

#### **Reduction of military expenditure**

292. The need to reduce military expenditure in favour of social spending was first addressed in the 1996 White Paper on National Defence for the Republic of South Africa. The White Paper pointed out the complexity involved in drawing defence budgets. It noted that there are competing interests between reducing defence expenditure in favour of social spending and the need to maintain a military force capable on fulfilling its primary functions. In terms of the White Paper, South Africa has rationalised its defence spending, and eliminated waste and unnecessary duplication. South Africa has also sought to establish a relatively small Regular Force and a sufficiently large part-time force as a primary means of ensuring cost-effective defence capability.

### **ARTICLE 11: PROTECTION OF WOMEN IN ARMED CONFLICT**

#### **Protection of asylum seekers and refugees**

293. South Africa did not recognise refugees until 1993. Subsequently, the country became a party to the UN Convention related to the status of Refugees and the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.
294. In 1998, South Africa enacted the Refugees Act, 1998.<sup>428</sup> It provides for the reception into South Africa, and the rights and obligations of refugees and asylum seekers.

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<sup>428</sup> Act No. 130 of 1998

295. *Refoulement* means the expulsion of persons who have the right to be recognised as refugees. The principle of *non-refoulement* has first been laid out in 1954 in the Convention relating to the Status of Refugees, which, in Article 33(1), provides that: "*No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.*"
296. It is important to note that the principle of *non-refoulement* does not only forbid the expulsion of refugees to their country of origin, but to any country in which they might be subject to persecution. The only possible exception provided for by the UN Convention is the case that the person to be expelled constitutes a danger to national security. The protection of refugees and the principle of *non-refoulement* in South Africa is enshrined under the Refugees Act, 1998.<sup>429</sup> This Act seeks to give effect to relevant international legal instruments, principles and standards relating to refugees.
297. South Africa is amongst the countries that have the highest numbers of individuals applying for asylum in the world. In 2008 a total of 207 206 applications were received and in 2009 the number rose to 223 324. The great majority of applicants are clearly work-seekers and not refugees as defined in any of the conventions South Africa is a signatory to. One of the measures taken was to make the application process more efficient. In this regard, the Department of Home Affairs introduced additional controls and streamlined processes.
298. The legislation also outlines the rights of refugees and asylum seekers. A refugee is entitled to the following:
- (a) a formal written recognition of refugee status;
  - (b) full legal protection, which includes the rights set out in chapter 2 of the Constitution of the Republic of South Africa, except those rights that only apply to citizens;
  - (c) permanent residence in terms of section 27(d) of the Immigration Act, after five years of continuous residence in South Africa;
  - (d) an identity document;
  - (e) a travel document if he or she applies in the prescribed manner; and
  - (f) to seek employment.
299. South Africa does not host refugee camps. While they are being processed and hold a valid asylum seeker visa, asylum seekers can move freely and have the right to work and study, as well as access to basic health services. Refugees are entitled to apply for birth certificates for their children born in South Africa, identity documents and travel documents that are limited only by not allowing travel to countries of origin.
300. Foreign nationals, once they enter South Africa, enjoy the protection provided by the Constitution of the Republic of South Africa. Section 7(1) of the Constitution expressly provides that the Bill of Rights enshrines the rights of "all people in our country." They are therefore entitled to the right to legal

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<sup>429</sup> Act No. 130 of 1998

representation in addition to review and appeal processes under the Refugees Act, 1998.<sup>430</sup> Various organisations, some funded by the UNHCR, provide legal support for asylum seekers and refugees.

301. An asylum seeker, is further entitled to the following whilst within the territory of South Africa:
- (a) a formal written recognition as an asylum seeker, pending finalization of his or her application for asylum;
  - (b) the right to remain in the Republic of South Africa pending the finalization of his or her application for asylum;
  - (c) the right not to be unlawfully arrested or detained; and
  - (d) the rights contained in the Constitution of the Republic of South Africa in so far as those rights apply to an asylum seeker.
302. In the case of *Tantoush v Refugee Appeal Board*<sup>431</sup> the High Court, citing the Convention as an interpretative guide, upheld the principle of *non-refoulement*. The court overturned the decision of the Refugee Appeal Board not to grant the applicant refugee status in South Africa. In reaching this decision, the court noted that it would be a contravention of the doctrine of *non-refoulement* to return the applicant to Libya as there were substantial grounds to believe that he would be in danger of being tortured if he were so returned. The court stated: *“Objectively there is a consistent pattern of gross, flagrant and perhaps mass violation of human rights in Libya; and subjectively the evidence establishes conclusively that the applicant has engaged in activity within and outside of Libya over the past 20 years, including his application for asylum, which makes him vulnerable to the risk of being placed in danger of torture were he to be returned to Libya.”*<sup>432</sup>
303. The Act ensures that all refugees including women are treated with dignity and have unhampered access to life’s necessities, including health, social grants, housing, education and work. Unfortunately, there has been growing resentment and reaction to refugees that has been demonstrated through violent attacks in different parts of the country in May 2008, which resulted in death of 62 refugees. An Inter-sectoral Ministerial Committee was established to address issues of xenophobia in South Africa. Initiatives taken by government during this May 2008 xenophobic attack include erecting camps in hot spots to place and protect refugees and other foreign citizen from being attached. This was followed by refugees and foreign national being incorporated back into the communities after resolving the challenges.

#### **Participation of children in armed conflicts**

304. Under the Defence Act, 1957<sup>433</sup> the relevant provisions of which operated until 2002, male persons between the ages of 12 and 17, both included, were required to undergo mandatory cadet training. The Act further expressly provided that every male citizen between the age of 17 and 65, both included, was liable to render service in the South African Defence Force.

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<sup>430</sup> Act No. 130 of 1998

<sup>431</sup> 2008 (1) SA 232 (T)

<sup>432</sup> Par 135

<sup>433</sup> Act No. 44 of 1957

305. This position changed in 2002 when the new Defence Act, 2002<sup>434</sup> was enacted. The new Act prohibits the recruitment of children into the armed forces by expressly providing that the South African regular armed forces shall consist of persons not younger than 18 years of age.

## ARTICLE 12: RIGHT TO EDUCATION AND TRAINING

306. Since 1994, South Africa has tirelessly pursued transformation measures in all aspects of education, including those aimed at the advancement of girls and women. As an initial step towards transforming the education system, the White Paper on Education and Training was adopted in 1995. It provides the blueprint for the transition to a single, national non-racial education system. Law reform measures followed the adoption of the Policy. The National Education Policy Act, 1996<sup>435</sup> and the South African Schools Act, 1996<sup>436</sup> were enacted to promote access to education for all. The South African Schools Act, 1996<sup>437</sup> made schooling compulsory for children from the year in which the child turns 7 to 15 years (or 9<sup>th</sup> grade, whichever occurs first).
307. In relation to higher education, the National Plan for Higher Education was adopted in 2001. It laid down the plan for the restructuring of the higher education system. It established student-equity and employment equity targets. Student equity-targets are for black and female students while employment equity aims to address the race and gender employment inequalities.
308. In 2002, the National Curriculum Statement was adopted. It is a radical departure from the previous racist and sexist curriculum model. This new curriculum is liberating, nation building, learner centred, outcomes based, and gender sensitive. Since its adoption, the Statement has been supplemented by advocacy inserts on learner pregnancy, sexual violence and harassment in schools in print media. Learners are also educated about the prevention of pregnancy and sexually transmitted diseases and about lifestyle choices through the Life Orientation Programme in the National Curriculum, which is compulsory for grade 1 to 12. Peer education, prevention and support programmes are available.
309. Significantly women now outnumber male enrolments in higher education. In 1993 women made up 43% of enrolments in universities and technikons (Council on Higher Education, 1999). By 1997, the proportions were almost even, with women then stretching ahead as the majority of higher education individuals. By 2011, women made up 54% of all students (938 201 students in total) enrolled in contact university programmes and 63% of those enrolled in distance education programmes. (DHET, 2013).
310. The Further Education and Training Colleges, 2006<sup>438</sup> (which repealed the Further Education and Training Act, 1998)<sup>439</sup> regulates further education, and addresses the advancement of women in

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<sup>434</sup> Act No. 42 of 2002

<sup>435</sup> Act No. 27 of 1996

<sup>436</sup> Act No. 84 of 1996

<sup>437</sup> Act No. 84 of 1996

<sup>438</sup> Act No. 16 of 2006

<sup>439</sup> Act No. 98 of 1998

further education as well as in previously male-dominated fields. The Skills Development Act, 1998<sup>440</sup> provides for upgrading and acquisition of new skills for employment and advancement in the labour sector and requires the Department of Labour to consider the provisions of gender equality.

311. Legislative reforms have also targeted the promotion of adult literacy. The Adult Basic Education and Training Act, 2000<sup>441</sup> provides for basic education to older persons who previously could not access education opportunities. This Act largely benefits women in general and black women in rural areas, in particular, those who were historically disadvantaged.
312. Education measures in South Africa were provided and implemented following the democratic elections in 1994. Following the 2009 general elections, the Department of Education was divided into two separate Departments, namely one for Basic Education and the other for Higher Education and Training.
313. The Department of Basic Education is responsible for the primary education system and adult literacy; and the Department of Higher Education and Training is responsible for the higher education system, further education and training institutions, national skills authority, sector education and training, trade testing centres and skills development institutions.
314. This is in stark contrast to the system obtained under the apartheid regime during which the education system was fragmented along racial lines and administered by a total of 19 separate departments. The statutes and policies outlined above have provided the framework for transforming the education system in South Africa. Advances have been made in the proportion of women in the education system with parity being achieved in almost all spheres. Since 1994, primary education has been characterized by high rates of enrolment and retention. These rates show strong gender equity, and where small differences do exist, they are in the girl child's favour. Universal primary education is already effectively a reality. The adjusted net enrolment ratios show that primary education is at 98% by 2009, up from 96% in 2002. At this level almost the same proportion of boys of school going-age and similarly that for girls are in school.
315. According to the South Africa Country Report "Education for All"<sup>442</sup> the gender parity access to primary and secondary education, including Early Childhood Development has almost been achieved. However, the proportion of males to females is marginally higher in primary school, and that of females to males is marginally higher in secondary schools.
316. **Table 23** below indicates that parity was achieved in the participation of male and female children in this age group. Between 2002 and 2013, there is approximately equal participation in education by both sexes, with a Gender Parity Index for 7 to 15 years being achieved.

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<sup>440</sup> Act No. 97 of 1998

<sup>441</sup> Act No. 52 of 2000

<sup>442</sup> 2009

**Table 23: Percentage of 7-15 years old attending educational institution by gender, 2002-2013**

	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
<b>Male</b>	96.0	96.7	97.4	97.6	97.4	97.6	97.8	98.3	98.6	98.7	98.5	98.6
<b>Female</b>	96.6	97.6	98.1	97.9	97.8	98.2	98.1	98.6	98.7	98.8	99.1	98.9
<b>Total</b>	96.3	97.2	97.7	97.8	97.6	97.9	97.9	98.5	98.7	98.8	98.8	98.8

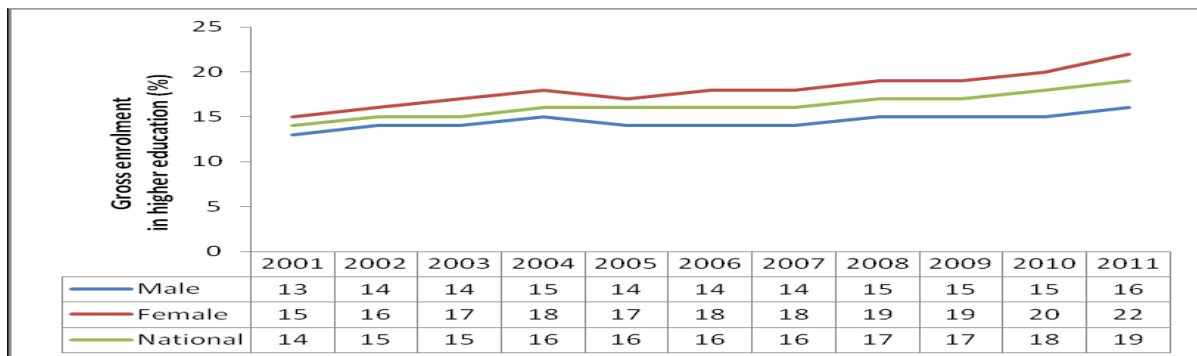
317. As **Table 24** indicates, older females are more likely to be out of school than males in this age group. The 2013 General Household Survey found that 15% of females aged 16 to 18 years were not attending an educational institution compared to almost 13% of males in the same age group. While the percentage of females that were not attending educational institutions had decreased from approximately 21% in 2002 to almost 15% in 2013, the percentage of males remained stable at an average of 14% between 2002 and 2013.

**Table 24: Percentage of 16 to 18-year-old youth not attending education institutions by gender, 2002 to 2013**

Gender	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
<b>Male</b>	14.3	14.6	14.1	14.8	15.7	13.4	15.5	15.9	15.2	14.3	12.8	12.6
<b>Female</b>	20.9	19.8	20.5	20.9	19.5	16.3	16.9	17.5	19.0	16.0	15.4	15.1
<b>Total</b>	17.6	17.2	17.3	17.8	17.5	14.8	16.2	16.7	17.1	15.1	14.1	13.9

318. Completion rates of primary education have also improved from 89.6% in 2002 to 93.8% in 2009 and 96.1% in 2011. These completion rates are also accompanied by improving literacy rates that reach 93%.
319. The Department of Higher Education and Training's (DHET) Strategic Plan for Higher Education and Training 2010–2015, highlights the importance of tertiary education in relation to the government's development agenda. In contrast to the universal targets set for primary education, Higher Education is aimed at providing access to tertiary institutions to at least 20% of learners who successfully complete Grade 12. As indicated in **Table 25** below, there has been an increase in higher education enrolments from 677 913 candidates in 2002 to 938 201 in 2011 (DHET, 2012a). With the target being 20% enrolment rate in higher education by 2014 and 19% of youth already in higher education in 2011, South Africa is well on course to meet the national target. The national average shows an increase of approximately 5 percentage points from 2001 to 2011. When comparing males and females a slightly different scenario is observed. Over the ten year period 2001 to 2011, females made more gains than males as they improved their participation rate by 7 percentage points from 15% to 22% (Figure 16) when compared to the 3 percentage points gain observed for males.

**Table 25: Gross enrolment rate in higher education by sex**



320. The percentage of people of age 20 years and older that received no formal education has decreased steadily between 1996 and 2011. In 1996, 17.0% of males had no formal education. This decreased to 15.5% in 2001 and further to 7.2% in 2012. For females, the percentage with no formal education decreased from 20.9% in 1996 to 20.0% in 2001 and 9.9% in 2011. This finding also indicates that women have always been more likely than men to have no education with a slight narrowing of the gap between these two group toward 2011.
321. The distribution of highest qualifications of persons aged 20 years and older that have attained post-school qualification in 2001 indicated that most of the qualifications for men were in the field of business, commerce or management science (i.e. 19, 4%) and engineering technology (i.e. 19,1%), whilst most women tended to have qualifications in the field of education, training and related fields (i.e. 30,8%) as well as being represented in low levels in business, commerce or management science (i.e. 16,8%).
322. In 2011 women have significantly shifted towards business, commerce or management science (26,1%) and away from education, training and related fields(19,8 %), the former dominant field. Women, especially black, were under represented in science, engineering and technology, as well as in business and commerce programmes - the critical areas needed in the country. Black Women, especially African women are underrepresented in postgraduate studies which are dominated by white males.
323. The National Research and Development Strategy and the 2008 Ten Year Innovation Plan transformed the Science and Technology workforce which resulted in an equitable representation of women and black persons in science and technology in particular. Following the implementation of these strategies, women enrolment in higher education has increased from 48% in 1996 to 58% in 2012, the proportion of women in honours programmes from 44% to 49% and in doctoral programme from 38% to 44%. South Africa is the highest in Africa at 44% only matched by Tanzania.
324. The enrolment of women in science, engineering and technology fields increased from 43.8% in 2000 to 45% in 2012 and women graduation increased from 48.4% to 51% during this period. Guidelines on improving the distribution of bursaries and scholarship has set a target of 55% of support to post graduate students to go to women. This has shown an improvement from under 50% in 2011/2012 to



53% in 2013- with women constituting 53% of all honours students, 49% doctoral degrees and 45% of postdoctoral degrees.

325. The South African Government has also introduced a number of innovative programmes that seek to improve women's vocational choices with special attention given to accelerating their participation in science and technology. These programmes are a response to the 2001 National Census that revealed that for the population aged 20 years and older, there were twice as many women as men in the social sciences, whilst there were ten times as many men as women in the engineering and the pure and life sciences. Thus in 2003, the Science, Engineering and Technology for Women Sub-Committee was established to advise the Government on issues relating to women within science and technology. Since 2003, awards and fellowships worth millions of South African Rand have been awarded to women in the field of science and technology.
326. One of the positive spin-offs of this process has been assistance provided by the Department of Science and Technology in the production of a television series on Women in Science that was screened on national television in South Africa in 2007. This series served both to educate young girls on careers in science, engineering and technology, but also highlighted the impact of women scientists in South Africa. The winners of the different categories in the Women in Science Awards also featured in a supplement to a weekly South African newspaper. In addition in 2003, the Department created the Women in Science Awards to honour the achievements of women within the sector. These awards showcase the achievements of women scientists and provide role models for young girls in science and technology.
327. Moreover, the Girls Education Movement (GEM) was initiated in 2002 to address issues of gender and culture, and encourage girls to participate in science and technology areas. Gem's Techno-girl programme provides girls with career guidance and life skills support, particularly in mathematics and technology. The target group comprises secondary school female learners or tertiary school entrants between the ages of 15 and 20, drawn from the rural areas. Every year during school vacation, the GEM camp is held in which life skills education is offered in addition to raising awareness on the participation, retention and achievement of girls in maths, science and technology. An Information Technology Academy in Tombo, a rural village in the Eastern Cape Province, has also been established.
328. Talent Development Strategy supports youth into Science and Mathematics Olympiads and competition for learners and the programme reserves 60% of the participants to girls' learners who are in grade 10-12. Between 2011 and 2013, 70% of the participants in the Talent Development Programme were girls. The Thuthuka programme of the National Research Foundation supports women and black students who are emerging as researchers and this programme have to date awarded 1 058 research grants to 698 women and 594 black researchers.
329. With regards to funding, poverty is one of the challenges that make it difficult for young women to access higher education and training in South Africa. Government has made huge strides in increasing access to higher education. The National Student Financial Aid Scheme (NSFAS) provides access to higher education students from poor and working class families with the potential to achieve academically. This is a category of students who would not be able to pursue higher education without financial assistance. The amount disbursed to students as loans and bursaries through NSFAS has

increased from R3.5 billion in 2009 to R7.4 billion in 2012. Since 2012, NSFAS provides 100% bursary allocations for all students with family joint income of under R122 000.00 per annum. Another bursary programme was made available since 2008 to provide financial support to students with disabilities. This support is intended to provide the necessary additional teaching and learning (curriculum) support for this category of students to overcome any barriers to learning which have resulted from their disabilities.

330. Opportunities for education and training have opened up. By 2009, 85% of unemployed people were trained on learner-ships and of those completing the training 54% were women.
331. The South African Schools Act, 1996<sup>443</sup> prohibits discrimination on learners on the basis of pregnancy and in this regard, Measures for the Prevention and Management of Learner Pregnancy provide support to educators to manage pregnancy in schools and to contribute to the reduction of girls dropping out of school.
332. Pregnancy is amongst the major concerns that pose a serious threat to gains achieved in public schools thus far. Teenage pregnancy undermines the efforts to ensure that girl children remain in school, in order to contribute towards a quality life for all, free of poverty. The Department of Basic Education has taken an active role in seeking to understand and effectively address this challenge, as it impacts significantly on learners. In 2008, the Department commissioned a desktop study to document, review and critically analyse literature on teenage pregnancy with a focus on school-going adolescents. The study analyses both the prevalence of teenage pregnancy and its determinants and released the report 'Teenage Pregnancy in South Africa, with a Specific Focus on School-Going Learners' in 2009.
333. There are multiple drivers of South Africa's high levels of teenage pregnancies. Poverty, inequality, sexual abuse, poor information, stigma and limited access to health services create conditions which limit young girls' abilities to prevent and address unintended pregnancy. Dropping out of school due to pregnancy often prevents a girl-child from achieving a better quality of life. While being vulnerable to pregnancy, teenage girls are also at risk of contracting HIV and AIDS as well as other forms of sexually transmitted diseases.
334. **Table 26** below shows the learner pregnancy rates from 2004 to 2008. For the period 2004-2008, the number of pregnant learners per 1000 registered learners was estimated. For example, in 2004, the Education Department registered 51 pregnancies for every 1000 female learners. A provincial breakdown of the number of pregnancies per 1000 learners show a consistent pattern of high pregnancy rates are reported for provinces that are poor and mostly rural (Eastern Cape, KwaZulu-Natal and Limpopo), and a reverse is evident for the more affluent and urban provinces (Gauteng and Western Cape).

**Table 26:**

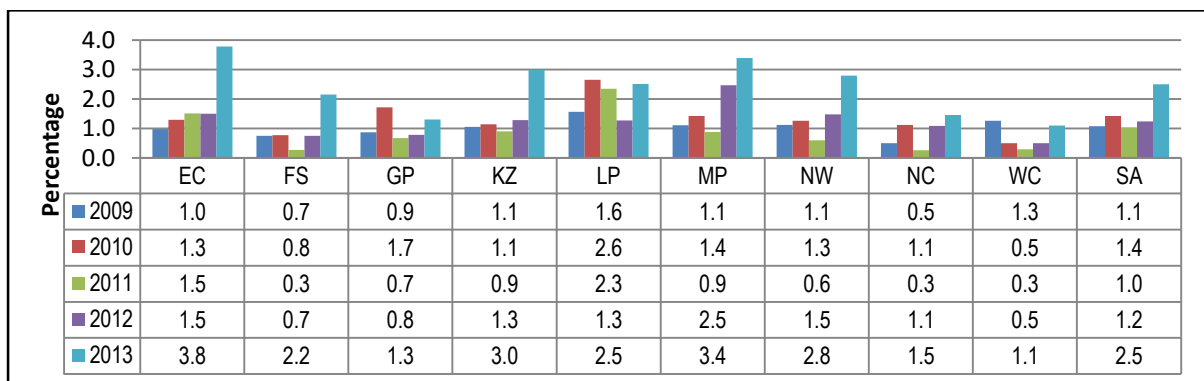
Year	No of pregnant learners/1000 registered	No of learners captured

<sup>443</sup> Act No. 84 of 1996

2004	51.42	8058
2005	55.69	9691
2006	56.34	9031
2007	59.51	16336
2008	62.81	16320
Total	58.22	59436

335. **Table 27** below shows that in 2013, the percentage of learners attending schools who fell pregnant increased compared to 2009. In 2013, 2.5% of female learners nationally were pregnant in schools, compared to 1% in 2009.

**Table 27: Percentage of pregnant learners from 2009 to 2013**



336. The role of education to prevent teenage pregnancy has long been cited as a critical factor in the development of nations and in the achievement of the Millennium Development Goals. Learners are being educated on the prevention of pregnancy and interventions have been put in place to ensure that pregnant learners are not discriminated against, and that their prompt return to the schooling system post pregnancy is ensured. According to the Constitution and the Schools Act, discrimination on the basis of pregnancy is prohibited. As stated, the Department of Education has adopted the Measures for the Prevention and Management of Learner Pregnancy in 2007.
337. With regard to addressing adult literacy, the KhaRiGude(Let us learn) Mass literacy Campaign, was approved by Cabinet in 2007 and is regarded as one of the important ways in which the developmental state prioritizes the needs of the poor and addresses the right of all citizens to basic education in the official language of their choice. The campaign is intended to provide 4.7 million South Africans with the opportunity to become literate. The campaign enables adult learners to read, write and calculate in their mother tongue, which is in line with the unit standards for ABET Level 1, as well as to learn conversational English. The campaign targets vulnerable groups, including the deaf and the visually impaired. Currently, 80% of the learners are women, 8% are disabled, 25% are youths and 20% are

over the age of 60. In 2009, out of the 287384 learners enrolled at the Adult Basic Education and Training (ABET) Centres, 207042 were female learners. The majority of these female learners were registered for mathematics (2 321) and physical science (1 296). According to the Development Indicators released during the end of 2010 South Africa's adult literacy rate is captured in **Table 28** below:

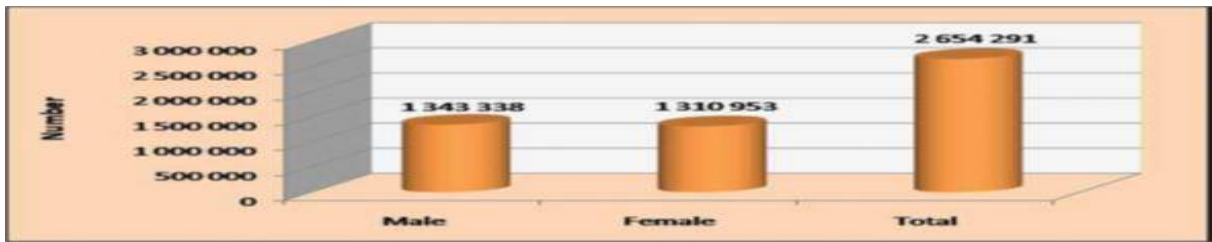
Adult literacy rate	2002	2003	2004	2005	2006	2007	2008
Total literacy rate	70.7	72.6	73.3	74.2	74.4	74.1	76.5
Female literacy rate	69.4	70.3	71.8	72.1	73.2	74.2	74.7

338. The achievement of education for all has been fast tracked by national education policies that greatly impacted on access to learning. They include the introduction of the No-Fee Schools Policy, the National School Nutrition Programme and other programmes aimed at retaining learners in schools that have led to dramatic increases in both primary and secondary school enrolment.
339. Many young children living in poverty are food-deprived and are therefore not able to participate fully in their own development. The National School Nutrition Programme (NSNP) aims to promote better quality education for the poorest learners by providing a daily meal to learners benefiting from the programme. In the 2010-2011 financial year, a total of 8 281 927 learners in 20 815 schools were reached: 6 536 744 learners in 17 315 primary schools and 1 745 183 learners in 3 500 secondary schools. Since 2008, the budget of the programme has progressively extended to include poor learners in secondary schools and in 2013, it provided over 8 million learners in over 20 000 schools.
340. No Fee Schools Policy has been of support to children from poor families as well as orphans, where in 2012 at least 6% of all children attending school were orphans. In 2012, 97.5% of learners who did not pay schools fees indicated that schools did not ask for fees or the school was a "no fee paying school". There was an increase in the percentage of children who are not paying school fees from 94% in 2009 to 97.7% in 2012. The increase in the percentage indicates that government is making schooling more accessible through the introduction of no fee schools. Furthermore, it confirms that the national education policies are being implemented successfully in the provinces. **Table 29** below shows the main reasons for non-payment of school fees from 2009 to 2012.



341. The Department of Basic Education and the Sport and Recreation South Africa jointly launched the National School Sport Programme which is aimed at ensuring that learners are physically active to improve and maintain their health. The School Sport Program includes sporting codes that are traditionally played by girl children such as netball, women’s football, basketball and athletics. The first National School Sport Championships were successfully held in December 2012. The roll-out of school sport program is underpinned by physical education; top school leagues and national championships. Approximately 8000 learners participated in the finals of the National School Sport Championships in 2013. The total number is inclusive of girls and learners with disabilities, the challenge is disaggregated data which clearly indicates how many girls and learners with disabilities participated.
342. Safe schools are schools that are physically and psychological safe and that allow educators, learners and non-educators to work without fearing for their lives.<sup>444</sup> Among the reasons stated for not attending schooling in the General Household Survey 2012 Report which focusing on schooling was “lack of transport” (1%) and “safety at school” (1%). School safety is a prerequisite for effective teaching and learning and for the delivery of quality education.
343. A survey undertaken by the Medical Research Council (MRC) in 2010 found that more than one-quarter of learners (27%) felt unsafe at school. This was the case for both girls and boys. Significantly fewer White (13.8%) and Indian (13.7%) learners felt unsafe at school when compared to Black (27.6%) and Coloured (28.5%) learners (MRC, 2010). **Table 30** below shows school violence by gender in 2011.

<sup>444</sup> Prinsloo, 2005



344. One of the reasons why learners do not feel safe at school is the absence of teacher supervision during breaks and when children leave the premises at the end of the school day. A study undertaken in 2005<sup>445</sup> noted that more than one-third of children (34%) reported that male learners always/often/sometimes sexually harassed female learners by touching or threatening them, or by making rude remarks. It was also found that 8% of children indicated that male educators proposed relationships with female learners at school.
345. Government has embarked on several strategies to promote school safety. The *Guidelines for the Prevention and Management of Sexual Violence and Harassment* was distributed to all schools. The Guidelines serve to enhance measures to create a safe and caring school environment free from all forms of sexual harassment and violence, as well as to assist public schools in maintaining the minimum standard procedures for addressing allegations of sexual violence in schools.<sup>446</sup>
346. According to the “*Education for All (EFA) 2013 Country Progress Report: South Africa*” school-related gender-based violence can be broadly clustered into two overlapping categories: explicit gender (sexual) violence, which includes sexual harassment, intimidation, abuse, assault and rape; and implicit gender violence, which includes corporal punishment, bullying, verbal and psychological abuse, and teacher’s unofficial use of students for free labour and other forms of aggressive or unauthorized behaviour that is violent. The report further states that in schools where sexual violence against girls is taking place, the education system itself may increase a girl’s chances of dropping out, interrupting her studies, experiencing an unwanted pregnancy or becoming infected with HIV.<sup>447</sup>
347. Sexual abuse may occur outside the school with girls engaging in sex with adult men in exchange for gifts and money. Girls may be sexually or violently abused in school by teachers. Such behaviour exploits the teachers’ position of authority and betrays their duty of care. There are several programmes to provide a comprehensive response to gender based violence. These programmes have been institutionalized in the Curriculum and Assessment Policy Statements in the Life Orientation Curriculum across all grades and bands. Programmes include “Speak Out” Youth report sexual abuse, the HIV/AIDS and Life Skills programme, the Sexual Reproductive Health programme, Peer Education Programmes and Opening your Eyes-Educators Addressing GBV, amongst others. There are also scripted lessons and messaging on gender-based violence in the Life Orientation workbooks that is distributed to all learners. Developmentally appropriate messaging and information are included.

<sup>445</sup> Prinsloo, 2005

<sup>446</sup> DBE, 2010

<sup>447</sup> p. 40

## ARTICLE 13: ECONOMIC, SOCIAL AND CULTURAL RIGHTS

348. South Africa has implemented labour market transformation measures that are aimed at equalizing access to employment opportunities since 1994. A key focus of such interventions has been the implementation of a legislative framework to transform labour market relations with a view to affirming women and enabling them to enter and advance in enclaves of the labour market that were previously closed to them.
349. The principal legal framework that has been implemented in this regard include the Labour Relations Act, 1995,<sup>448</sup> the Basic Conditions of Employment Act, 1997,<sup>449</sup> the Employment Equity Act, 1998,<sup>450</sup> and the Preferential Procurement Policy Framework Act, 2000.<sup>451</sup>
350. The Labour Relations Act, 1995<sup>452</sup> prohibits the dismissal of an employee on account of her pregnancy, intended pregnancy, or on any reason related to her pregnancy. Moreover the Act defines 'dismissal' to include the refusal to allow an employee to resume work after she has taken maternity leave in terms of any law, collective agreement or her contract.
351. The Basic Conditions of Employment Act, 1997<sup>453</sup> provides for maternity leave and the protection of female employees before and after birth. The Act also provides for family responsibility leave, which may be taken when an employee's child is born or sick, or in the event of the death of a spouse or family member. The Employment Equity Act, 1998<sup>454</sup> provides that affirmative action may be taken to promote the employment of historically disadvantaged groups such as women. Similarly, the Preferential Procurement Policy Framework Act, 2000<sup>455</sup> requires state organs to implement a procurement policy that is favourable to the contracting of historically disadvantaged groups such as women.
352. The National Empowerment Fund (NEF) was established to promote and facilitate black economic participation through the provision of financial and non-financial support to black empowered businesses, as well as by promoting a culture of savings and investment among black people with a vision to become the leading provider of innovative transformation solutions for an economically inclusive South Africa.
353. The Black Economic Empowerment Act, 2003<sup>456</sup> including related regulations (the Codes and Sector Codes) are aimed at the following, amongst others:

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<sup>448</sup> Act No. 66 of 1995

<sup>449</sup> Act No. 75 of 1997

<sup>450</sup> Act No. 55 of 1998

<sup>451</sup> Act No. 5 of 2000

<sup>452</sup> Act No. 66 of 1995

<sup>453</sup> Act No. 75 of 1997

<sup>454</sup> Act No. 55 of 1998

<sup>455</sup> Act No. 5 of 2000

<sup>456</sup> Act No. 53 of 2003

- Increasing the extent to which communities, workers, cooperatives and other collective enterprises own and manage existing and new enterprises and increasing their access to economic activities, infrastructure and skills training;
  - Increasing the extent to which black women own and manage existing and new enterprises, and increasing their access to economic activities, infrastructure and skills training.
354. In 2007 the Codes of Good Practice were published to assist and advise both the public and private sectors in their implementation of the objectives of the BBBEE Act. The Codes also provide principles and guidelines that would facilitate and accelerate the implementation of broad-based empowerment in a meaningful and sustainable manner. The Preferential Procurement Policy Framework, 2000<sup>457</sup> provides a framework for preferential treatment of historically disadvantaged groups (such as women and people with disabilities) in procurement transactions. The Act provides specific targets for women and people with disabilities and recognises that public procurement can serve as an important policy instrument for advancing marginalised groups, such as women-owned businesses. Study findings show that public procurement constitutes 10-15% of GDP in developed countries and up to 20% in developing countries.
355. The National Industrial Policy Framework, published in 2007, and the Industrial Policy Action Plan (IPAP), which followed, provided frameworks for improving policy interventions to stimulate industrial development. The New Growth Path identified a number of key sectors to focus on in order to diversify and grow the economy and create jobs. Since then, the automotive, clothing and textiles, film and television, business-process services, and metals and engineering industries have registered some progress.
356. The establishment and success of small, medium and micro enterprises (SMMEs) are globally recognised as critical to address the challenges of job creation, poverty alleviation, socio-economic conditions and equality for all. This is especially the case in South Africa where the role of SMMEs is vital to drive economic growth, employment, innovation and competitiveness. It is estimated that South Africa has some 5.9 million SMMEs which generate 40% of its gross domestic product and 60% of employment in the country. Women enterprises are largely represented in SMMEs. Following the 2014 South African elections, President Jacob Zuma proclaimed the Department of Small Business Development to champion the support of small businesses.
357. South Africa's economic growth improved dramatically with the transition to democracy and has been reasonably robust and stable throughout the democratic era. It grew for 40 quarters between the fourth quarter of 1998 and the third quarter of 2008, and has grown steadily from the third quarter of 2009 to the third quarter of 2013. South Africa's economy grew by 1,5% in 2014. Eight of the ten industry groups experienced some growth during the year, while two industries shrank in size. The industry that grew the fastest in 2014 was agriculture.

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<sup>457</sup> Act No. 5 of 2000



358. Government has implemented various approaches to supporting SMMEs which include; measures to reduce the tax compliance burden, providing dedicated credit facilities, establishing support and extension agencies and incubators, and diversifying procurement towards emerging enterprises where possible. In 2012, the various national small business finance agencies, such as Khula Enterprise Finance Ltd, the South African Micro-Finance Apex Fund (Samaf) and the IDC's small business activities, were consolidated into the Small Enterprise Financing Agency (SEFA), which was housed in the Industrial Development Corporation (IDC). This was initiated after the adoption of the New Growth Path (NGP) in 2010 which identified enterprise development as a key priority. Resultant policies aim to promote small business and entrepreneurship by improving access to and efficiency of government funding and making more resources available to SMMEs. The Small Enterprise Financing Agency's mandate is to foster the establishment, survival and growth of SMMEs and contribute towards poverty alleviation and job creation.
359. South Africa has put measures in place to encourage women to start their own business and also form cooperatives which will further open employment opportunities to other women. Several initiatives are in place to assist women who want to start their own business.
360. The Small Enterprise Development Agency (SEDA) is an agency of the South African Department of Trade and Industry. SEDA was established in December 2004, through the National Small Business Amendment Act, 2004<sup>458</sup> with the mandate to:
- Implement National Government's small business strategy;
  - Design and implement a standard and common national delivery network that must uniformly apply throughout the Republic in respect of small enterprise development; and
  - Integrating all government funded small enterprise support agencies across all tiers of government.
361. SEDA's mission is to develop, support and promote small enterprises throughout the country, ensuring their growth and sustainability in co-ordination and partnership with various role players, including global partners, who make international best practices available to local entrepreneurs.
362. Isivande Women's Fund (IWF) is an exclusive fund that aims to accelerate women's economic empowerment by providing more affordable, usable and responsive finance than is currently available. The IWF targets formally registered, 60% women-owned and/or managed enterprises that have been in existence and operating for two or more years with a loan range of R30 000 to R2 million.
363. The B'avumile Skills Development Programme is a women's empowerment initiative aimed at enhancing talent in the arts and crafts and textiles and clothing sectors among women. It consists of a formal training programme to develop women enterprises' expertise in production of marketable goods and creation of formal enterprises in the creative and clothing and textiles industry. This initiative provides the country with an opportunity to fast-track rural women's economic empowerment, as well as grows number of women owned enterprises that are integrated into the economic mainstream.

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<sup>458</sup> Act No. 29 of 2004

364. Technology for Women in Business (TWIB) is an initiative aimed at enhancing the accessibility of Science and Technology in particular in Small, Medium and Macro Enterprises (SMMEs). This programme was initiated in 1998, with the emphasis on the application of science and technology solutions to achieve business growth in women-led enterprises and consequently move women-led enterprises from the side-lines towards the mainstream economy.
365. The objectives of TWIB are facilitating focused action by women entrepreneurs at all levels; creating successful role models; unlocking solutions to progressive approaches to doing business in a global economy; and exploiting partnerships with government, corporate and women focused organisations.
366. The TWIB programme also holds annual awards ceremony to recognize and reward women entrepreneurs who have successfully used appropriate technologies to improve the performance of their businesses. The national programme focuses on female entrepreneurs at all levels of business, from SMMEs. It aims to accelerate business growth through partnerships, education, mentoring and training.
367. Many women's enterprises are established as cooperative supported by the Co-operative Incentive Scheme (CIS). This is a 100% grant for registered primary co-operatives (a primary co-operative consists of five or more members). The objective of the CIS is to improve the viability and competitiveness of co-operative enterprises by lowering their cost of doing business through an incentive that supports Broad-Based Black Economic Empowerment. The objectives are as follows:
- Promote co-operatives through the provision of a matching grant;
  - Improve the viability and competitiveness of co-operative enterprises by lowering the cost of doing business;
  - Assist co-operatives to acquire their start up requirements;
  - Build an initial asset base for emerging co-operatives to enable them to leverage other support; and
  - Provide an incentive that supports broad-based black economic empowerment.
368. Since 1994, following concerted efforts to promote equality between men and women in the labour sector coupled with affirmative action, the proportion of women in wage employment in the non-agricultural sector has been slowly rising. As **Table 31** below shows, in 1996 and 1999, the female share of wage employment was 43%, if agriculture is excluded. The share showed a mild stepwise increase to 44% in 2005 and then 45% in 2010. In terms of population group, the overall share is highest for coloured females, at 48.2%, followed by white females at 47.5%. For Black Africans it is at 44.7%, while for the Indian/Asian group it is at 40.5%. The female share of wage employment increased for the Black African and Indian/Asian groups between 2004 and 2010, while it declined for the coloured group.

**Table 31: Employees by sex (excluding the area of agriculture) from 1996-2010:**

Year	Male	Female	Female share
1996	4 191 155	3 226 789	43%
1999	5 300 237	3 987 245	43%
2005	5 359 657	4 138 220	44%
2010	5 621 478	4 672 513	45%

369. South Africa (Statistics SA) released a study in 2014, entitled the *Gender Series: Volume 1: Economic Empowerment 2001-2014* focusing on gender disparities in economic empowerment and providing more in-depth analyses and covering different focal areas related to gender. The areas indicated here are amongst some of the important aspects in the report. Labour force participation of females in the economy can have an impact on raising the overall income for households. Raised income for females in turn increases their chances for better access to and control over resources, and can have a statistically significant impact on poverty reduction.
370. The labour force participation rate of males was higher than that for females in both 2001 and in 2014. Even though both sexes are participating at lower rates in 2014 than in 2001, the gap between male and female participation rates remained stable over the reference period. Nationally, the labour force participation rates of both males and females were higher in 2001 than in 2014. The participation rate of males decreased from 67.4% in 2001 to 63.6% in 2014. The participation rate of females was 54.9% in 2001 and declined to 51.0% in 2014. The study also indicated that levels of employment increased by 2.5 million and males reported the highest increase of about 1,7 million, while the number of employed females only increased by 826000.
371. When education was assessed in relation to field of study, it was found that employed persons with a tertiary education were more likely to be qualified in the economic and management sciences. Gender differences were observed in relation to qualifications. Males were three times more likely (with a percentage share of 75,4%) to be qualified in physics/mathematics/engineering than females.
372. On the other hand, females were more likely to be in possession of qualifications in the field of social studies/health sciences and arts/education/hospitality (approximately 66% and 68%, respectively).
373. **Table 32** below indicates analyses of the share in employment level of males and females with tertiary qualification by sex and field of study in 2011, as per Census 2011.

Field of Study	Males		Females		Both sexes	
	Numbers	%	Numbers	%	Numbers	%
Social Studies/health sciences	139	34.6	263	65.4	402	17.4
Arts/Education/hospitality	154	32.4	321	67.6	475	20.6
Economic and management Science	325	45.3	335	50.7	661	28.6

Physical/mathematical science/engineering	373	75.4	121	24.6	495	21.5
Agriculture/others	145	54.9	129	47.1	274	11.9
Total	1136	49.3	1170	50.7	2306	100

Source: Census 2011

374. With regard to earnings, females continued to dominate among those earning in the bottom ranges of earnings. However, the last 13 years saw noticeable shifts in male and female earnings, with the gender gap between males and females earning in the upper salary ranges (i.e. R7 501–R11 500 and R11 500+) narrowing considerably. Analysis by population group further showed that the percentage share of females with monthly earnings between R11 501 or more, was highest among those of females with a tertiary education who belonged to other race groups (56,2%) in 2001. However, 13 years later, the largest percentage share for females with monthly earnings of R11 501 or more was found amongst black African females with a tertiary qualification (64,3%). This percentage was higher than the percentage depicted for their male counterparts, irrespective of race.
375. Business enterprises in the country show an increase in percentage shares amongst females owning small- to medium-sized businesses. Furthermore, while most females continue to be employed in the informal sector, the percentage share of females operating businesses in the formal sector has increased over time.
376. Women's ownership of and control over resources is increasingly seen as a key element of women's empowerment. The proportion of households headed by females who owned land used for agricultural purposes also exceeded that of males within each province in 2013. The largest growth in the share of households headed by females owning the agricultural land they cultivated within each province occurred in Free State, followed by Western Cape and Northern Cape. In terms of the gender gap in 2013, gender parity ratios in ownership of land used for agricultural purposes were higher among households headed by the white and coloured population groups (GPRs of 1,07 and 0,93 respectively) and lowest amongst black Africans (1,24).
377. In 2013, the unemployment rate was approximately 25%. The unemployment rate has increased between 1994 and 2013, despite the large growth in employment over the period, which could be ascribed to the high number of people entering the labour market as well as the high number of people being counted in the labour market. The number of people entering the labour market has increased both due to population growth and due to the ending of apartheid. More people began actively seeking work, particularly in urban areas, as the restrictions placed on black people, especially women, were removed.
378. Decreasing the levels of unemployment is particularly important because of its direct impact on the reduction of levels of poverty. Unemployment affects men and women equally. However, the rate of unemployment tends to be higher for women than it is for men. Overall unemployment rates for males and females grew slightly (0.6 percentage points) between 2001 and 2014 from 24.6% in 2001 to 25.2% in 2014. Females aged 15–24 years were most likely to be unemployed with an unemployment rate of 56.3% in 2014. The largest increase was observed between 2001 and 2014 (5.8 percentage points).

379. In South Africa it is estimated that around 38% of businesses are owned by women,<sup>459</sup> and that the country has made use of preferential procurement policies to create greater opportunities for women to promote their access and visibility in public procurement spending. However, women-owned businesses still face various barriers in accessing government procurement and supply chains. Participation of women in previously male dominated sectors is still a problem.
380. In South Africa, women-owned businesses are still underrepresented in public procurement when compared to their male counterparts, and are unlikely to account for more than 25% of procurement spend<sup>460</sup> in the country. Over the 2011/12 financial year, the study undertaken by the Business Women's Association of South Africa indicates that women-owned businesses were recipients of R16.56 billion in government procurement spending out of a total of R183.3 billion in the research sample (which represents only 30% of total procurement spend in this year), thus accounting for only 9% of the total procurement spend in the sample studied.
381. There are different levels at which these women entrepreneurs operate their businesses, with different challenges being faced. For example, some women entrepreneurs need to be given training, whilst other may require marketing support for their businesses to take them into higher level of wealth creation. In the main most women use their businesses as a means of income generation to feed their families. However, some of the women are seeking ways to make the business grow and spread to other parts of the country. They wish to also seek other measures to process their products in-house. This means that training is required as well as access to resources which would expand their businesses.

## **ARTICLE 14: HEALTH AND REPRODUCTIVE RIGHTS**

382. The health system in South Africa prior to 1994 was fragmented, inefficient and inequitable and based on apartheid policies. As a result, the majority of Black South Africans had poor access and inequitable health care. Following the end of apartheid, the Constitution introduced a human rights based approach to health and health care services.
383. The Policy on Universal Access to Primary Health Care, introduced in 1994, paved the way for effective health care delivery programmes. This policy provides for free health care to pregnant and lactating women and children under the age of six. One outcome of the implementation of universal access has been a marked increase in access to health facilities and high levels of utilization of primary health care (PHC) services. The Gender Policy Guidelines for the Public Health Sector, 2002 were developed to ensure that an effective framework is in place to develop, implement and monitor laws, policies, programmes, procedures and practices for women's health. Further the policy ensures that in all spheres of life, equitable attention and sensitivity is given to the health needs of women and girls in relation to men and boys. Implementation of this policy allows for a gender-focused approach to

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<sup>459</sup> Wits Business School Journal, 2011 – as quoted in the research study by the Business Women's Association of South Africa (BWASA), 2013: "The Current Status of Policies, Practices, Measures and Barriers regarding Women-Owned Businesses in Government Procurement".

<sup>460</sup> Ibid

health planning and programming. It has provided the impetus for numerous innovative initiatives. The National Health Act, 2003<sup>461</sup> further entrenches principles for promotion of women's health.

### Access to health services

384. The right to have access to health care, food and water are enshrined in section 27 of the Constitution.<sup>462</sup> South Africa's health system consists of a large public sector and a smaller but fast growing private sector. Health care in South Africa varies from the most basic primary health care, offered free by the state, to highly specialised, hi-tech health services available in the both the public and private sector.
385. While the state contributes about 40% of all expenditure on health, the public health sector is under pressure to deliver services to about 80% of the population. The private sector, on the other hand, is run largely on commercial lines and caters to middle- and high-income earners who tend to be members of medical aid schemes. It also attracts most of the country's health professionals. The situation is compounded by public health challenges, including the burden of diseases such as HIV and tuberculosis (TB), and a shortage of key medical personnel.
386. However, government is responding with a far-reaching reform plan to revitalise and restructure the South African health care system, including:
- Fast-tracking the implementation of a National Health Insurance scheme, which will eventually cover all South Africans.
  - Strengthening the fight against HIV and TB, non-communicable diseases, as well as injury and violence.
  - Improving human-resource management at state hospitals and strengthening co-ordination between the public and private health sector.
  - Deploying health teams to communities and schools.
  - Regulating costs to make health care affordable to all.
  - Increasing life expectancy from 56.5 years in 2009 to 58.5 years in 2014.
387. Before South Africa's first democratic elections, hospitals were assigned to particular racial groups and most were concentrated in white areas. With 14 different health departments, the system was characterized by fragmentation and duplication. Transformation is now under fully under way.
388. The Department of Health holds overall responsibility for health care, with a specific responsibility for the public sector. Provincial health departments provide and manage comprehensive health services, via a district-based, public health-care model. Local hospital management has delegated authority over operational issues, such as the budget and human resources, to facilitate quicker responses to

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<sup>461</sup> Act No. 61 of 2003

<sup>462</sup> S 27 "(1) Everyone has the right to have access to –  
(d) health care services, including reproductive health care;  
(e) sufficient food and water; and  
(f) ..."

local needs. Public health consumes around 11% of the government's total budget, which is allocated and mostly spent by the nine provinces. How these resources are allocated, and the standard of health care delivered, varies from province to province.

389. A Health Charter has been devised with the aim of creating a platform for engagement between sectors to address issues of access, equity and quality of health services as well as issues of broad-based black economic empowerment and employment equity.
390. The Department of Health is focused on implementing an improved health system, which involves an emphasis focus on public health, as well as improving the functionality and management of the system through stringent budget and expenditure monitoring. Known as the "10-point plan", the strategic programme is improving hospital infrastructure and human resources management, as well as procurement of the necessary equipment and skills. Under this plan, health facilities – such as nursing colleges and tertiary hospitals – are being upgraded and rebuilt to lay the way for the implementation of the National Health Insurance (NHI) scheme.
391. The NHI is intended to bring about reform that will improve service provision and health care delivery. It will promote equity and efficiency to ensure that all South Africans have access to affordable, quality health care services regardless of their employment status and ability to make a direct monetary contribution to the NHI Fund. The NHI will be phased in over 14 years, beginning in 2012. In 2012/13, the government earmarked R1-billion to its pilot projects. Apart from infrastructure and management overhauls, another factor for ensuring the success of the NHI will be the strict regulation of the sector to make it more affordable to all South Africans.
392. There are 4 200 public health facilities in South Africa. Since 1994, more than 1 600 clinics have been built or upgraded. Free health care for children under six and for pregnant or breastfeeding mothers was introduced in the mid-1990s. A large percentage of the women live in isolated areas, and struggle to gain physical access to the hospitals or clinics. Government is addressing this problem by rolling out mobile clinics to visit the larger rural areas. Many rural women are not always fully informed of the healthcare options open to them, and therefore do not seek treatment for treatable problems. This is being corrected by mobile clinics and extensive information campaigns.
393. More importantly, access to primary health care improved for marginalized communities in both urban and rural areas. The proportion of African persons who reported travelling 15 minutes or less from home to health services increased from just over a third (36.3%) to above half (54%) between 1995 and 1998.<sup>463</sup> For the South African government some of the health priorities have included HIV and AIDS, Tuberculosis (TB) and malaria control, medicine supply and providing the human resources needed for health care provision. Special attention has been paid to women and the girl child.

### **Reproductive health services**

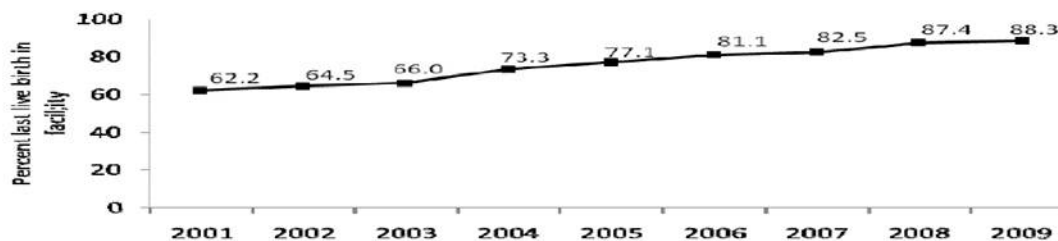
394. There has been a demonstrable increase in women's access to reproductive health care services in South Africa. Improved reproductive health services have resulted in a reduction in illness and death

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<sup>463</sup> Smith et al 1999

amongst women. For example, as **Table 33** below shows, the percentage of women in South Africa whose live birth occurred in a health facility increased from 76.6 % in 2001 to 94.1 % in 2009. This indicates a significant improvement in the extent of services provided at health care facilities in South Africa.

**Table 33: The percentage of last live birth in a health facility from 2001-2009:**



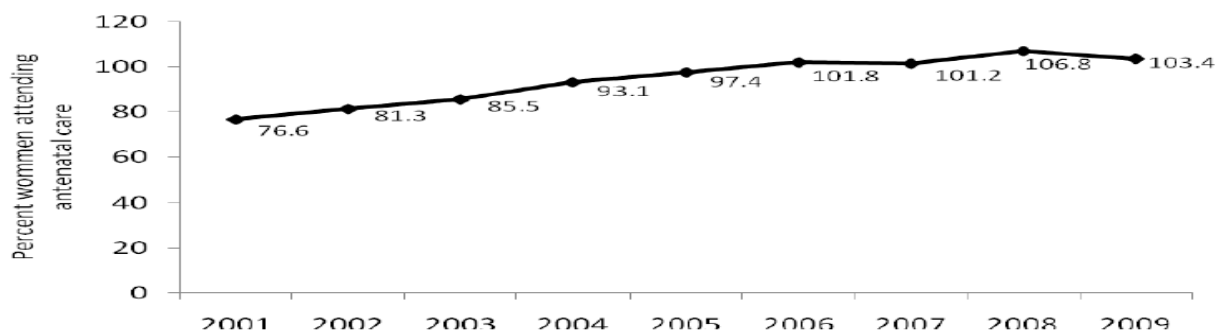
395. Family planning is a broad term that encompasses the provision of contraception methods to sexually active women and includes fertility planning, for example spacing and management of infertility, and termination of pregnancies. The ability of women to control their own fertility is fundamental to women's empowerment and equality. Reproductive rights including the right to decide on the number, timing and spacing of children, and to make decisions regarding reproduction free of discrimination, without coercion and violence, contribute to gender equality and empowerment. The provision of appropriate and adequate family planning services in South Africa is critical in a context of high rates of teenage pregnancies, as well as high rates of mother and child mortality and HIV.
396. In South Africa, according to Statistics South Africa in its estimates of the 2013 population of just less than 53-million people, the total fertility rate<sup>464</sup> had dropped from 2.7 children per woman in 2002 to 2.3 children per woman in 2013. Many factors influence the fertility rate, including urbanisation, female educational levels, infant mortality, costs of raising children, cultural and religious beliefs as well as the use of contraception. In South Africa, estimates show that about two thirds of sexually active 15- to 49-year-old women use a modern contraceptive method. This usage contributes to the decline in the total fertility rate.
397. On improving access to contraception and family planning for women, the country recently launched the National Family Planning Campaign in February 2014 under the theme "*My Responsibility, My Choice, Our Future - I choose dual protection*". The aim of the campaign is to provide information and services about various methods that prevent HIV, STI's and unwanted pregnancies. The campaign encourages the use of a combination of condoms and a second method of protection. The sub-dermal implant, which is a long acting progesterone contraceptive method that is inserted under the skin in the upper arm and provides protection from pregnancy for up to 3-5 years, was also launched with this campaign.

<sup>464</sup> The total fertility rate of a population is the average number of children that would be born to a woman over her lifetime.



398. Access to and utilization of Antenatal Care Services (ANC) is encouragingly high, as **Table 34** below indicates:

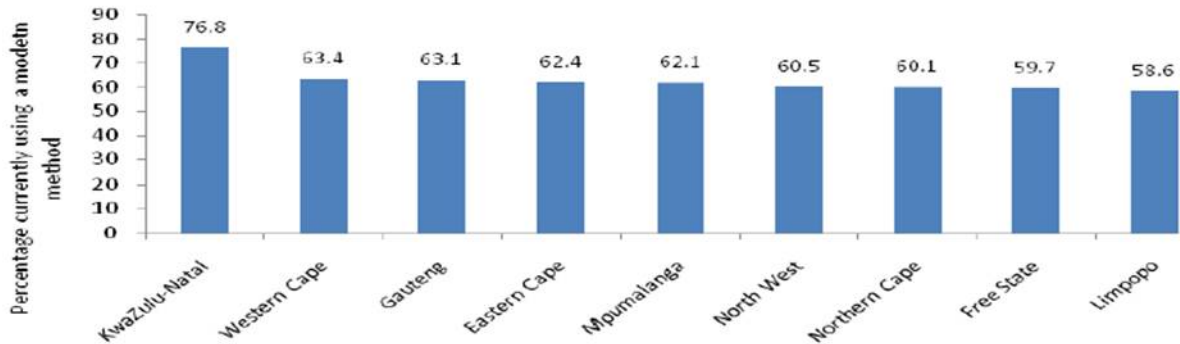
**Table 34: Percentages of women who have attended at least one visit for antenatal care from 2001-2009:**



399. Access to and use of contraceptives by women is also improving. Contraceptive use is an important element in the promotion of sexual and reproductive health. Contraception promotes reproductive health as contraceptive use mitigates against unwanted as well as high risk pregnancies. High risk pregnancies are detrimental to women's health and can exacerbate maternal mortality in a population. The 2003 South African Demographic and Health Survey Report indicate that the modern contraceptive prevalence rate among sexually active women increased from 61% in 1998 to 65% in 2003. The couple year protection rate, which is a proxy for the contraceptive prevalence rate, has been fairly stable, averaging close to 30% since 2001. The strategic objective set for improving women's health was to improve access to sexual and reproductive health services. All public sector health facilities are providing family planning services with a varying mix of contraceptives. A protection rate of 37.8% was recorded, marginally exceeding the 35% national target set for 2012/13.
400. During 2012/13 the updated National Contraception and Fertility Planning Policy and Service Delivery Guidelines were approved by the National Health Council. The National Contraception and Fertility Planning Policy and Service Delivery Guidelines and National Contraception Clinical Guidelines are extremely important documents, aimed at reprioritising contraception and fertility planning in South Africa, with an emphasis on dual protection.
401. Contraception is one of the most powerful public health tools for any country. Providing women with access to safe and effective contraception is a critical element of women's health. Enabling women to make choices about their fertility is empowering and offers women better economic and social opportunities. Birth spacing also improves the opportunities for children to thrive physically and emotionally. Engaging men in sexual and reproductive health encourages shared responsibility in their roles as partners and parents. The adoption of the revised Contraception Policy takes place within the context of renewed international focus. One of the key changes in the policy is to increase the range of contraceptive commodities available in the public sector thereby increasing the contraceptive method mix. The most notable additions are sub-dermal contraceptive implants and a greater variety of intra-uterine devices. These increases to the method mix should give more choice and security of contraceptive protection to women, thus improving family planning.<sup>465</sup>

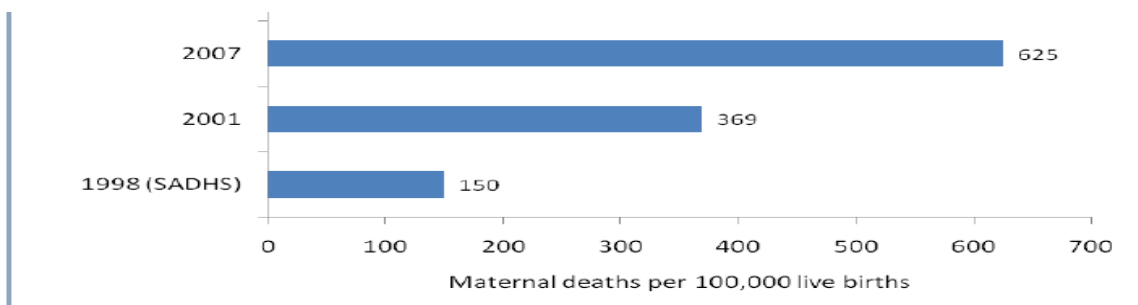
<sup>465</sup> DoH Annual Report 2012/2013

402. **Table 35** below shows the percentage of sexually active women using a modern contraceptive method by province, 2003:



403. Despite the achievements witnessed in the reproductive health sector, maternal mortality remains a challenge in South Africa. Data indicates that maternal mortality ratio (MMR) is high and increasing. The MMR based on the 1998 South Africa Demographic and Health Survey was 150 per 100,000 live births for the approximate period of 1993-1998.

404. As **Table 36** below shows, it is estimated that the MMR increased from 1998 to 2007. Five major causes of maternal death have been identified, namely non-pregnancy related infections – mainly resulting from AIDS (43.7%); complications of hypertension (15.7%); obstetric haemorrhage (12.4%); pregnancy-related sepsis (9%); and pre-existing maternal disease (6%).



405. In response to the prevalence of maternal mortality, South Africa established the National Committee on the Confidential Enquiries into Maternal Deaths (NCCEMD). The NCCEMD enquires into and publishes reports on maternal deaths at frequent intervals to enable the providers of health care to review their provision of services. The data in **Table 37** below from the Saving Mothers Report (2008-2010) has been entered before 15 April 2011 and indicate the trends of maternal mortality in South Africa up to 2010.

**Table 37: Maternal Mortality from 1998-2010 in South Africa**

Maternal Mortality from 1998-2010 in South Africa													
Year	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
<b>Total MM</b>	676	805	1035	990	1012	1221	1173	1263	1448	1366	1554	1766	1646

406. The high maternal mortality ratios reported by the NCCEMD since its inception in 1997, is mainly due to high rates of infection with HIV. The HIV pandemic affects maternal mortality both directly – since most women who are infected are young and most are likely to die from opportunistic infections, postpartum sepsis and obstetric haemorrhage.
407. Annual data from the NCCEMD reflect that institutional MMR has decreased from 188,9 per 100 000 live births in 2009 to 146,7 per 100 000 live births for facility based births and to 269 per 100 000 live births for population based figures in 2012. The Under-5 mortality rate (U5MR) has decreased from 56 deaths per 1,000 live births in 2009, to 42 deaths per 1,000 live births in 2011. The Infant Mortality Rate (IMR) has decreased from 40 deaths per 1,000 live births in 2009, to 30 deaths per 1,000 live births in 2011.<sup>466</sup>
408. Care of pregnant HIV infected women has focussed on preventing transmission of HIV to the baby and the Prevention of Mother to Child Transmission (PMTCT) Program has been highly successful. The finding of high mortality ratios amongst HIV infected women, the cause of approximately 42% of all maternal deaths in South Africa warrants that more attention be given to treating women for their own health and that more emphasis be placed on an accelerated plan of initiating HAART during pregnancy.
409. South Africa accelerated the implementation of key health programmes such as the provision of Anti-Retroviral Treatment (ART); the prevention of mother-to-child-transmission of HIV; and HIV counselling and testing. Access to life saving anti-retroviral (ARV) treatment has improved the life expectancy for women in the country. There has also been a 97% reduction in mother-to-child transmission of HIV. Progress has been recorded in scaling up Prevention of Mother-to-Child Transmission (PMTCT) of HIV from 71% in 2009 to 99% in 2013, resulting in reduction in mother to child transmission from 8% in 2008 to 2.0% in 2013. This has improved the health and well-being of both mother and child. The number of people receiving ART in South Africa has increased exponentially between 2004 and 2011, with women and users of the public sector gaining greater access to ART.<sup>467</sup>
410. The introduction of District Clinical Specialist Teams as part of Primary Health Care (PHC) Re-engineering has contributed to improving maternal and child health. The campaign on accelerated reduction of maternal and child mortality (CARMMA) has contributed in the reduction of deaths of mothers and infants. CARMMA focuses on promoting sexual and reproductive health services;

<sup>466</sup> DoH Annual Performance Plan 2013/14 – 2015/16

<sup>467</sup> Inputs from Department of Health, South Africa: November 2014

antenatal care; access to skilled birth attendants; allocating dedicated obstetric ambulances and establishing maternity homes; strengthening human resources for maternal and child care; intensifying management of HIV positive mothers and children; promoting child survival through supporting exclusive breast-feeding, and provision of lactating mothers facilities in hospitals and promoting kangaroo mother care. Evidence<sup>468</sup> also shows that as a result of these interventions, the maternal mortality rate is steadily decreasing. In 1998 the maternal mortality rate was standing at 150 per 100 000 live births and then increased sharply to 310 per 100 000 live births in 2008, and is now gradually.

411. Significant progress has been made in initiating people on treatment. There have been 1.79 million people started on ARTs by 2011, an increase from 1.1 million in 2009. The country appears to be on track to meet its target of 3 million by 2014 as 2.4 million patients have received ARTs by end of financial year in 2013. The initiation of ARTs for all pregnant women living with HIV with a CD4 count of less than 350, and provision of treatment to all other pregnant women living with AIDS at 14 weeks of pregnancy has positively impacted in reducing maternal and child mortality rates. In 2004, of the total number of patients receiving ARTs (47 500), women comprised 25 600. In 2011, of the total figure of 1 793 000 patients, women comprised 1 090 000 of those receiving ARVs.
412. This turnaround can be attributed to an acceleration and expansion of HIV awareness and prevention campaigns, counselling and testing, treatment, care and support. For example, since the presidential launch of the HIV Counselling and Testing (HCT) Campaign in April 2010, the number of people tested has increased substantially, confirming improvements in health-seeking behaviour among South Africans. As at mid-2011, 15.1 million people had been tested and an additional 4.8 million people have since been tested. Based on this Presidential mandate, there has been a collaborative effort with partners to ensure implementation of the HIV Counselling and Testing (HCT) campaign for pregnant women and expanded treatment care and support. The accelerated efforts included expanding health facilities offering prevention of mother-to-child transmission programmes, training of midwives on Nurse Initiated Management of Antiretroviral Therapy programme, which makes lifelong access to ARVs possible for pregnant women.
413. In April 2013, South Africa rolled out fixed-dose combination antiretroviral (ARV) medication, which is one tablet instead of three pills a day, reducing the risk of patients defaulting from treatment. The fixed-dose combination ARV is given to newly diagnose HIV-positive people, including HIV-positive pregnant women and breast-feeding mothers. The fixed-dose combination will helps reduce pill burden as is easy to take; highly effective and in no way inferior to taking three individual drugs. The guideline for prevention of mother-to-child transmission, paediatric and adult treatment was revised due to changes in the eligibility criteria where all pregnant women irrespective of CD4 cell count will be initiated on lifelong ART.
414. South Africa's efforts to promote women's reproductive health extend to addressing cancer of the breast and cervix. Breast cancer is the leading cancer for women in South Africa, with one in 27 women diagnosed with breast cancer in her lifetime. Cancer of the cervix is the second most common form of cancer amongst women in South Africa, with one in 41 women developing the cancer in their lifetime

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<sup>468</sup> Ibid

and the National Cancer registry reports that the highest rates can be found among black women aged 66-69 years of age. A range of measures have been taken to address cancer of the breast and cervix in South Africa. In 2001, the National Guidelines of the Cervical Cancer Screening Programme were introduced and rolled out incrementally. The ultimate goal is to screen at least 70% of women nationally within the target group of women 30 years and older within 10 years of initiating the programme. By 2007, 30% of primary health care facilities had at least one health care provider trained to conduct pap smears and close to 20% of women were screened for cervical cancer during 2006/07, which marked great progress from the 2.6% recorded in 2001.

415. The launch of the Human Papilloma Virus (HPV) vaccine campaign in March 2014 is a major step towards protecting women against cervical cancer. The campaign targets girl-children aged between nine and 12 years old and aims to vaccinate an estimated 500 000 girls in 17 000 schools. The HPV vaccine will contribute to reducing the number of women dying as a result of cervical cancer.

### **Termination of pregnancy**

416. In 1997, South Africa enacted the Choice on Termination of Pregnancy Act, 1996<sup>469</sup> (hereinafter referred to as the "CTOP Act") that allows for the termination of pregnancy. Pursuant to the Act, a pregnancy may be unconditionally terminated within the first 12 weeks of the pregnancy. From the 13th up to the 20th week of gestation, a pregnancy may be terminated if a medical practitioner is of the opinion that: (i) the pregnancy would pose a risk to the woman's physical or mental health; or (ii) there exists a substantial risk that the foetus would suffer from a severe physical or mental disability; or (iii) the pregnancy resulted from rape or incest; or (iv) the continued pregnancy would significantly affect the social or economic circumstances of the women. After the 20th week of gestation, a pregnancy may be terminated if a medical practitioner after consultation with another medical practitioner or a registered midwife is of the opinion that the continued pregnancy would: (i) endanger the woman's life; (ii) result in a severe malformation of the foetus; or (iii) pose a risk of injury to the foetus.
417. Only a medical practitioner or a registered midwife may carry out a termination of pregnancy. Such termination may take place only at a facility designated in accordance with the CTOP Act. The termination of pregnancy can only take place with the informed consent of the pregnant woman. In the case of a pregnant minor, she must be advised to consult with her parents, guardian, family members or friends before the pregnancy is terminated. However, the termination of the pregnancy shall not be denied because the minor chooses not to consult. Designated facilities at which terminations are carried out are required to collate and forward to the Department of Health information on all terminations carried out. The said information does not include the name or address of the women who has requested or obtained a termination of pregnancy. The CTOP Act was amended in 2008 through the Choice on Termination of Pregnancy Amendment Act, 2008.<sup>470</sup>
418. Information from records prior to the passing of the CTOP Act indicate that between 800 and 1000 legal pregnancy terminations were performed per year nationwide, as compared to 6000 to 120000

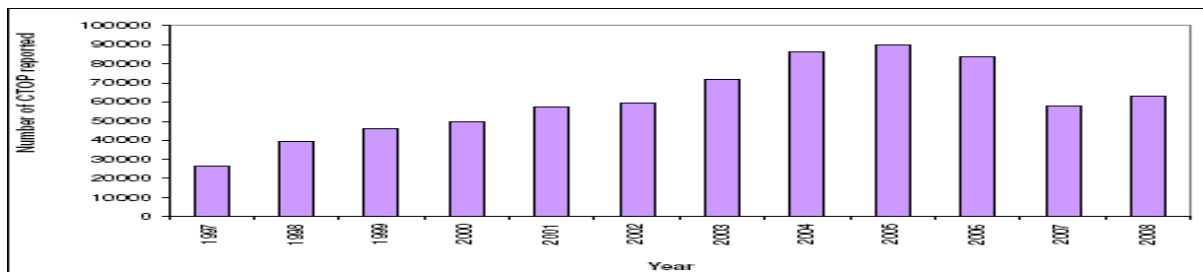
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<sup>469</sup> Act No. 92 of 1996

<sup>470</sup> Act No. 1 of 2008

illegal pregnancy terminations performed. In another research study done in 1994 that looked at the epidemiology of incomplete pregnancy terminations, it was estimated that of the 44868 women, admitted to South Africa's public hospitals each year with incomplete pregnancy terminations, at least one third had medical complications that indicated their pregnancy terminations were induced using unsafe procedures. However, with the enactment and operation of the CTOP Act, women's access to safe termination of pregnancy services has improved considerably. Mortality from unsafe pregnancy terminations has reduced significantly.

419. From 1997 when the CTOP Act commenced to operate to 2008, a total of 731193 pregnancy terminations have been reported. Most of these terminations (72%) occurred before the 13th week of gestation although there were a substantial number of terminations (22%) that occurred in the gestational period of 13-20 weeks. A relatively high proportion of women who required pregnancy termination were older than 18 years. **Table 38** below shows the trend of pregnancy terminations from 1997 to 2008.



420. A total of 77 771 legal terminations of pregnancy were performed in South Africa in 2011, which indicated a 31% increase since 2010. In 2010, 59 447 terminations were carried out. The province with the highest termination rate is the Free State, where 21 994 terminations were performed during 2011, followed by 12 138 in the North West and 11 239 in Gauteng.<sup>471</sup>
421. Deaths from miscarriage occurred most frequently at regional hospitals (50%), followed by district (29%) and level 3 (20%) hospitals. Of the subcategories of miscarriage, 66% were classified as septic miscarriage, 24% as deaths from haemorrhage (non-traumatic), and 5% followed legal termination of pregnancy.

## HIV/AIDS

422. HIV prevalence in the country appears to be stabilising after peaking in the 1990s and early 2000s. However, with 11% of persons aged 2 years and above with HIV, the prevalence rate is still high. As **Table 39** below shows, in 2010, an estimated 10.5% of the total population was HIV positive. Approximately one fifth of South African women in their productive ages are HIV positive. A tendency towards stabilization of the prevalence among pregnant women who access antenatal care services from the public health sector has been observed since 2004. Moreover, there has been a decline in prevalence from 16% in 2004 to 13.5% in 2006 among women younger than 20 years of age as well as a decline in prevalence among those who are between 20 and 24 years of age.

<sup>471</sup> Reply by the Minister of Health to a Parliamentary question, 21 August 2012

**Table 39: HIV prevalence estimates and the number of people living with HIV, 2001-2010**

Year	Population 15–49 years		Percentage of the total population	Total number of people living with HIV (in millions)
	Percentage of women	Percentage of the population		
2001	18,7	15,4	9,4	4,10
2002	19,2	15,8	9,6	4,38
2003	19,4	16,1	9,8	4,53
2004	19,6	16,3	9,9	4,64
2005	19,7	16,5	10,0	4,74
2006	19,7	16,6	10,1	4,85
2007	19,7	16,7	10,2	4,93
2008	19,7	16,9	10,3	5,02
2009	19,6	17,0	10,3	5,11
2010	19,7	17,3	10,5	5,24

423. Aids and other poverty-related diseases such as tuberculosis and cholera place a tremendous strain on South Africa's health care system. According to Statistics South Africa, in 2011:
- The overall HIV prevalence rate was 10,6%. About one-fifth of South African women in their reproductive ages were HIV positive.
  - There were 5.38-million people living with HIV. This was up from 4.21-million in 2001.
  - 16,6% of the adult population (aged 15–49) years was HIV positive.
  - There were about 2.01-million orphans due to HIV.
  - New HIV infections for 2011 among adults was estimated at 316 900.
  - An estimated 1.06-million adults and 105 123 children were receiving antiretroviral treatment in 2010. This was up from 101 416 and close to 12 000 children in 2005.
424. The South Africa National AIDS Council (SANAC), a multi-sectoral body that is chaired by the Deputy President of the country was launched in May 2007 to coordinate responses to HIV and AIDS in South Africa. In recognition of the feminised nature of the HIV and AIDS pandemic, SANAC has established a Women's Sector within its organizational structure. At the political level, there is also the Inter-Ministerial Committee comprising 8 key ministers that focuses on HIV and AIDS. Dedicated expenditure on programmes that seek to combat HIV and AIDS has increased from about R30 million in 1994 to R3.6 billion in 2006.
425. As outlined in the HIV and STI Strategic Plan for South Africa 2007-2011, South Africa has adopted a multi-sectoral approach to the challenge of HIV and the wide-ranging impacts of AIDS. During 2011 a collaborative effort was undertaken by the South African National AIDS Council, in which government, business, labour and civil society are represented, to review the implementation of these strategic plans and to develop the next five year plan (for the period 2012-2016). There is in place a comprehensive prevention, care and treatment programme. Key components of the programme include Voluntary Counselling and Testing (VCT), prevention of mother to child transmission (PMTCT), antiretroviral therapy, condom distribution, and awareness education. Over the years, South Africa has been expanding its infrastructure for the implementation of the HIV and AIDS response programme. Public health facilities offering VCT and PMTCT have been expanded to cover the whole country.
426. The co-infection rates of HIV and TB exceed 70%, with TB being the most common opportunistic infection in HIV-positive patients. Because of late detection, poor treatment management, drug-resistant forms of TB (known as DR-TB or multidrug-resistant TB; and XDR TB or extensively drug-

resistant TB) have increased significantly, with about 5 500 cases diagnosed during 2009. Integrating the double scourge of HIV/Aids and TB for the first time, government has launched the National Strategic Plan for HIV/AIDS and TB for 2012 – 2016. The plan seeks to address the social structural drivers of HIV/Aids, STD and TB care, prevention and support; to prevent new infections; to sustain health and wellness; and to protect human rights of sufferers.

427. The HIV Counselling and Testing (HCT) campaign was launched in April 2010. By 2011, 19.9 million people had undergone voluntary testing for HIV. By mid- 2012, almost 20-million people had been tested and knew their status. Millions were also screened for TB. Increasing the number of anti-retroviral sites as well as nurses certified to initiate ARV treatment has seen 1.7-million people placed on ARV treatment, from 1.1-million in 2009.
428. South Africa has the largest ARV therapy programme in the world, and an improved procurement process has seen a 50% decrease in the prices of ARV drugs. The cost of ARVs has been halved making it possible for government to treat more people within the same resources.
429. In the area of combating HIV and AIDS including Tuberculosis, we have witnessed a stabilisation of the number of people living with HIV in the country. We have also seen a reduction in mother to child transmission from 8% in 2008 to 3.5% in 2011, protecting more than 30 000 babies per annum from infection. We have also witnessed an increase in people who tested for Tuberculosis to 8 million with the cure rate reaching the 70% mark in 2010. In improving maternal and child health, we have reached 70% immunisation coverage for diarrhoea and pneumonia.<sup>472</sup>
430. The number of patients accessing antiretroviral therapy (ART) has been increasing over the years as shown in **Table 40** below. It is estimated that 1.6 million patients are in need of ART, 183000 of whom are children. It is estimated that there are 2 million AIDS orphans in South Africa. **Table 40** below shows the estimated number of adults receiving ART & percentage of children receiving ART and cotrimoxazole from 2005-2009:

	Adults ( 15+ years)	Children	
	Estimated number receiving ART*	Estimated percentage receiving ART	Estimated percentage receiving cotrimoxazole
2005	133 000	7	2
2006	239 000	8	4
2007	424 000	12	12
2008	679 000	29	21
2009	920 000	38	29

431. PMTCT is almost universally available in public primary health facilities in South Africa. Following the decision of the Constitutional Court in *Minister of Health and Others v Treatment Action Campaign and Others 2002 (5) 721 (CC)*, South Africa removed restrictions in the availability of Nevirapine and rolled out a comprehensive PMTCT programme throughout the country. By 2008, PMTCT services were available in more than 95% of health facilities in the country. In the same year, the PMTCT Guidelines were revised to introduce the dual therapy regimen of Nevirapine and AZT (Zidovudine).

<sup>472</sup> Media statement by Minister in The Presidency for Performance Monitoring and Evaluation on the release of the Mid-Term Review, June 2012



Polymerase Chain Reaction (PCR) tests show (**Table 41**) that the proportion of HIV positive babies has declined from the estimated 15.2% in 2008-2009 to 9.4% in 2010.

**Table 41: PCR tests for diagnosis of HIV among children under 18 months of age:**

	2008 -2009				2009 – 2010			
	1 <sup>st</sup> quarter	2 <sup>nd</sup> quarter	3 <sup>rd</sup> quarter	4 <sup>th</sup> quarter	1 <sup>st</sup> quarter	2 <sup>nd</sup> quarter	3 <sup>rd</sup> quarter	4 <sup>th</sup> quarter
Estimated number of HIV - exposed infants	66872	66872	66872	66872	66872	66872	66872	66872
Percentage of PCR tests conducted	78.4	87.0	77.8	91.4	91.6	96.0	93.9	103.4
Percentage of HIV positive children	15.2	13.7	13.5	11.9	9.8	9.7	10.0	9.4

432. HIV and AIDS awareness education has been a major component of the strategy to address the pandemic in South Africa. In 2001, South Africa launched the Khomanani (caring together) HIV and AIDS mass awareness campaign. The result of this campaign has been positive. The 2009 National Communication Survey shows that awareness and knowledge of HIV prevention methods is high. The results indicate a knowledge level of 87% on average for condoms across age groups. Knowledge of other HIV prevention methods such as faithfulness, partner reduction and abstinence is lower, but has improved since the 2006 National Communication Survey. The 2009 National Community Survey also indicates that knowledge of treatment that allows people living with HIV to be healthy is high and has significantly increased. Of those who knew about treatment, 87% (85% male and 88% female) identified antiretroviral therapy (ART) as a treatment, and 73% knew that ART is for life (in 2006, 42% identified ART and 40% knew that it was for life). Despite the progress made, stigma and discrimination continue to present challenges in the management of HIV and AIDS.
433. The Department of Higher Education and Training is running the HIV/AIDS Programme which is a national initiative to develop and support HIV mitigation programmes at South Africa's public Higher Education institutions. The AIDS programme is informed by the human rights approach in addressing the HIV and AIDS pandemic. The programmes pay special attention to four key areas, namely:
- Developing HIV prevention programmes for students and staff and facilities for the treatment, care and support of students and staff living with HIV Providing a comprehensive workplace HIV/AIDS programme that caters for the needs of staff;
  - Educating and equipping students to make a contribution to the national HIV/AIDS response in their future career fields;
  - Conducting research that will strengthen society's ability to resist and eventually overcome the pandemic; and
  - Providing HIV/AIDS services to related communities through outreach projects and practical training programmes.

## Sex education

434. In response to the HIV and AIDS pandemic in the 1990s, South Africa introduced a life skills program in schools. This program was introduced to increase learners' knowledge of HIV, improve their skills for engaging in healthy relationships by improving communication and decision-making ability and to shift attitudes about people living with HIV and AIDS.
435. The Department of Higher Education and Training launched a First-Things-First Campaign at the Mangosuthu University of Technology on 7 March 2013. This Campaign targets students in universities by making Life Orientation a compulsory first year subject in Universities and Further Education and Training Colleges where students are introduced to HIV and AIDS, health and reproductive rights issues.
436. The majority of South African women still rely heavily on health services that are provided by the state. This is evidenced by the low percentage of private medical scheme coverage and the numbers that are using private health facilities. According to Statistic South Africa's publication titled "Gender Statistics in South Africa (2011)", overall South African women are less likely (38.8%) to visit private health facilities when they need health care than men (39.9%) and only 32.3% African women and men use private health facilities. Access to private medical scheme coverage is lowest at 9.3% for black African women compared to 70.7% for white women, 9.1% for black African men and 70.5% for white men. Therefore increasing access to public health care benefits the majority of Black African women to a large extent.

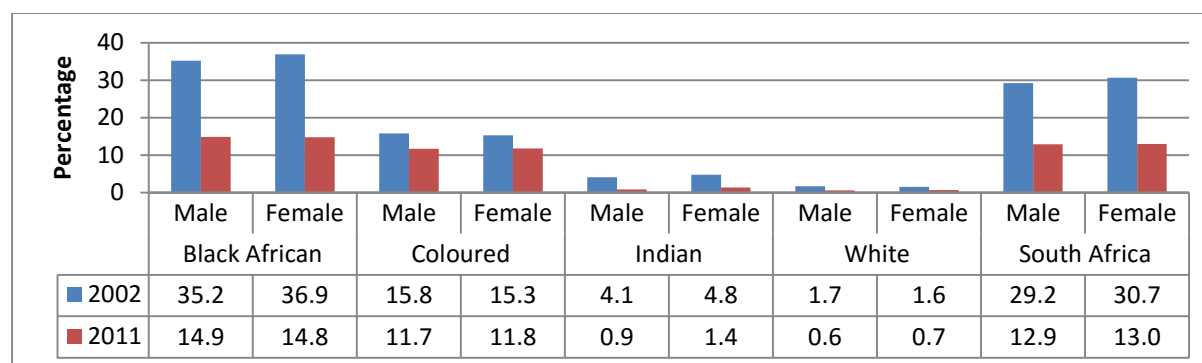
## ARTICLE 15: RIGHT TO FOOD SECURITY

437. With regards to the right to food the Constitution enshrines the right of everyone 'to have access to sufficient food' in section 27(1)(b) and protects the right of every child to 'basic nutrition' in section 28(1)(c). Numerous measures have been taken to ensure food security in the country. South Africa has ratified the majority of the core international human rights instruments that protect the right to food.
438. In 1994, recognising that the socio-economic and political order of apartheid had resulted in poverty and food insecurity, especially amongst the black population, the Reconstruction and Development Programme (RDP) identified food security as a basic human need. The government therefore reprioritised public spending to focus on improving the food security conditions of the historically disadvantaged. The RDP food security framework was refined in subsequent policy papers, such as the 1995 Agriculture White Paper and the 1999 Agricultural Policy Discussion Document. In 2002, the Integrated Food Security Strategy for South Africa (IFSS) was adopted to serve as the overarching policy document on food security in the country.
439. Several government departments work in a coordinated manner to ensure food security in South Africa. The Department of Health runs the Integrated Nutrition Programme, which was developed from the recommendations of the Nutrition Committee established in 1994. It organizes and participates in three main promotion events to raise awareness on nutrition issues. These events are

the World Breastfeeding Week, World Food Day, and Nutrition Week. The Department of Agriculture, Forestry and Fisheries develops and facilitates the implementation of agrarian reform policies and targeted programmes aimed at enhancing the contribution of subsistence and smallholder producers to food security. The Department of Social Development provides social support to those who are most vulnerable to food insecurity.

440. South Africa has been food secure in the last 20 years. However, in 2008, the world financial crisis led to a recession in South Africa, which resulted in, inter alia, challenges to food security faced by household. South Africa is still a net producer of food, the real problem relates to the distribution amongst households. South Africa rose to meet the challenge by increasing expenditure on social relief and distress. In November 2008, R500 million was allocated for this purpose and many poor people throughout the country benefited from the distribution of food parcels and related benefits. In addition, the government intervened to assist distressed farmers who were battling to finance their loans.
441. World Bank statistics which show that in 2014 the top 10% of our country's households spend 10% of their income on food – an average of R29 000 a year. The bottom 25% of households spend 48% of their income on food – R8 700 a year. The most food-insecure households were those headed by women or children. Women face hunger more often than men, due to disparities in income, limited access to employment or means of production and cultural practices. Fewer than 2 percent of households grow the majority of their own food, and the majority of small scale producers in rural areas are unable to feed their families.
442. Hunger is not a product of a failure in food production but in the pricing of quality food and in people's ability to afford it. SANHANES-1 – the South African National Health and Nutrition Examination Survey shows that the Eastern Cape, followed by Limpopo, had the highest numbers of citizens experiencing food insecurity.
443. The proportion of South Africans who are living below the food poverty line has been decreasing over the years. The percentage of the population living below the food poverty line of R148 in 2000 and R209 equivalent in 2006 declined from 28.5% to 24.8% respectively. The same downward trend was observed when looking at the food poverty line by sex because for both males and females the proportion of people living below the food poverty line declined between 2000 and 2006 from 26.7% for males to 22.9% and for females it declined from 30.2% to 26.4%. Admittedly, however, the proportion of females living below the food poverty line remains high compared to that of males.
444. It is clear from **Table 42** below that vulnerability to hunger is strongly associated with population group. Black African males and females experienced the highest vulnerability to hunger in 2002 and 2011. Black African females are noticeably more likely to experience vulnerability to hunger and food insecurity than their male peers. The figures show that, despite improvements since 2002, female-headed households remain more likely than male-headed households to have experienced hunger across all population groups.

**Table 42: Percentage of males and females that lived in households that reported hunger, by sex and population group, in 2002 and 2011:**



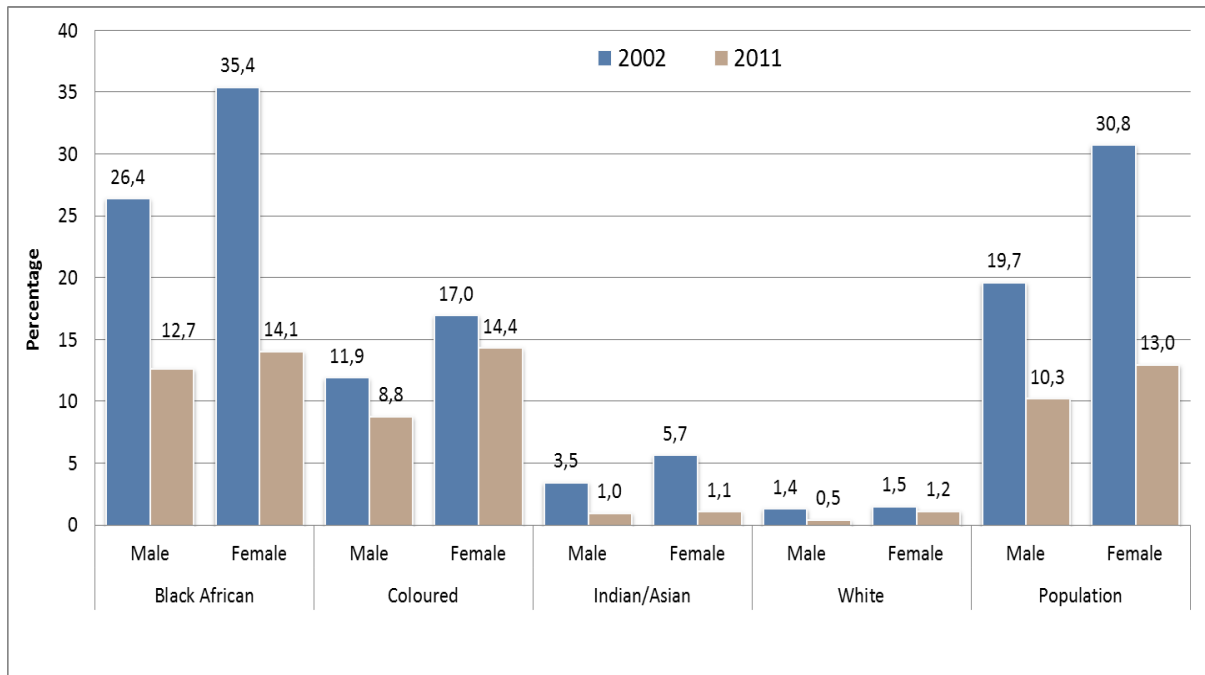
445. **Table 43** below shows the percentage of males and female household heads in households that reported hunger by age group, 2002–2008, and 2010–2011.<sup>473</sup>

Age	Gender	Year								
		2002	2003	2004	2005	2006	2007	2008	2010	2011
18-34	Male	17,7	19,3	15,3	14,2	9,8	8,4	11,8	10,9	10,8
	Female	25,3	24,2	18,1	19,4	13,9	10,5	14,4	14,8	11,5
35–59	Male	19,9	18,7	15,1	12,6	9,8	9,0	11,7	11,4	10,8
	Female	33,9	30,5	24,8	21,2	15,8	15,8	17,9	19,2	14,5
Over 60	Male	21,8	20,5	15,6	14,1	9,4	8,8	10,2	10,0	7,6
	Female	30,1	28,7	23,6	17,8	12,6	12,5	13,8	13,6	11,5

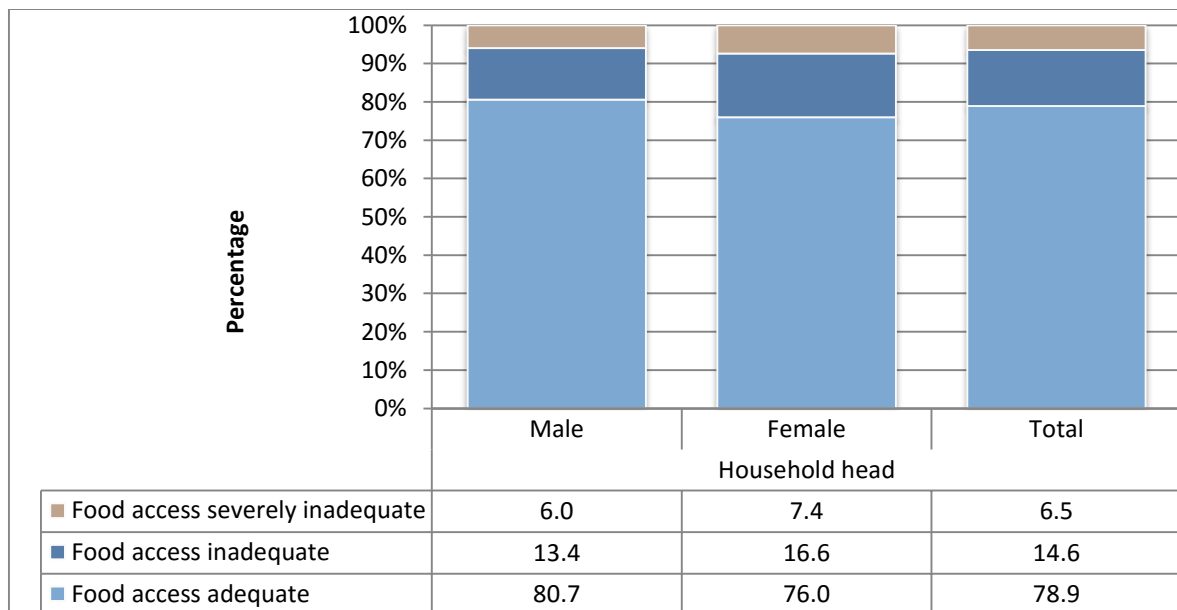
446. **Table 43** above explores the association between the age of the household head and the household's vulnerability to hunger within the context of apparent gender differences. It is clear from this table that female-headed households are consistently more likely to have experienced hunger than their male-headed equivalents across all age groups. In fact, if the six groups (male and female in each of the four age groups) are arranged from high to low according to the percentage of households that have experienced vulnerability to hunger, female-headed households will fill the first three places.

447. **Table 44** below shows the percentage of households that have experienced hunger by population group and gender of the household head, 2011:

<sup>473</sup> Questions on hunger were replaced by questions to measure food access and supply in 2009.

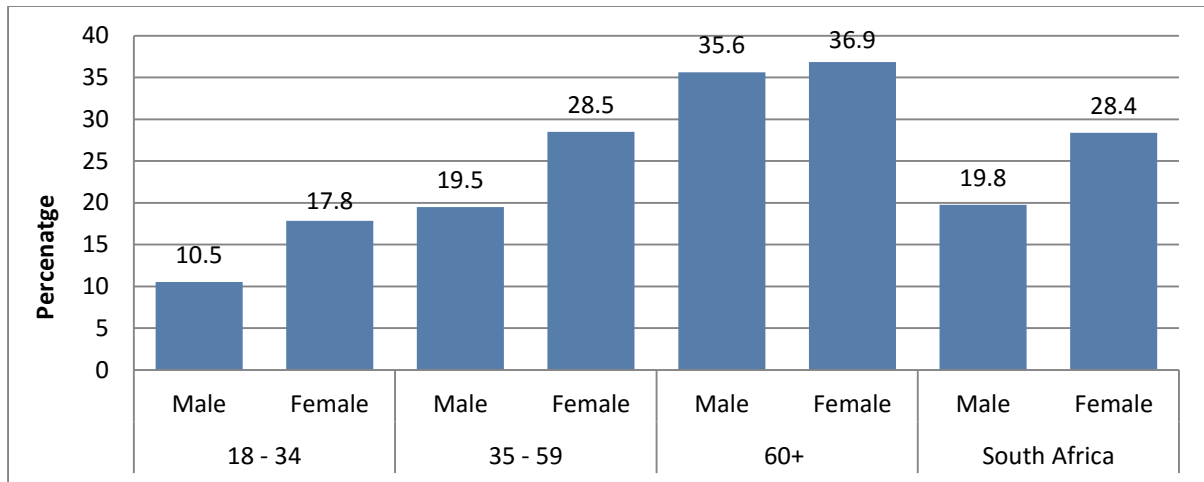


448. **Table 45** below shows the percentage of male- and female-headed households by access to food, 2011:



449. Female-headed households are more likely than male-headed households to participate in agricultural activities across all three age groups. Although female-headed households are more likely to be involved in agricultural production than male-headed households before the age of 60 years, male- and female-headed households are almost equally likely to engage in some form of agricultural production after the age of 60 years. Female-headed households are somewhat more likely to grow produce for home consumption than male-headed households, which tend to sell more of the

produce.<sup>474</sup> **Table 46** shows the percentage of households that participate in agricultural production, by gender and age of the household head, 2011:



450. The right to food, both in South Africa and internationally, is based on the multi-dimensional concept of food security. Food security is not dependent solely on the availability of food. Food availability is a necessary, but not a sufficient condition for ensuring that a community is food secure. Then there are the concepts of food justice and food sovereignty. The food sovereignty movement seeks to ensure the right to food, but with the additional emphasis on the need for political and economic reform of food systems so that more control is given to communities and small, local producers.
451. In South Africa, as in the rest of the world, challenges predominantly relate not to the production of food, but to the food system. The food system consists of both public and private sector role-players. The food system is not something that government alone, or the market alone, can address. As government's National Development Plan 2030 states, our country must ensure household food and nutrition security involving both public and private sector action.
452. The Department of Health has implemented various nutrition interventions. Some programmes are included in health lifestyles programmes and various information and communication programmes on Nutrition. Other initiatives include the fortification of staple food with selected vitamins and minerals to address micronutrient deficiencies in the South African population. Addressing challenges of malnutrition and stunting amongst children require a concerted effort and partnership with other government departments, civil society and development partners. To this end, among the key evidence based interventions to improve child survival is the promotion of exclusive breastfeeding and the provision of Vitamin A to children under the age of five. Further, the Department has re-committed itself in promoting, protection and support of breastfeeding with an aim to secure the health of infants and prevent under-nutrition.

<sup>474</sup> Stats SA: 2011: Social Profile of Vulnerable Groups in South Africa 2002-2010

453. In the 2010/2011 financial year food security was re-prioritised as one of the top priorities for South African government. This is in line with the United Nations Millennium Development Goal, which aims to halve the proportion of people who go hungry by 2015.
454. The Department of Agriculture, Forestry and Fisheries (DAFF) was mandated to develop agricultural policies and support programmes to ensure that South African citizens are given agricultural opportunities that will enable them to meet their basic food needs. The DAFF's major role is, among others, to ensure that opportunities are created to encourage South African citizens to participate in agriculture and produce to reduce food insecurity in the country. The Department has since initiated a number of programmes that are meant to contribute positively to food security in the country. The Department prioritized the development of appropriate agricultural skills among those previously excluded to ensure equitable participation in the agricultural sector. In this regard, a dedicated unit in the Department for the promotion of appropriate agricultural skills was established. This unit came to be known as Education, Training and Extension Services (DETES). The purpose of the DETES is to ensure that farmers and other Stakeholders access appropriate agricultural skills for the development of agriculture as an industry.
455. The DAFF, in conjunction with the District Municipalities and the municipal health services, have held Pesticides Safety Awareness campaigns at various primary schools nationwide. The campaign is part of the Department's drive to increase the level of awareness among people after some communities have experienced sporadic incidents of children becoming ill because of a lack of knowledge of pesticides. The Department's plan is to introduce more sustainable interventions that will create awareness among the previously disadvantaged communities. It also entrenches the commitment to a safe environment and management of pesticides and the intention to eradicate the unlawful street vending of pesticides.
456. Daily meals are provided to 9 million learners in 20 000 schools through the National School Nutrition Programme. The programme aims to foster better quality education by enhancing children's active learning capacity, alleviating short-term hunger, providing an incentive for children to attend school regularly and punctually; and addressing certain micro-nutrient deficiencies. School feeding is part of the Integrated Food Security Strategy for South Africa, which was introduced in 2002 and involves the Departments of Health, Social Development, Land Affairs and Agriculture.
457. Access to safe drinking water is an integral component of food security. The right to have access to health care, food and water are enshrined in section 27 of the Constitution.<sup>475</sup>
458. With regards to the right to water and sanitation, it must be noted that under South Africa's former water law the right to use public water was tied to the ownership of land along watercourses. A new system of water allocation has been phased in so as to provide equitable access to water, to meet the basic human needs of present and future generations, and to redress the results of past racial and

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<sup>475</sup> S 27 "(1) Everyone has the right to have access to –  
(g) health care services, including reproductive health care;  
(h) sufficient food and water; and  
(i) ..."

gender discrimination. The constitutional right to access to water is implemented in South Africa through the Water Services Act, 1997<sup>476</sup> and the National Water Act, 1998.<sup>477</sup>

459. The Water Services Act, 1997<sup>478</sup> and the National Water Act, 1998<sup>479</sup> protect and facilitate the free exercise of the right to access and dispose of water resources in an equitable, environmentally-responsible and sustainable manner. In terms of section 4 of the Water Services Act, 1997<sup>480</sup> everyone is entitled to basic water supply.
460. Over the years since 1994, there has been an increase in the proportion of the population that is accessing safe drinking water in South Africa. There was a progressive increase (4%) in the percentage of households with access to water supply from a safe source between 2002 (88.7%) and 2009 (92.4%). The percentage of households with access to water infrastructure above or equal to the Reconstruction and Development Programme standard increased from 61.7% in 1994 to 91.8% in March 2009. Using these data sources, it is estimated that 93% of the population had access to an improved drinking water supply in the year 2010. More households, particularly the previously disadvantaged, are receiving basic services from the municipalities in which they reside. For water, the total number of consumer units that received free basic water services increased by 16.3% (from 9.9 million to 11.5 million) between the 2007 and 2008 financial years. Eastern Cape tops the list with an increase of 47.6%, followed by Limpopo with 33.1%. Mpumalanga showed the lowest proportion (2.3%), after Free State (5.4%).
461. In terms of sanitation, nationwide the percentage of households with access to various forms of sanitation facilities (flush toilet connected to a public sewerage system, flush toilet connected to a septic tank, chemical toilet, pit latrine with ventilation pipe and pit latrine without ventilation pipe) is 90.7%, while households with no toilets or bucket toilets decreased from 12,6% in 2002 to 6,1% in 2010. Provinces with the highest percentage of no toilet facilities/bucket users include: Eastern Cape (16,8%), Limpopo (8,8%) and Northern Cape (7,1%). The percentage of households that used the refuse disposal services of their municipality increased steadily – from 57,8% in 2002 to 62,2% in 2006 before falling back to 59% in 2010.

## ARTICLE 16: RIGHT TO ADEQUATE HOUSING

462. Section 26 of the Constitution provides that everyone has the right to have access to adequate housing and that the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.<sup>481</sup>

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<sup>476</sup> Act No. 108 of 1997

<sup>477</sup> Act No. 36 of 1998

<sup>478</sup> Act No. 108 of 1997

<sup>479</sup> Act No. 36 of 1998

<sup>480</sup> Act No. 108 of 1997

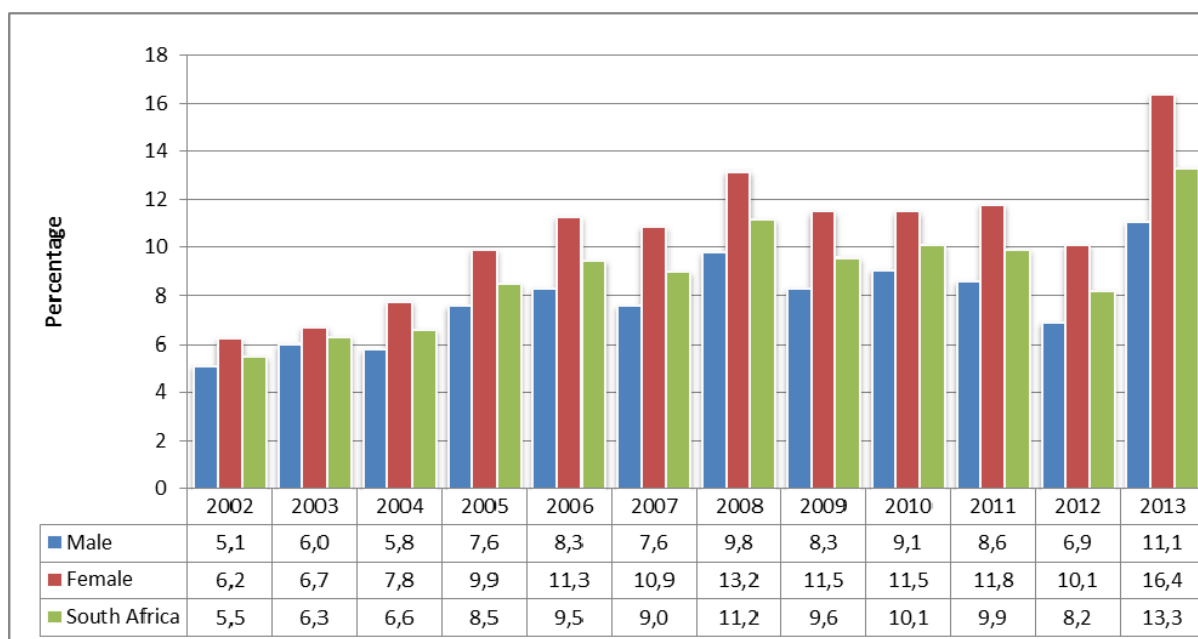
<sup>481</sup> S 26 (1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, achieve the progressive realisation of this right.

(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.



463. The percentage of households that fully own the dwellings they inhabit increased slightly from 52,9% in 2002 to 61,4% in 2008, before declining to 54,9% in 2013. This increase was accompanied by a decrease of four percentage points for households that partially owned their houses, and a slight increase in the percentage of households that rented accommodation. Households that maintained 'other' tenure arrangements increased from 11,7% in 2002 to 12% in 2013.<sup>482</sup>
464. In 2013, more than three-quarters (77,7%) of South African households lived in formal dwellings, followed by 13,6% who lived in informal dwellings and 7,8% in traditional dwellings. Between 2002 and 2013, the percentage of households that lived in formal dwellings increased from 73,7% to 77,7 while households that lived in informal dwellings increased by +0,4% to 13,6%. The percentage of households that lived in traditional dwellings declined by +2,5% over this period. The percentage of households that lived in formal dwellings increased slightly from 73,7% in 2002 to 74,6% in 2008, and continued to increase to 77,7% in 2013.
465. The percentage of households that received a government housing subsidy increased from 5,5% in 2002 to 13,3% in 2013. As **Table 47** below shows, female-headed households were more likely to have received housing subsidies than male-headed households in 2013 (16,4% compared to 11,1%). This is in line with government policies that give preference to households headed by individuals from vulnerable groups, including females, and individuals with disabilities.



466. The Housing Act, 1997<sup>483</sup> obliges the national, provincial and local spheres of government to promote measures that prohibit unfair discrimination on the ground of gender and other forms of unfair discrimination by all actors in the housing development process. It also obliges these spheres of government to take measures that promote the housing needs of marginalized women and other groups disadvantaged by unfair discrimination. South Africa has taken positive measures to ensure

<sup>482</sup> General Household Survey 2013

<sup>483</sup> Act No. 107 of 1997

that women have equal access to housing. In partnership with several housing finance institutions, the government extends credit to women to enable them acquire housing.

467. The Act provides for the facilitation of a sustainable housing development process and lays down the roles, responsibilities and functions of the different spheres of government. National government is responsible for, among other things, determining a housing policy, setting broad national housing delivery goals and monitoring the performance of provincial and local government delivery goals and budgets. It is also required to establish and maintain a national housing data bank and information system. Broadly, provincial government is required to “promote and facilitate the provision of adequate housing in its province within the framework of national housing policy”. It must coordinate housing development in the province and support municipalities in the performance of their duties. Municipalities must ensure that the right to housing is progressively realised in their jurisdiction. They must also identify and designate land for housing and ensure that water, sanitation, electricity, roads, storm water drainage and transport are provided.
468. The National Norms and Standards 2007 outline the minimum physical requirements for standalone dwellings. Each house must have 40m<sup>2</sup> of floor space, two bedrooms, a separate bathroom with a toilet, a shower and hand basin, and a combined living area and kitchen. It must also have an electrical board installed that has access to electricity. There are further requirements regarding access to water, sanitation, roads, storm water drains and street lighting.
469. The Social Housing Act, 2008<sup>484</sup> establishes and promotes a sustainable social housing environment, provide for the establishment of the Social Housing Regulatory Authority in order to regulate all social housing institutions or housing obtained through public funds and allow for the undertaking of approve project by other delivery agents with the benefits of public money. Social housing means a rental or co-operative housing option for low to medium income households, and the social housing institution is accredited institution to carry out the business of providing social housing.
470. The Department of Human Settlements (DHS) has taken significant steps in addressing the inequalities that existed in the past as a result of race and gender discrimination. Various regulatory measures have been put in place to encourage financial institutions to extend credit to historically disadvantaged groups. One of these measures was the Home Loan and Mortgage Disclosure Act, 2000<sup>485</sup> which sought to encourage financial institutions to provide credit to help historically disadvantaged persons to acquire housing. The Housing Consumers Protection Act Measures Act, 1998<sup>486</sup> provides for the protection of housing consumers and the establishment and functions of the National Home Builders Registration Council.
471. South Africa has also put in place policies that increase historically disadvantaged groups’ access to credit to ensure that they are empowered economically. In addressing the needs of the poor for housing and shelter, the Rural Housing Loan Fund has been established to provide loans through intermediaries to low-income households for incremental housing purposes. Incremental housing is a

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<sup>484</sup> Act No. 16 of 2008

<sup>485</sup> Act No 63 of 2000

<sup>486</sup> Act No 27 of 1999

people-driven process that seeks to empower low-income families in rural areas to access credit, to improve their homes or to build homes. The subsidy beneficiaries must contribute towards achieving access to the benefits of the housing subsidy. As of April 2002, all subsidy beneficiaries were required to make a contribution (of R2 479.00). Significantly, beneficiaries of rural subsidies are exempt from making this contribution. People with disabilities requiring reasonable accommodation have access to a 'top-up subsidy to compensate for the additional cost of housing.

472. The DHS conducted a review of its current national human settlements mandate and strategy and subsequently a macro structure that will support the delivery thereof has been developed. The recommended structure is aligned with the new mandate, broadened from the limited scope of "housing" into all spheres of "human settlements", consequently necessitating the broader strategic objectives. The focus required value-added analysis to ensure that the Department's mandate would be enabled through the adoption of recommended changes, which would result in a tangible improvement in the current service delivery levels within the country. Within this broader vision, the Department is committed to meeting the following specific objectives:
- Accelerating the delivery of housing as a key strategy for poverty alleviation;
  - Utilising provision of housing as a major job creation strategy;
  - Ensuring property can be accessed by all as an asset for wealth creation and empowerment;
  - Leveraging growth in the economy;
  - Combating crime, promoting social cohesion and improving quality of life for the poor;
  - Supporting the functioning of the entire single residential property market to reduce duality within the sector, by breaking the barriers between the first economy residential property boom and the second economy slump; and
  - Utilising housing as an instrument for the development of sustainable human settlements, in support of spatial restructuring.
473. The Comprehensive Plan for the Creation of Sustainable Human Settlements envisages enhanced delivery systems and approaches to achieve the vision and objectives set out above. Specifically, the Plan requires the housing sector to implement bold initiatives to achieve the objectives of delivering sustainable human settlements.
474. The Department of Human Settlements, between 2009 and September 2011, delivered 83 000 serviced sites across the country. Over 15 400 units for rental purposes have been built and a pipeline of additional rental housing projects is in place. Eight municipalities have been accredited to deliver housing and are waiting provincial gazetting and a further 16 have been assessed for compliance.
475. Government is also making progress in the transfer of well-located state land for integrated housing delivery. Some 1 329 hectares of land owned by State Owned Enterprises is in the process of being transferred to the Housing Development Agency and 1066 hectares have been transferred to municipalities. In order to address the affordable housing market, 100 000 loans were granted between 2009 and September 2011 through Housing Development Finance Institutions. The National Housing Finance Corporation has commenced with the necessary work to activate the Mortgage Default insurance programme. The Department has also revised the finance-linked individual subsidy programme (FLISP) to improve the ability of households in the income category R3 501–R15 000 to access mortgage finance for housing, thus increasing access to housing finance and the provision of

shelter and basic services. In the 2012/13 financial year, the management of the Urban Settlement Grant continued to receive attention in the devolution of powers to the local sphere of government.

476. The Department of Human Settlements is providing support to provinces and municipalities to map, categorise and implement informal settlement upgrading plans in 45 priority municipalities. It is also focusing on rationalising the Housing Development Finance Institutions and increasing their support to provinces to develop mixed income and mixed use projects. A further area of focus in the future will be monitoring of the contribution of private banks to the affordable housing market.
477. A number of significant cases pertaining to shelter and housing have been handed down by the courts during the period under review.<sup>487</sup>

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<sup>487</sup> The case of *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) concerned the fate of a small group of people who had been unlawfully occupying some vacant, unused and private land in the jurisdiction of the municipality of Port Elizabeth. At the instance of the landowners and a large number of concerned locals, the municipality applied for their eviction. It fell to the court to decide whether the eviction could go ahead under the circumstances. It found that it could not. Sachs J made reference to the judiciary's "new task," which was to manage "the counter positioning of conventional rights of ownership against the new, equally relevant, right not to be arbitrarily deprived of a home, without creating hierarchies of privilege.

In *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC) more than 400 occupiers of two buildings in the inner city of Johannesburg (the occupiers) applied for leave to appeal against a decision of the Supreme Court of Appeal. They challenged the correctness of the judgment and order of that Court authorising their eviction at the instance of the City of Johannesburg (the City) based on the finding that the buildings they occupied were unsafe and unhealthy. The City was ordered to provide those of the occupiers who were "desperately in need of housing assistance with relocation to a temporary settlement area". The application for leave to appeal was granted.

In *Abahlalibase Mjondolo Movement SA v Premier of the Province of KZN* (2009) ZACC 31, the Abahlalibase Mjondolo Movement of South Africa, an organisation representing thousands of people who live in informal settlements, and its President approached the KwaZulu-Natal High Court, Durban, challenging the constitutionality of the KwaZulu-Natal Elimination and Prevention of Re-emergence of Slums Act. The High Court dismissed the challenge. They also contended that section 16 of the Act was inconsistent with the Constitution and invalid. Section 16 gives the Member of the Executive Council of the province power to publish a notice in the provincial gazette determining a period within which an owner or person in charge of land or a building that is occupied by unlawful occupiers must institute proceedings to evict the occupiers under the PIE Act. If the owner or person fails to comply, the municipality must bring proceedings to evict the occupiers. On the constitutional validity of section 16 of the Act, the Constitutional Court held that section 16 of the Act is inconsistent with the Constitution. The Court noted that section 16 of the Act will make residents of informal settlements, who are invariably unlawful occupiers, more vulnerable to evictions should an MEC decide to issue a notice under section 16.

In *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue* [2010] ZAGPJHC 3, the occupiers of 7 Saratoga Avenue are a community of 86 desperately poor people living in disused industrial property in Berea, Johannesburg. In 2006, they were sued for eviction by the owner of the property. They opposed the application, stating that they could not be evicted unless and until the City of Johannesburg discharged its constitutional obligation to provide them with temporary alternative accommodation pending ultimate access to formal housing as part of the national housing programme. They joined the City of Johannesburg ('the City') to the proceedings and sought an order compelling it to do so. The South Gauteng High Court, granted the eviction and ordered the occupiers to vacate the property. The Court directed the City either to provide the occupiers with temporary accommodation or to pay each of the occupiers' households R850 per month towards the cost of finding their own alternative accommodation. The City subsequently appealed the SCA judgment, and the appeal was heard in the Constitutional Court. Judgment was handed down, the Court accordingly upheld the order of the SCA but ordered the eviction of the occupiers 14 days after the City was ordered to provide those occupiers

478. In *Government of the Republic of South Africa v Grootboom*<sup>488</sup> the Constitutional Court found applicants' constitutional right to adequate housing had been violated and ordered that the various governments devise, fund, implement and supervise measures to provide relief to those in desperate need. The decision had a major impact on housing policy, with most municipalities put in place a "Grootboom allocation" in their budgets to address the needs of those in desperate need and in this regard women and children were considered the main proponents of those most needy of housing.
479. The percentage of housing types inhabited by male and female-headed households for the period 2002 to 2011 is presented in Table 43 below. The table reveals very similar patterns for male and female-headed households over this period. In 2010, approximately three-quarters of male and female-headed households resided in formal dwellings.<sup>489</sup> Female-headed households are, however, much more likely to live in traditional structures (13.7% compared to 7,9% for males in 2011). This is consistent with the observation in this table that most female-headed households are found in more rural provinces such as Limpopo, Mpumalanga, Eastern Cape and Kwazulu-Natal. Male-headed households are slightly more likely to live in informal dwellings than female-headed households (15% compared to 9.7% in 2010).<sup>490</sup>

**Table 48: percentage of households living in formal, informal and traditional housing, by gender of the household head, 2002–2011**

Type of dwelling	Year									
	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011

who were in need with temporary accommodation. This was to ensure that they would not be rendered homeless because of the eviction.

In *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others (SCA) [2012] ZASCA 116* Changing Tide Properties had applied for the eviction of the occupiers, which was unopposed by the occupiers. However, the owner highlighted that the eviction may lead to homelessness. The South Gauteng High Court ordered the City of Johannesburg (the City) to provide alternative accommodation to approximately 100 unlawful occupiers of a building in inner city Johannesburg.

<sup>488</sup> 2001 (1) SA 46 (CC)

<sup>489</sup> Housing is categorized as formal, informal, traditional and other. Formal housing refers to dwellings or brick structures on separate stands; flats or apartments; cluster houses; townhouses; semi-detached houses and rooms, flatlets or domestic quarters. Informal housing refers to informal dwellings or shacks in backyards or in informal settlements. Traditional housing is defined as 'a traditional dwelling/hut/structure made of traditional materials'. 'Other' refers to caravans and tents. Formal housing is generally considered a proxy for adequate housing.

<sup>490</sup> Stats SA: 2011: Social Profile of Vulnerable Groups in South Africa 2002-2010

Male										
Formal	74,3	75,7	75,4	70,8	73,9	73,2	74,7	76,0	77,0	77,8
Traditional	8,0	7,7	8,4	8,0	7,3	7,1	7,9	7,6	7,5	7,9
Informal	13,8	13,4	12,9	17,6	15,9	16,9	16,3	15,3	15,0	14,0
Other	4,0	3,3	3,3	3,6	2,9	2,7	1,0	1,1	0,5	0,3
<b>Per cent</b>	<b>100,0</b>	<b>100,0</b>	<b>100,0</b>	<b>100,0</b>	<b>100,0</b>	<b>100,0</b>	<b>100,0</b>	<b>100,0</b>	<b>100,0</b>	<b>100</b>
<b>Total (thousands)</b>	<b>6 892</b>	<b>7 108</b>	<b>7 319</b>	<b>7 538</b>	<b>7 780</b>	<b>8 007</b>	<b>8 314</b>	<b>8 629</b>	<b>8 937</b>	<b>9119</b>
Female										
Formal	72,6	72,0	72,5	71,1	73,2	73,5	74,3	74,7	76,7	77,0
Traditional	15,1	15,7	16,9	15,9	13,9	14,0	14,6	14,6	13,3	13,7
Informal	11,7	11,8	10,2	12,5	12,1	11,7	10,5	10,2	9,7	9,0
Other	0,6	0,5	0,4	0,5	0,8	0,8	0,6	0,5	0,3	0,2
<b>Per cent</b>	<b>100,0</b>	<b>100,0</b>	<b>100,0</b>	<b>100,0</b>	<b>100,0</b>	<b>100,0</b>	<b>100,0</b>	<b>100,0</b>	<b>100,0</b>	<b>100</b>
<b>Total (thousands)</b>	<b>4 111</b>	<b>4 248</b>	<b>4 386</b>	<b>4 522</b>	<b>4 670</b>	<b>4 801</b>	<b>5 000</b>	<b>5 183</b>	<b>5 367</b>	<b>5 485</b>

480. Female-headed households have been notably and consistently more likely to live in households that are partially or fully owned than male-headed households or households in general. It is notable that the percentages of male and female-headed households that have this tenure status in 2010 dropped below the levels measured in 2002 after fluctuating visibly between 2002 and 2008, as **Table 49** below shows.

**Table 49: Comparison of the basic living condition indicators for South African households by gender of the household head, 2002–2011:**

Access to service indicator	Sex of head	Year									
		2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
% living in dwellings that are partially or fully owned	Male	65,2	67,6	64,6	67,2	65,5	63,6	70,0	61,2	63,4	57,4
	Female	74,5	77,0	75,2	75,3	77,4	74,3	80,0	71,8	73,7	68,1
	<b>Total</b>	<b>68,7</b>	<b>71,1</b>	<b>68,6</b>	<b>70,3</b>	<b>70,0</b>	<b>67,6</b>	<b>73,8</b>	<b>65,2</b>	<b>67,3</b>	<b>61,4</b>

## ARTICLE 17: RIGHT TO POSITIVE CULTURAL CONTEXT

481. The Constitution provides that everyone has the right to participate in the cultural life of their choice. However, to ensure discriminatory and harmful cultural practices are not practiced, the Constitution provides that anyone exercising his or her culture may not do so in a manner inconsistent with any provision of the Bill of Rights. In relation to the right to participation in **cultural practices** of one's choice, section 30 and 31 of the Constitution apply.<sup>491</sup> The section 31 right protects both individual and group interests in cultural integrity.
482. It is within this context that numerous cultural practices that discriminate against women have been found to be unconstitutional and consequently abolished and/or outlawed. The Equality Act stipulates that unfair discrimination on the ground of gender includes 'any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and well-being of the girl child'.
483. Harmful practices that are reportedly practiced in South Africa have been detailed in Article 5 on Harmful Cultural Practices in the report.
484. The Department of Arts and Culture is responsible for the promotion of positive culture at the national level. Government is constantly mindful of the fact that South Africa is a country of rich cultural diversity. Perhaps one of the most outstanding things about South African culture is that it is not one single culture, but rather a range of different cultures representing every level of a very stratified community. Hybrid mixtures of these different cultures also exist, making South Africa one of the most culturally diverse countries in the world.
485. As a result government is continuously seeking to overcome the legacy of past discriminatory practices and strives to develop one nation, united in our diversity. The country has thus undertaken not only to promote diversity and tolerance but it has also taken positive measures to promote the rights of minority groups. The Department of Arts and Culture (DAC) is specifically tasked to create an environment conducive to the growth and development of South Africa's arts and culture. Among its key objectives are the improvement, re-orientation and expansion of the arts and culture sector to serve South Africa's cultural needs. The DAC's vision is to develop and preserve South African culture so as to ensure social cohesion and nation-building. For example, as part of our efforts to promote inclusive citizenships, the DAC hosted no less than eighty community conversations held throughout

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<sup>491</sup> S 30 "Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights." And s 31 "(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community-

- (c) to enjoy their culture, practise their religion and use their language; and
  - (d) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.
- (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights."

South Africa to determine from communities the kind of society they seek to build. These conversations culminated in our country's first National Summit on Social Cohesion, held in Kliptown in July 2012. The summit brought together South Africans; black and white, women and men, rich and poor, young and old, urban and rural, with a diversity of beliefs, seeking to unite them under a common declaration and through a practical programme of action.

486. As part of implementing the Mzansi Golden Economy strategy the DAC continued to support major cultural events in all the provinces. Some of the events supported include: the National Arts Festival, the South African Music Awards, the Mbokodo Awards, Joy of Jazz, Mapungubwe Arts Festival, the Buyel'ekhaya Pan-African Music Festival, the Cape Town International Jazz Festival and the Mangaung African Festival (Macufe), to mention a few. An estimated total of 25 000 job opportunities were created in the past couple of years as a result of the twenty-eight cultural events we continue to support across the country. Future plans are to upgrade some of these events with a view to enhancing their contribution to the goals of nation building, social cohesion and economic development.<sup>492</sup> The Department of Arts and Culture has demonstrated its unwavering commitment to bring arts, culture and heritage activities into the mainstream to provide economic and transformational tools for the vast majority of South Africans. This sector now forms an essential part of South Africa's New Growth Path. There is greater appreciation of the contribution of the arts to the GDP of the nation.
487. The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities is an independent chapter nine institution in South Africa. It draws its mandate from the Constitution and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act of 2002.<sup>493</sup> The Commission has been operational since 2003 and is mandated to promote respect for and further the protection of the rights of cultural, religious and linguistic communities; promote and develop peace, friendship, humanity, tolerance, national unity among and within cultural, religious and linguistic communities on the basis of equality, non-discrimination and free association; to promote the right of communities to develop their historically diminished heritage and to recognise community councils. The Commission works along five key strategic areas: public education and information; investigation and dispute resolution; policy and research; community councils; and national consultative conference.
488. In addition, South Africa has implemented and funded practical steps and significant educational, economic and scientific programmes for the protection and promotion of indigenous people. Known as the Indigenous Knowledge System, this ambitious programme brings together indigenous communities, universities, research centres and economic partners and enjoys the support of the government.
489. The Department of Science and Technology's National Indigenous Knowledge Systems Office (NIKSO) has received international recognition for its innovation in enhancing indigenous knowledge systems in the country.
490. The DAC declared 2012 the year of heritage in order to increase focus on preserving and promoting our country's cultural heritage, with particular emphasis on our liberation heritage. Specifically, the

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<sup>492</sup> DAC, Annual Report 2012-2013

<sup>493</sup> Act No. 19 of 2002



sacrifices and contributions of some of the heroes and heroines of our struggle for national liberation were celebrated. Significant progress has been made in implementing the twenty-nine heritage projects across the country. These include the completion of the Steve Biko Centre in Ginsberg in the Eastern Cape, the opening of the museum component of Freedom Park, the building of a road linking Freedom Park and the Voortrekker Monument, the completion of the Ncome Museum in Northern KwaZulu-Natal and the Matola Monument and Museum in Mozambique. Progress with refurbishing the former President of the ANC, O.R. Tambo's homestead in Bizana and with building an interpreting centre. We have also developed policies on living heritage, Under Water Cultural Heritage, Digitisation and Human Resources Development strategies for heritage.

491. The promulgation of the Pan South African Language Board Act, 1995<sup>494</sup> has been applied in South African cultural and language communities so as to protect and promote their indigenous languages. It takes into account the broad acceptance of linguistic diversity, social justice, the principle of equal access to public services and programmes, and respect for language rights. This is indicative of the integration of indigenous peoples which South Africa seeks to achieve through the recognition of the multiple cultures and linguistic communities who all live in South Africa.
492. Chapter 11 of the Constitution states that the institution, status and roles of traditional leadership, according to customary law, are recognised, subject to the Constitution. The Department of Traditional Affairs was established in April 2010 to underline the critical focus on traditional leadership. This signifies the importance that is placed on the role and place of traditional leaders in the lives of people, especially in rural areas. The department is working on a range of policies which, among other things, include policy on unity and diversity, initiation, traditional healing, traditional leader's protocol, family trees, involvement of the Khoisan people in the system of governance in South Africa, and remuneration and benefits of traditional leaders based on uniform norms and standards.
493. The Constitution recognises customary law as an independent source of law, embodied in the customary law is the custom of traditional leadership amongst others. The National House of Traditional Leaders was established in terms of the National House of Traditions Leaders Act, 1997.<sup>495</sup> Its objectives and functions are to promote the role of traditional leadership within a democratic constitutional dispensation, enhance unity and understanding among traditional communities and advise national government. Provincial houses of traditional leaders were established in eight (8) provinces, namely the Eastern Cape, Western Cape, Northern Cape, KwaZulu-Natal, the Free State, Mpumalanga, Limpopo and North West. Unlike the other provinces, Gauteng only has a Council of Traditional Leaders and not a Provincial House of Traditional Leaders.
494. The Traditional Leadership and Governance Framework Act, 2003<sup>496</sup> provides for the establishment of local houses of traditional leaders. The national and provincial houses of traditional leaders enhance the co-operative relationships within national and provincial government, while the establishment of local houses of traditional leaders deepen and cement the relationship between municipalities and

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<sup>494</sup> Act No. 59 of 1995

<sup>495</sup> Act No. 10 of 1997

<sup>496</sup> Act No 41 of 2003

traditional leaders on customary law and development initiatives. The Act has transformed the composition of traditional councils to provide for elements of democracy. Closely connected to the role of traditional leadership in South Africa is the position of customary law. The status and relevance of customary law in South Africa has been acknowledged by the Constitutional Court, however, customary law and the institution of traditional leadership cannot be used to perpetrate racial discrimination as it would then fall foul of the Constitution.<sup>497</sup>

495. The establishment of the Department of Traditional Affairs was approved by Cabinet on 5 March 2008. The former Department of Provincial and Local Government was given a mandate deriving from a March 2008 Cabinet decision to drive the processes for the establishment of this new department. The strategic role of the department is not only to assist the institution of traditional and the Khoi-San leadership to transform themselves to be strategic partners with Government in the development of their communities, but also to coordinate the traditional affairs activities of the Department and those of other Departments at national, provincial and local government levels. This is meant to ensure that their needs in terms of development, service delivery, governance, access to indigenous knowledge systems, traditional courts and indigenous law, traditional healing and medicine are adequately met.
496. An effective and efficient institution of traditional leadership that enhances sustainable development and service delivery and to coordinate traditional affairs activities across government through the development of appropriate policies, systems and regulatory framework governing Traditional Affairs, the enhancement of organisational efficiency and effectiveness, the establishment of capacity development systems and partnership models, undertaking periodic research and development on traditional affairs matters; and monitoring and evaluation of performance of the DTA and its entities. The establishment of this department signifies the importance that is placed on the role and place of traditional leaders in the lives of people, especially in rural areas. The strategic role of the department is to assist the institution of traditional leadership to transform itself into a strategic partner of government in the development of communities.
497. Courts have handed down cases worth noting, for example in the case of *MEC for Education: Kwazulu-Natal v Pillay*<sup>498</sup> the Constitutional Court held that a school policy that forbids the wearing of a small

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<sup>497</sup> *Bhe v Magistrate Khayelitsha* 2005 (1) BCLR 1 (CC) and *Alexkor Ltd v Richtersveld Community* 2003 (12) BCLR 1301 (CC). In *Shilubana and Others v Nwamitwa* 2008 (9) BCLR 914 (CC) a dispute arose between Ms Shilubana, the daughter of Hosi Fofeza Nwamitwa and Mr Nwamitwa, the son of Hosi Malathini Richard Nwamitwa. On 24 February 1968 Hosi Fofeza died without a male heir. At that time, succession to Hosi (the Chieftainship) was governed by the principle of male primogeniture. Therefore, Ms Shilubana, Hosi Fofeza's eldest daughter, was not considered for the position, despite being of age in 1968. Instead, Hosi Fofeza's younger brother, Richard, succeeded him as Hosi of the Valoyi community. The dispute in this case arose following the death of Hosi Richard on 1 October 2001. The Constitutional Court explained that the issue to be decided was whether the community has the authority to restore the position of traditional leadership to the house from which it was removed due to gender discrimination, even if this discrimination occurred prior to the coming into operation of the Constitution. The Court reiterated that Section 211(2) specifically provides for the right of traditional communities to function subject to their own system of customary law, including amendment or repeal of laws. If the traditional authority had only those powers accorded it by the narrow view; it would be contrary to the Constitution and would frustrate the achievement of the values in the Bill of Rights as Section 39(2) of the Constitution obliges the Court to develop the customary law in accordance with the spirit, purport and aims of the Bill of Rights.

<sup>498</sup> 2008 (1) SA 474 (CC)

nose stud, worn as a religious and cultural expression, is discriminatory and unconstitutional. The evidence before the Court showed that the wearing of a nose stud was a voluntary practice that formed part of the learner's South Indian Tamil Hindu culture, which was part of her Hindu religion. The school and its policy had therefore interfered with her right to religion and culture. As that burden was not imposed on others, the school's interference amounted to discrimination against her.

498. The right to express one's religion received judicial affirmation in a variety of cases. For example, in the case of *Antonie v Governing Body, Settlers High School*<sup>499</sup> a learner had been found guilty of "serious misconduct" for coming to school with dreadlocks and a cap – something which was considered part of her religious practice as a Rastafarian. The school decided that she had violated the school's code of conduct that had a rule about the appearance of learners. The Cape High Court set aside the decision of the governing body on the basis that it should have given 'adequate recognition' to the values and principles in the Constitution, including the learner's need to have freedom of expression.

## ARTICLE 18: RIGHT TO A HEALTHY AND SUSTAINABLE ENVIRONMENT

499. The protection and conservation of the environment is a constitutional imperative in South Africa. Section 24 of the Constitution provides that everyone has the right to an environment that is not harmful to their health or wellbeing. The State is obliged to protect the environment through reasonable legislative and other measures that: (a) prevent pollution and ecological degradation; (b) promote conservation; and (c) secure ecologically sustainable development. There are numerous statutes that have been enacted to ensure environmental protection and conservation, key among them is the National Environmental Management Act, 1998.<sup>500</sup> The Department of Environmental Affairs ensures the implementation of these statutes.
500. South Africa recognizes the link between gender and the environment, and the role of women in the planning, management and preservation of the environment. The National Environmental Management Act, 1998<sup>501</sup> specifically provides that '*the vital role of women and youth in environmental management and development must be recognised and their full participation therein must be promoted*'. On indigenous knowledge systems, the Act provides that all forms of knowledge, including traditional and ordinary knowledge, must be recognized.
501. Women have been reasonably represented in environmental policy development. In 2005, the Department of Environmental Affairs hosted a National Conference on Women and the Environment in which the role of South African women in the environmental sector was assessed. Following the conclusion of the Conference, the Mogale City Declaration on the Women and the Environment was adopted. The Declaration comprised of specific action points that the government has since been implementing in a bid to strengthen the role of women in environmental management.

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<sup>499</sup> 2002 (4) SA 738 (C)

<sup>500</sup> Act No. 107 of 1998

<sup>501</sup> Act No. 107 of 1998

502. South Africa hosted the Convention on State Parties (COP 17) in Durban in 2011. Towards this end, the Department for Women, Children and People with Disabilities, in partnership with the Department of Environmental Affairs, consulted widely with rural women on the position of women in environmental issues. In addition, the Minister for Women, Children and People with Disabilities hosted the SADC Women Ministers for Gender Affairs on the development of a SADC Position Paper on Women and the Environment, including the green economy. The Department of International Relations and Cooperation hosted a meeting of AU Ministers for Gender Affairs to develop an Africa-wide consensus position. Both positions were presented at the main plenary of COP 17 in Durban.
503. The work of Government is guided by the constitutional imperatives in the execution of their mandate which also promises that all South Africans have a right to an environment that is not harmful to their health or well-being, and to have the environment protected, for the benefit of present and future generations. Thus Government's work on the environment includes:
- Protecting and conserving oceans and coastal environment
  - Waste management
  - Creation of green jobs while contributing to the creation of decent work and livelihood opportunities.
  - Developing communications to heighten environmental awareness.
  - Ensure that government, industry and the public are informed, supported and regulated to act responsibly to conservation generally including conservation of the ocean and coastal environment,
  - Ensure that South Africa honours local and global obligations.
  - Promote, coordinate and manage an effective national mitigation and adaptation response to climate change
504. The priority areas of focus include:
- providing support to local government in the areas of air quality management, waste management, biodiversity management, coastal planning and open space planning;
  - drawing linkages between climate change, the green economy and sustainable development;
  - paying particular attention to ensuring that environmental assets and natural resources are valued, protected and continually enhanced.
505. The most impoverished communities in South Africa are most vulnerable to issues surrounding their environment, for example climate changes caused by un-sustainable means of resources management. Women in particular from the rural areas are considered to be most vulnerable to harsh impacts of climate change because of their high levels of poverty and underdevelopment, as a result their capacity to adapt to, and recover from, climate change related impacts is limited to a very large extent. In many cases women in these areas are still directly dependent on ecosystem services as the basis for their survival and livelihoods.
506. Addressing these issues requires vigorous interventions such as those envisaged by initiatives undertaken by the Conference of Parties (COP), the resolutions undertaken within these structures can be used to drive this transformation by raising local, national and international awareness of climate change issues, to create and encourage political support for climate protection, and to catalyse

the conversion to the green economy. To this end, the country has set up a multi departmental team to ensure that the country implements resolutions with identified timeframes.

507. For instance a number of important climate change related interventions were instigated as a direct consequence of hosting the 2010 FIFA World Cup in Durban. These included reforestation projects with mitigation, adaptation and social upliftment co-benefits, as well as urban greening initiatives and awareness raising. Hosting the United Nations Framework Convention on Climate Change COP 17/CMP 7 negotiations has extended these efforts, providing the opportunity to increase awareness of climate change and the climate protection work that is being done by eThekweni Municipality. It has also catalysed the development of novel approaches such as the CEBA<sup>502</sup> concept.
508. Programmes of Government include, amongst others, -
- Environmental Quality and Protection: Protect and improve the quality and safety of the environment to give effect to the right of all South Africans to an environment that is not harmful to health and wellbeing.
  - Oceans and Coasts: Ensure that government, industry and the public are informed, supported and regulated to act responsibly to conserve the ocean and coastal environment as well as to honour South Africa's local and global obligations.
  - Climate Change: Promote, coordinate and manage an effective national mitigation and adaptation response to climate change.
  - Biodiversity and Conservation: Promote the conservation and sustainable use of natural resources to contribute to economic growth and poverty alleviation.
  - Environmental Sector Programmes and Projects: Implement environmental sector projects and assist in job creation In dealing with political challenges they reaffirming Rio principles and past action plans by reaffirm their commitment to advance progress in implementation of the Rio Declaration on Environment and Development, Agenda 21, the Programme for the Further Implementation of Agenda 21, the Johannesburg Declaration on Sustainable Development and the Plan of Implementation of the World Summit on Sustainable Development, the Barbados Programme of Action and the Mauritius Strategy for Implementation.
509. Other programmes that empower women include:
- *Working for Water*: The programme is globally recognised as one of the most outstanding environmental conservation initiatives on the continent. It enjoys sustained political support for its job creation efforts and the fight against poverty. WfW considers the development of people as an essential element of environmental conservation. Short-term contract jobs created through the clearing activities are undertaken, with the emphasis on endeavouring to recruit women (the target is 60%), youth (20%) and disabled (5%). Creating an enabling environment for skills training, it is investing in the development of communities wherever it works. Implementing HIV and Aids projects and other socio- development initiatives are important objectives. Since its inception in 1995, the programme has cleared more than one million hectares of invasive alien plants providing jobs and training to approximately 20 000

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<sup>502</sup> "Community ecosystem-based adaptation"

people from among the most marginalized sectors of society per annum. Of these, 52% are women.

- *Working for Land (WfL)*: Working for Land in partnership with Land care Programme, communal farmers and community leaders to prevent and continuously control natural resources so as to mitigate bush encroachment/thickening and loss of top soil. This would create employment opportunities and socio-economic benefits for the local residents and thus making the necessary contribution to the Expanded Public Works Programme (EPWP). The Special Public Works Programme includes the targets of 60% women, 20% youth and 2% disability.
- *Working for Wetlands*: The programme is implemented by the South African National Biodiversity Institute (SANBI) on behalf of the departments of Environmental Affairs (DEA); Agriculture, Forestry and Fisheries (DAFF) and Water Affairs (DWA). It forms part of the government's Expanded Public Works Programme, which seeks to draw unemployed people into the productive sector of the economy.
- *Working on Fire*: Working on Fire (WoF) was launched in September 2003 as part of the South African Government's initiative to create jobs and to alleviate poverty. Today WoF employs more than 5000 young men and women who have been fully trained as veld and forest fire fighters and are stationed in more than 200 teams throughout South Africa. WoF addresses the prevention and control of wild land fires to enhance the sustainability and protection of life, poverty and the environment through the implementation of Integrated Fire Management (IFM) practices 85% of whom are youth, 37% are women (the highest level in any comparable fire service in the world).

510. There are other programmes that involve women and the environment such as, amongst others, the *Rhino Dialogues South Africa*, *Green Cars*, *Green Fund*, *Climate Action Now*, as well as donor funded projects. The socio-economic development of any country leans strongly on the need to conserve its natural resources and to this regard South Africa has been working towards bolstering this sector and ensuring our natural resources are seen as a scarce and therefore valuable resource for development.

511. In 2011, the Department of Public Works undertook to build houses with rural women using indigenous and traditional products. This was a project that connected women's economic empowerment and environmental sustainability as well as the green economy.

## **ARTICLE 19: RIGHT TO SUSTAINABLE DEVELOPMENT INCLUDING THE RIGHT TO PROPERTY, ACCESS TO LAND AND CREDIT**

512. A major progress in ensuring women's right to sustainable development has been the reform of South Africa's land policy. The reform has had a particularly positive impact on rural women. The South African White Paper on Land Reform laid the policy framework for the abolition of all laws that discriminated against women in relation to property ownership. The White Paper was reinforced by a sectoral Land Reform Gender Policy that aims to create an enabling environment for women to

access, own, control, use and manage land as well as access credit facilities. Several pieces of legislation have given effect to the White Paper and the Land Reform Gender Policy. The legislation includes the Land Reform (Labour Tenants) Act, 1996,<sup>503</sup> the Housing Act, 1997,<sup>504</sup> the Water Services Act, 1997<sup>505</sup> and the Land Bank Amendment Act, 1998.<sup>506</sup>

513. The Agricultural Development Fund Act, 1993<sup>507</sup> provides for the establishment of and control over an agricultural development fund for the handling of money received for development. The Land and Agricultural Development Bank, 2002<sup>508</sup> provides for a juristic person known as the Land and Agricultural Development Bank. The Land Bank is a specialist agricultural bank guided by a government mandate to provide financial services to the commercial farming sector and to agri-business and to make available new, appropriately designed financial products that would facilitate access to finance by new entrants to agriculture from historically disadvantaged backgrounds.
514. Government developed a Green Paper on Rural Development and Land Reform. The Green Paper is a strategic policy document of the Department of Rural Development and Land Reform that intends to bring drastic changes in the implementation of Land Reform and overhaul rural communities into vibrant, equitable and sustainable rural communities. The need to instil national identity, shared citizenship and autonomy-fostering service delivery are the primary reasons why the state must continue to invest in the transformation of land relations (systems and patterns of land control and ownership).
515. Rural women's access to and ownership of land have improved. Approximately 13.3 % of the total number of households that benefited from the Land Redistribution and Tenure Reform Programmes during the period 1994 to December 2007 was female-headed households. This marked an increase from 1,016 households recorded at the beginning of the programme in 1994, of which only 1.2% of the beneficiaries were female-headed households. This is due to the fact that land restitution primarily restores land ownership to previous owners who were dispossessed by apartheid. In the majority of instances such owners are men. The Government's efforts to address gender imbalances are mainly targeted at land reform as this presents more meaningful opportunities for women for sustainable development. South Africa has set targets to increase the proportion of women who own land to 30% by 2015. **Table 50 (a) and (b)** below show the number of female beneficiaries of land reform programmes from 1994 to 2007:

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<sup>503</sup> Act No. 3 of 1996

<sup>504</sup> Act No. 107 of 1997

<sup>505</sup> Act No. 108 of 1997

<sup>506</sup> Act No. 21 of 1998

<sup>507</sup> Act No. 175 of 1993

<sup>508</sup> Act No. 15 of 2002

Province	% of land owned by women
Eastern Cape	11.35%
Free State	25.87%
Gauteng	9.65%
Kwa-Zulu Natal	7.63%
Limpopo	8.56%
Mpumalanga	1.63%
Northern Cape	32.35%
North West	14.32%
Western Cape	41.25%
<b>TOTAL</b>	<b>13.29%</b>

Females beneficiaries in land reform programmes : 1994 to 2007				
Province	Number of individuals	Number of Females	% of Females	Loan Amount where females are involved
Eastern Cape	23,185	2,632	11.35%	R 109,003,449.00
Free State	7,182	1,858	25.87%	R 3,834,063.00
Gauteng	6,997	675	9.65%	R 18,938,698.00
Kwa-Zulu Natal	30,282	2,311	7.63%	R 8,922,115.00
Limpopo	6,392	547	8.56%	R 22,262,587.00
Mpumalanga	11,294	184	1.63%	R 0.00
Northern Cape	2,402	777	32.35%	R 24,801,755.00
North West	28,832	4,129	14.32%	R 21,159,646.00
Western Cape	8,484	3,500	41.25%	R 1,988,653.00
<b>TOTAL</b>	<b>125,050</b>	<b>16,613</b>	<b>13.29%</b>	<b>R 210,910,966.00</b>

516. In 2009-2010, a total of 5681 females were beneficiaries of the redistribution and land tenure reform programme. This amounted to women benefiting to a total of 150 925.16 hectares of land worth some R1.1 billion. In terms of the land restitution programme, of the 9294 households making up 48 233 beneficiaries that benefited from the programme, 4177 were female headed households. Figures for the shorter period April 2010 to January 2011 indicate that out of 8,658 households with successful claims, 4,412 (51%) were female-headed households. The total land awarded to women in this programme amounted to 145 492 hectares worth some R810 million.
517. The overall progress from 1994 to 31 March 2014 regarding the redistribution target of 30% white owned agricultural land (or 24.5 million ha) in South Africa (total of 82 million ha) is 4,313,168 million ha under Land Redistribution through 5 015 projects, benefiting 233,250 beneficiaries of which 50,473 are women, 32,589 are youth and 674 are people with disabilities.



## ARTICLES 20, 21, 22, 23, 24: RIGHTS OF SPECIALLY PROTECTED WOMEN'S GROUP

### Widows' Rights

518. Under the Compensation for Occupational Injuries and Diseases Act, 1993<sup>509</sup> and the Occupational Diseases in Mines and Works, 1973<sup>510</sup> widows are entitled to compensation for the death of their spouses caused by occupational diseases or injuries. As discussed earlier in this report (in reference to the cases of *Amod*, *Daniels*, and *Hassam*), the courts have been keen in protecting the proprietary rights of widows, particularly those who were married under religious and/or polygamous marriages.
519. Widows have long been the subject of discriminatory and inhuman, humiliating or degrading treatment. A study conducted by the CGE on the experiences of widows in South Africa revealed that there was widespread discrimination against widows. Several initiatives have been taken to reverse this situation. In 2008, the CGE held provincial stakeholder workshops in an effort to raise awareness among widows on their rights and to empower them in identifying and reporting discrimination, harassment and hate speech that they may possibly experience.
520. The Department of Women, Children and People with Disabilities hosted a National Summit for rural women, widows and domestic workers in November 2011 in Port Shepstone, Kwazulu-Natal, which was addressed by President Jacob Zuma. The summit, which was attended by 3000 women, comprised mainly widows, domestic workers and rural women from across the country. Some of the general comments and recommendations received from the summit include: (i) a high number of widows are unemployed; (ii) many of them are struggling to raise their children and therefore cannot afford to provide for their families; (iii) Illiteracy is one of the challenges faced by these women and it is therefore important to look at issues of ABET and vocational training to enable them to initiate projects within their localities; (iv) inheritance is still a problem; (v) issues of land are also a problem, especially in areas that are ruled by traditional leaders steeped in patriarchal thinking and practices.

### Widows' Right to Inheritance

521. In South Africa, there has been several complaints that a number of widows have been robbed of their husband's inheritance due to lack of knowledge of the law in this regard. There have been widows who were forced to marry their late husband's relatives, especially the elder brother, a practice that is culturally motivated.<sup>511</sup> The widow sees no option but to heed this practice as it is often the only way she can continue to enjoy the inheritance.
522. The National Widowed Women's Forum creates awareness among widows on their rights and improves their level of decision making with regard to the deceased estates. The platform also provides an opportunity to share information related to investments and business funding and management.

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<sup>509</sup> Act No. 130 of 1993

<sup>510</sup> Act No. 73 of 1973

<sup>511</sup> A practice known as Ukungenwa

## Protection of Elderly Women

523. The particular rights of and protection afforded to older persons in South Africa are enshrined under the Older Persons Act, 2006.<sup>512</sup> The Act's object is to deal effectively with the plight of older persons by establishing a framework aimed at the empowerment and protection of older persons and at the promotion and maintenance of their status, rights, well-being, safety and security. It is expressly provided under the Act that the abuse of an older person is an offence punishable in law. Abuse is broadly defined in the Act to include physical, sexual, psychological and economic abuse.
524. The Older Persons Act stands as one of the key interventions to stop abuse of older persons in the country. The national inter-sectoral implementation of this Act is led by the Department of Social Development. It is an Act intended to protect, promote and maintain the status, rights, well – being and security of older persons. Section 30 of the Act criminalizes any act of abuse against an older person, and further defines 'abuse' as including physical abuse, sexual abuse, psychological abuse and economic abuse. The Act provides for the prescription of norms and standards that define the acceptable levels of services that may be provided to older persons and in terms of which services must be monitored and evaluated. It provides for the registration, regulation and monitoring of community-based programmes and residential facilities for older persons. Section 31 requires the Minister of Social Development to keep a register of persons convicted of the abuse of an older person. This is mainly to prevent all registered convicted persons from working in environments that will expose them to older persons. The aim is to reduce the re-offending rate in these cases, while protecting older persons from potential abuse. Since 2010, the Department has been collecting statistics on the abuse of older persons.
525. In terms of the Social Assistance Act, 2004<sup>513</sup> older persons are entitled to an older person's grant. In this regard, women who have attained the age of 60 years are entitled to the grant. As of April 2010, according to the Social Assistance Amendment, 2008<sup>514</sup> the age requirement for men is also 60 years old whereas previously it was set at 63 years. Since the enactment of Social Assistance Act the number of older persons receiving the older person's grant has been growing.

## Special Protection of Women with Disabilities

526. Discrimination on the basis of disability is expressly mentioned as one of the prohibited grounds of unfair discrimination under section 9 of the South African Constitution.
527. The South African Schools Act, 1996<sup>515</sup> provides for the inclusion of learners with special educational needs. Public schools are required by law to admit all learners and provide the necessary educational requirements without discrimination. The Employment Equity Act, 1998<sup>516</sup> prohibits the discrimination of an employee on the ground of disability. It further provides that affirmative action

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<sup>512</sup> Act No. 13 of 2006

<sup>513</sup> Act No. 13 of 2004

<sup>514</sup> Act No. 6 of 2008

<sup>515</sup> Act No. 84 of 1996

<sup>516</sup> Act No. 55 of 1998

may be taken to promote the employment of previously disadvantaged groups such as persons with disabilities (PWDs).

528. The Promotion of Equality Act and Prevention of Unfair Discrimination Act, 2000<sup>517</sup> provides that unfair discrimination on the basis of disability includes: (a) denying or removing from any person who has a disability, any supporting or enabling facility necessary for their functioning in society; (b) contravening the code of practice or regulations of the South African Bureau of Standards that govern environmental accessibility; (c) failing to eliminate obstacles that unfairly limit or restrict persons with disabilities from enjoying equal opportunities or failing to take steps to reasonably accommodate the needs of such persons.
529. Several other pieces of legislation pay particular attention to persons with disabilities. The Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007<sup>518</sup> makes it an offence to sexually exploit a person who is mentally disabled. Similarly, the Preferential Procurement Policy Framework Act, 2000<sup>519</sup> requires organs of state to implement a preferential procurement policy that is favourable to the contracting of historically disadvantaged groups such as PWDs.
530. In its efforts to generally eradicate discrimination on the basis of disability, South Africa has paid special attention to women with disabilities. In this regard, the 1997 Integrated National Disability Strategy White Paper recognised women with disabilities as one of the most vulnerable group among the disabled. In 1997, South Africa established, within the office of the President, the Office of the Status of Disabled Persons (OSDP).
531. The Department of Social Development caters for the social needs of disabled people and has put in place the Policy on Disability, which embodies strategic guidelines in the delivery of social services. The Department of Social Development also administers the disability grant to which disabled people in South Africa are entitled to in accordance with the Social Assistance Act, 2004.<sup>520</sup>
532. The majority of people with disabilities in South Africa live in rural areas and survive mostly on social grants. The inclusion of people with disabilities in the National Rural Youth Service Corps programme by the Department of Rural Development and Land Reform is therefore recognised as an important step in ensuring sustainable livelihoods for those with disabilities and their families. The South African Government has set a target of 2% employment in the public service for people with disabilities by March 2013 in order to compel government to employ them. Government also focuses on monitoring equal access by people with disabilities to government's economic empowerment programmes, such as the Jobs Fund, cooperatives development and the review of the sheltered employed workshops.

### **Special Protection of Women in Distress**

533. South Africa is well aware of the feminised character of poverty. South Africa's anti-poverty strategy has been to implement a comprehensive social security programme that combines income support

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<sup>517</sup> Act No. 4 of 2000

<sup>518</sup> Act No. 32 of 2007

<sup>519</sup> Act No. 5 of 2000

<sup>520</sup> Act No. 13 of 2004

(through the grant system) with a social wage package that includes clinic-based free primary health care (PHC) for all, compulsory education for all those aged seven to thirteen years, and subsidised housing, electricity, water, sanitation, refuse removal and transportation for those that qualify.

534. In terms of the Social Assistance Act, South Africa operates a number of income support programmes including the old age grant, the child support grant, the disability grant, the foster care grant, care dependency and grant in aid. The number of beneficiaries increased drastically between 1997 and 2010, leading to more than 14 million beneficiaries of income support programmes in 2010 as compared to 2.6 million in 1997. Women constitute the largest proportion of beneficiaries. At the end of 2014, the total number of social security beneficiaries was 16, 443, 196.

### **Women in Correctional Facilities**

536. In June 1994, through a Presidential Act, the then President of South Africa granted special remission of the remainder of their sentences to, inter alia, all mothers in prison on 10 May 1994, with minor children under the age of 12 years.
537. Concerning women in detention, South Africa has taken concerted measures to ensure that they are treated with dignity. In May 2010, there were 3529 females detained in correctional facilities around the country. There were eight (8) active women's correctional centers as at August 2010 while 91 other centers accommodated both men and women in separate sections of the centers.
538. According to the 2012/2013 Department of Correctional Services (DCS) annual report, there are 242 correctional centres that accommodate 150 608 inmates. In August 2013 of the 3 505 female inmates incarcerated across the country, 980 were remand detainees and 2 525 were sentenced offenders. Between January and March 2013, 282 mothers were incarcerated with their babies. In general, South Africa has taken several measures to improve conditions in correctional center. Concerted efforts have been channeled towards the provision of health care services to inmates. Inmates suffering from HIV/AIDS and tuberculosis have particularly received special attention. During 2007/08, four facilities were accredited for the provision of ARVs bringing to 12 the total number of facilities accredited. As at the end of 2007/2008 fiscal year, there were 4294 inmates on ARV. During that year, 22303 inmates were tested for HIV. A total of 5752 HIV/AIDS awareness and health education sessions were held. Government also ensured the availability of suitably qualified nurses to take care of the health of inmates.
539. In 2010, South Africa signed the UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) which are international guidelines for the treatment of women in prisons. One of the provisions stipulates that - *"Preventive health-care measures of particular relevance to women, such as Pap smears and screening for breast and gynaecological cancers, will be offered to women prisoners on an equal basis with women of the same age in the community."*
540. The Department of Correctional Services respected the requirements outlined in various legislations that aim to protect human rights. The DCS was mindful of section 28(1) of the Bill of Rights, which

asserted that every child had the right to be treated in a manner, and kept in conditions appropriate to the child's age. The Correctional Services Amendment, 2008<sup>521</sup> also allowed female offenders to stay with their babies in a correctional facility until the babies reached the age of two years. Women who had babies under that age were accommodated separately in the mother and baby units, which had been established in all six DCS regions. Where such facilities were not available closest to the mother's home, the mother was transferred, with her baby, to the nearest Female Correctional Centre with a mother and baby unit. The Department of Correctional Services is responsible for food, clothing, health care and facilities for the sound development of the child for the period that such child remains in prison.

541. The DCS has further adopted an approach that is focused on improving the conditions of female inmates in correctional facilities. In this regard DCS is ensuring that the sentences of the courts are carried out, but that they are incarcerated and rehabilitated in such a manner that they can be successfully re-integrated back into the community and there is minimum recidivism. The DCS also aims to achieve the following:

- Regular review of all standard operating procedures and policies to ensure that issues of women are favourably addressed in the implementation of incarceration and corrections;
- Ensuring that national special commemorative days, such as Women's Day, are made available to the Offender Population;
- Providing women placed on parole with opportunities to develop themselves as part of the development possibilities available to sentenced offenders;
- Partnering with external stakeholders such as non-governmental organisations, faith based organisations and other government departments to enhance support provided to women in the form of corrective and rehabilitation initiatives;
- Development and implementation of mother and child units in the correctional facilities to ensure that mothers take care of their children and those children born in incarceration are afforded a normal life as much as possible through early childhood development programmes and interaction with other children of mothers in incarceration.

542. The DCS has initiatives aimed at the employability of female offenders. These initiatives are contributing to crime prevention and the prevention of reoffending. The DCS has partnered with instances, such as the Working on Fire association, in order to provide training to women parolees on fire fighting and administrative work. The partnership started in 2009 and has enabled some women to be employed. The objective of all the initiatives mentioned, is to assist in preventing reoffending and crime.

### **Sanitary Dignity Campaign: Indigent women and girls**

543. Research<sup>522</sup> and surveys undertaken indicate that a number of girls and women from indigent families in South Africa are facing a serious challenge regarding management of their monthly menstruation

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<sup>521</sup> Act No. 25 of 2008

<sup>522</sup> Research has been undertaken by the Water Research Commission in South Africa while surveys have been undertaken by manufacturers and distributors of sanitary towels in SA such Proctor & Gamble as well as Johnson and Johnson.

as well as the resultant dysmenorrhea. This includes women and girls with disabilities, as well as elderly women who experience incontinence. Many girls and women in South Africa do not have access to sanitary towels, as a result they use washing rags, pieces of old clothes, toilet paper; newspapers, recycled pads and nappies. This is a major challenge for such women and young girls following child birth. The research also shows that girls are forced to miss school / classes because they do not have sanitary towels to use during this period and those whose menstrual pains are such that they cannot go to school and do not have access to pain medication. The average girl living in a community affected by high levels of poverty will miss almost a week of school each month due to lack of sanitary towels. This equates to 20% (or an average of 40 days) of a school year. Medical research highlights health risks associated with the usage of unhygienic practices and its psychological impact. In addition poor school infrastructure or lack of toilets and running water in some schools further exacerbates these challenges.

544. Government has acknowledged that these are issues that deny women and girls their right to dignity and respect for their dignity. With high levels of unemployment and poverty, there is a greater need to put women at the centre of both economic and social policies of Government. The South African Government in 2010 committed itself to promote the human dignity of indigent women and girls through the provision of sanitary towels. Even among women who work, the extent of poverty underscores the need for a far greater number of government interventions and programmes.
545. One of the significant steps that this Government is taking is the provision of sanitary dignity towels for all the vulnerable members of society in need of such products. This is a cross-cutting and integrated programme championed by the DWCPD in collaboration with the Departments of Basic Education; Cooperative Governance; Social Development; Health; Water Affairs; Public Works; Environmental Affairs and Correctional Services, among others. The integrated programme looks at increasing women's access throughout their life cycle to appropriate, descent, affordable and quality health care, information and related services; strengthening preventive programmes that promote women's health; undertaking gender sensitive initiatives that address women's rights and empowerment issues; as well as promoting women's economic empowerment initiatives on manufacturing and distribution of sanitary pads and waste management cooperatives to reduce the footprint of such towels on the environment.
546. With the emphasis being on the restoration of dignity for women and girls and meeting practical gender needs and towards a developmental approach, the programme seeks to have an economic empowerment element for women and people with disabilities.

## CONCLUSION

547. The dawn of a constitutional democracy in South Africa in 1994 unlocked the possibility of the creation of a society based on the values of human dignity, equality, human rights and freedoms, non-racism and non-sexism. Since then, as this report seeks to demonstrate, South Africa has made significant progress in the elimination of laws and practices that discriminate against women. Various legislative

and policy initiatives and interventions have been undertaken to ensure and enhance the promotion and protection of the rights of women.

548. However, the ideal society to which South Africans aspire has not yet been fully realized. It would be unrealistic to expect it after only 21 years of freedom. There are numerous challenges that still impair the achievement of equality between men and women, ranging from prejudicial attitudes, beliefs, and cultural and religious practices that entrench patriarchy to poverty and inequality.
549. What is the most important though is the fact that all South Africans are in a much better position today than we were before 1994.
550. Given our history, given that we have struggled and overcome, South Africa remains committed to building a human rights culture within our borders, in our region and across our continent. In this regard South Africa remains fully committed to the implementation of the Women's Protocol.