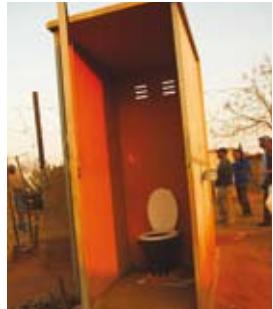


# SERI

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## Basic Sanitation in South Africa: A Guide to Legislation, Policy and Practice





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South Africa (SERI)

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**SERI**

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# Preface and Acknowledgements

The Socio-Economic Rights Institute of South Africa (SERI) is a non-profit organisation providing professional and dedicated socio-economic rights assistance to individuals, communities and social movements in South Africa. SERI conducts research, engages with government, advocates for policy and legal reform, facilitates civil society coordination and mobilisation, provides legal advice and litigates in the public interest. Our thematic areas are housing and evictions, access to basic services (water, sanitation and electricity) and migrant rights & livelihoods.

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This guide aims to provide a simplified yet comprehensive overview of legislation, policy, programmes and practice relating to basic sanitation in South Africa. The guide focuses on access to household sanitation by poor communities. While some progress has been made since 1994 in terms of the provision of basic sanitation, challenges remain in the formulation and implementation of policy by municipalities. The guide does not claim to be an exhaustive analysis of legislation, policy and practice; however aims to outline the legislative and policy framework, highlight key challenges faced by various departments and communities, and provide a tool for those working on sanitation issues in South Africa e.g. social movements, community-based organisations (CBOs), non-governmental organisations (NGOs), lawyers, development practitioners, planners, government officials, academics, scholars.

The guide was written by Kate Tissington (research and advocacy officer, SERI) and edited by Jackie Dugard (executive director, SERI) and Alex Spacht (research intern, SERI). Thanks to Marie Huchzermeyer (associate professor, School of Architecture and Planning at the University of the Witwatersrand) and Virginia Molose (senior training specialist, The Mvula Trust) for their input on earlier drafts of the guide.

Cover photographs: Social Justice Coalition (photo of the open toilet), Michael Premo from Housing is a Human Right (photos of VIPs) and Buselaphi Ntombela (photo of chemical toilets).

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# Abbreviations and Acronyms

<b>ANC</b>	African National Congress
<b>BEPP</b>	Built Environment Performance Plan
<b>BNG</b>	Breaking New Ground
<b>CoGTA</b>	Department of Cooperative Governance and Traditional Affairs (formerly DPLG)
<b>DEA</b>	Department of Environmental Affairs
<b>DEWATS</b>	Decentralised Wastewater Treatment Systems
<b>DHS</b>	Department of Human Settlements (formerly NDoH)
<b>DoH</b>	Department of Health
<b>DORA</b>	Division of Revenue Act
<b>DPLG</b>	Department of Provincial and Local Government
<b>DWA</b>	Department of Water Affairs (formerly DWAF)
<b>DWAF</b>	Department of Water Affairs and Forestry
<b>EHP</b>	Environmental Health Practitioner
<b>EHP</b>	Emergency Housing Programme
<b>ES</b>	Equitable Share
<b>FBS</b>	Free Basic Services
<b>FBSan</b>	Free Basic Sanitation
<b>FBW</b>	Free Basic Water
<b>IDP</b>	Integrated Development Plan
<b>IDT</b>	Independent Development Trust
<b>LOFLOS</b>	low flow on-site sanitation
<b>MDGs</b>	Millennium Development Goals
<b>MEC</b>	provincial Minister of the Executive Council
<b>MIG</b>	Municipal Infrastructure Grant
<b>MITT</b>	Municipal Infrastructure Task Team
<b>NDoH</b>	National Department of Housing
<b>NHSS</b>	National Housing Subsidy Scheme
<b>NSTT</b>	National Sanitation Task Team
<b>NWSRS</b>	National Water Services Regulation Strategy
<b>O/M</b>	Operations and Maintenance
<b>RDP</b>	Reconstruction and Development Programme
<b>RHIF</b>	Rural Household Infrastructure Grant
<b>SALGA</b>	South African Local Government Association
<b>SAHRC</b>	South African Human Rights Commission
<b>Stats SA</b>	Statistics South Africa
<b>TRA</b>	Temporary Relocation Area
<b>TRU</b>	Temporary Relocation Unit
<b>UD</b>	Urine Diversion
<b>UISP</b>	Upgrading of Informal Settlements Programme
<b>UN</b>	United Nations
<b>USDG</b>	Urban Settlements Development Grant
<b>VIP</b>	Ventilated Improved Pit Latrine
<b>WD-SA</b>	Water Dialogues - South Africa
<b>WHO</b>	World Health Organization
<b>WSA</b>	Water Services Authority
<b>WSDP</b>	Water Services Development Plan
<b>WSP</b>	Water Services Provider
<b>WRC</b>	Water Research Commission

# List of Key Legislation, Policy, Strategy and Guidelines

## Legislation

- Constitution of the Republic of South Africa Act 108 of 1996 (Constitution)
- Water Services Act 108 of 1997 (Water Services Act)
- Housing Act 107 of 1997 (Housing Act)
- National Water Act 36 of 1998
- Local Government: Municipal Structures Act 117 of 1998 (Municipal Structures Act)
- Promotion of Administrative Justice Act 3 of 2000 (PAJA)
- Local Government: Municipal Systems Act 32 of 2000 (Municipal Systems Act)
- Local Government: Municipal Finance Management Act 56 of 2003
- National Health Act 61 of 2003
- Intergovernmental Relations Framework Act 13 of 2005 (IGR Act)
- Division of Revenue Act (DORA) (promulgated annually)

## Regulations/Norms and Standards

- Regulations Relating to Compulsory National Standards and Measures to Conserve Water (8 June 2001) (Compulsory National Standards)
- Norms and Standards in Respect of Tariffs for Water Services (11 June 2001) (Norms and Standards)
- National Norms and Standards for the Construction of Stand Alone Residential Dwellings Financed through National Housing Programmes (2007) (National Norms and Standards)
- Regulations Defining the Scope of the Profession of Environmental Health: Amendment (26 June 2009)

## Policy

- DWAF, White Paper on Water Supply and Sanitation Policy (1994)
- DWAF, National Sanitation Policy (October 1996)
- NDoH, White Paper: A New Housing Policy and Strategy for South Africa (1994) (White Paper on Housing)
- DWAF, White Paper on Basic Household Sanitation (2001)
- DWAF, Strategic Framework for Water Services: Water is Life, Sanitation is Dignity (September 2003)
- NDoH, Breaking New Ground: A Comprehensive Plan for the Development of Sustainable Human Settlements (September 2004) (Breaking New Ground)

- NDoH, National Housing Code (2000, revised in 2009)
- DHS, Part 3 Volume 4 of the National Housing Code: Upgrading of Informal Settlements Programme (2009) (UISP)
- DHS, Part 3 Volume 4 of the National Housing Code: Emergency Housing Programme (2009) (EHP)

## Strategy and Guidelines

- DWAF, Guideline for Compulsory National Standards and Norms And Standards For Water Services Tariffs (April 2002)
- DWAF, Free Basic Water Implementation Strategy (August 2002)
- DWAF, Free Basic Water Implementation Guideline for Local Authorities (August 2002)
- DWAF, Sanitation Technology Options (2002)
- DWAF, A Protocol to Manage the Potential of Groundwater Contamination from On-Site Sanitation (March 2003)
- DPLG, Policy Framework for the Implementation of the Municipal Infrastructure Grant (MIG) (5 February 2004)
- DWAF, Ensuring Water Services to Residents on Privately Owned Land: A Guide for Municipalities (July 2005)
- DWAF, National Sanitation Strategy: Accelerating Sanitation Sector Delivery (August 2005)
- DPLG, Framework for a Municipal Indigent Policy (September 2005)
- DPLG, Guidelines for the Implementation of the National Indigent Policy by Municipalities (November 2005)
- DWAF and DoH, National Health and Hygiene Education Strategy (2005)
- DWAF, Guidelines for the Costing of Household Sanitation Projects (August 2007)
- DWAF, Guidelines for Sanitation Facilities for People with Disabilities (October 2007)
- DWAF, Guidelines for the Formulation of a Strategy and Implementation Plan for the Provision of Sanitation Services in Informal Settlements (October 2007)
- DWAF, Free Basic Sanitation Implementation Strategy (April 2009)
- DWA, National Water Services Regulation Strategy (NWSRS) (January 2010)

# Explanation of Terms

## accreditation

In terms of section 156(4) of the Constitution and section 10 of the Housing Act, the National Housing Programmes contained in the National Housing Code can be administered by local government through the accreditation of municipalities by the provincial Minister of the Executive Council (MEC). Accreditation involves the delegation and ultimate assignment of housing functions to municipalities, so that they are responsible for the planning and implementation of National Housing Programmes. There are three levels of accreditation and in March 2011, a number of municipalities were granted Level 2 accreditation by the Department of Human Settlements (DHS).<sup>1</sup>

## bucket system

The bucket system is a dry on-site sanitation system consisting of a top-structure with a seat positioned above a bucket or other container located in a small compartment beneath. In some areas these buckets are collected during the week by the municipality or a service provider, and in other areas households must dispose of the buckets at a specific location themselves. In 2005, the Presidency and Department of Water Affairs and Forestry (DWAF) launched the National Bucket Replacement Programme which aimed to eradicate the use of the bucket system in all formal areas by December 2007.<sup>2</sup> This deadline was then pushed to 2010; however in 2011 there are still many households throughout the country who are forced to use this unacceptable system.

## chemical toilet

A chemical toilet is a portable, standalone unit which uses chemicals below the toilet to neutralise human waste. Chemical toilets are only suitable for short-term temporary use, such as special functions. They are expensive, require regular emptying and are not recommended for large-scale use.<sup>3</sup>

## demand-driven

Demand-driven in the context of sanitation provision refers to the motivation/desire for sanitation originating from within the community, as opposed to from an outside agency.<sup>4</sup> This approach promotes behaviour change within communities through health and hygiene education, as opposed to infrastructure provision by the state. In South Africa there has been a shift away from a household level demand-driven approach to sanitation, to a municipal supply-driven model. See section 2.8 below.

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<sup>1</sup> For more on accreditation, see Socio-Economic Rights Institute of South Africa (SERI) "A Resource Guide to Housing in South Africa 1994-2010: Legislation, Policy, Programmes and Practice" (February 2011) 76-78.

<sup>2</sup> For more on the National Bucket Replacement Programme, see Department of Water Affairs and Forestry (DWAF) and WIN-SA "The National Sanitation Bucket Replacement Programme: Lessons Learnt" (March 2008).

<sup>3</sup> DWAF "Sanitation Technology Options" (2002) 5.

<sup>4</sup> DWAF "White Paper on Water Supply and Sanitation Policy" (1994) 9.

## Emergency Housing Programme (EHP)

The Emergency Housing Programme (EHP) is contained in the National Housing Code and was developed in terms of section 3(4)(g) of the Housing Act. Municipalities can apply to provinces for funding to provide temporary housing and access to services for households and communities affected by emergencies. See section 2.5 below for more on the EHP.

## Equitable Share (ES)

The Local Government Equitable Share (ES) is an unconditional grant (meaning that municipalities are able to spend it at their discretion) transferred from National Treasury to municipalities through the Department of Cooperative Governance and Traditional Affairs (CoGTA). The ES grant is meant to be used by municipalities to fund the operations and maintenance (O/M) of water and sanitation infrastructure. The Division of Revenue Act (DORA), promulgated annually, sets out how the national revenue is divided between national, provincial and local government. Each municipality receives an operations subsidy for sanitation for every poor/indigent household within its jurisdiction. However, in practice, municipalities commonly do not spend this subsidy on O/M for sanitation, and a significant portion is used to cover the overhead costs of municipal management and administration.<sup>5</sup>

## Free Basic Sanitation (FBSan)

There is a Free Basic Sanitation (FBSan) policy in South Africa, and municipalities are mandated to implement this policy and ensure every household has access to basic sanitation, as per the Constitution, Water Services Act and Municipal Systems Act. In 2009, a FBSan Implementation Strategy was published to assist municipalities fulfil this obligation. See section 2.10 below for more on the FBSan Implementation Strategy.

## health and hygiene education

Health and hygiene education focuses on changing behavioural practices to prevent the spread of diseases, and is meant to complement the provision of basic sanitation infrastructure. According to Regulation 2 of the Compulsory National Standards published in terms of the Water Services Act, the minimum standard for basic sanitation services includes "the provision of appropriate education." The definition of a basic sanitation service in the Strategic Framework for Water Services includes "the communication of good sanitation, hygiene and related practices." Current gaps in policy as well as institutional confusion over roles and responsibilities, has meant that this aspect of sanitation has often been neglected. See sections 4.6 and 5.8 below for more.

## indigent policy

In terms of the Municipal Systems Act, municipalities must develop an indigent policy that assists poor households to access basic municipal services. Municipal tariff and credit control/debt collection policies must make provision for indigent households. In 2000, a Free Basic Services (FBS) policy was adopted at the national level, followed by the Free Basic Water (FBW) Implementation Strategy in 2001. Section 104(1)(l) of the Municipal Systems Act states the Minister may make regulations of issue guidelines to provide for or regulate "the development and implementation of

<sup>5</sup> Still D, Walker N and Hazelton D "Basic Sanitation Services in South Africa: Learning from the past, planning for the future" Report to the Water Research Commission (WRC) (September 2009) vi.

an indigent policy" at the local level. In 2005, the Department of Provincial and Local Government (DPLG) published an indigent policy framework and guidelines for municipalities to draw up their own indigent policies. In 2009, the FBSan Implementation Strategy was published. See sections 2.6, 2.10 and 5.6 below for more.

## informal settlement upgrading

Informal settlement upgrading refers to the process of incrementally improving the lives of shackdwellers living in informal settlements, through the provision of basic services, security of tenure and housing assistance where they live (i.e. *in situ*), with minimal disruption to people's lives. The national Upgrading of Informal Settlements Programme (UISP), published in terms of section 3(4)(g) of the Housing Act and contained in the National Housing Code, is the mechanism whereby municipalities and provinces can implement upgrading projects in informal settlements. See section 2.5 below for more on the UISP.

## Integrated Development Plan (IDP)

Sections 25 and 26 of the Municipal Systems Act state that all municipalities are required to compile an Integrated Development Plan (IDP), which is an inclusive strategic plan for the development of the municipality. The IDP is meant to be a product of bottom-up planning processes, which includes IDP Forums (facilitated at the local level by ward committees) where communities can make proposals for the development of the municipality. The IDP is meant to link, integrate and coordinate sector plans within the municipality e.g. the Water Services Development Plan (WSDP) and the Housing Chapter.

## Independent Development Trust (IDT)

The Independent Development Trust (IDT) is a public entity established in 1990 as a development management agency, with the Minister of Public Works as its Executive Authority. It has a mandate to assist government in alleviating poverty by improving the quality of life of poor, rural communities. In 2010, the IDT was awarded a R55 million contract as the implementing agent to build sanitation infrastructure on behalf of the Department of Human Settlements (DHS).<sup>6</sup> However, in mid-June 2011, it emerged that the IDT was failing to deliver and that only a fraction of the toilets had been built.<sup>7</sup>

## Municipal Infrastructure Grant (MIG)

The Municipal Infrastructure Grant (MIG) is a ring-fenced, conditional grant administered by CoGTA to fund the capital cost of basic infrastructure for poor households.<sup>8</sup> The new Urban Settlements Development Grant (USDG) is set to replace the MIG-Cities grant, previously allocated to metropolitan municipalities. See section 4.7 below for more on the USDG.

## The Mvula Trust

The Mvula Trust is the leading non-government organisation (NGO) working on water and sanitation in South Africa. Formed in 1993, it has had a long-standing partnership with DWAF, managing

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<sup>6</sup> De Lange D "State loo agency behind on work" IOL (31 May 2011).

<sup>7</sup> DHS "Minutes of the Minister of Human Settlements briefing to the Parliamentary Portfolio Committee on Human Settlements" Parliamentary Monitoring Group (22 June 2011).

<sup>8</sup> For more on the MIG, see: <<http://www.dplg.gov.za/subwebsites/mig/index.html>>

the construction of toilets in rural and peri-urban communities, as well as engaging in advocacy and policy development at the national level. The organisation now works on water and sanitation projects in informal settlements in urban areas.<sup>9</sup>

## National Sanitation Programme

The National Sanitation Programme was launched by DWAF in 1996 with the aim to eradicate the sanitation backlog by 2010. The Programme was instrumental in developing the 2001 White Paper on Basic Household Sanitation and since 2002 was housed in the National Sanitation Programme Unit, established within DWAF during that year. In 2009, the National Sanitation Programme Unit, along with certain components of the National Sanitation Programme, was transferred from DWAF to the DHS. See section 4.4 below for more.

## National Sanitation Task Team (NSTT)

The National Sanitation Task Team (NSTT) was formed in 1995 to coordinate sanitation interventions by national departments. The NSTT comprised representatives from DWAF, DPLG, Department of Health (DoH), Department of Education, Department of Housing (NDoH), Department of Environmental Affairs, Department of Public Works and National Treasury. In 2001, in order to achieve greater alignment between sanitation and other municipal infrastructure programmes, the NSTT was re-established as a working group reporting to the Municipal Infrastructure Task Team (MITT), with DWAF as the coordinating department. The DHS wants to revive the NSTT.

## off-site sanitation

Off-site sanitation refers to a system of sanitation where human waste is removed from the household/plot and its immediate surroundings by a reticulated sewer network, and transported to a facility where it is treated. Off-site sanitation can be classified into two main categories: *decentralised* systems, where households are linked to a network leading to a communal treatment system e.g. Decentralised Wastewater Treatment Systems (DEWATS)<sup>10</sup>; and *centralised* systems, which rely on waste water treatment plants serving one or several communities.

## on-site sanitation

On-site sanitation refers to the treatment and disposal of human waste that cannot be carried away by an off-site sanitation system e.g. because of low-density population or lack of a bulk waste water reticulation. On-site sanitation can be classified into two main categories: wet (which requires water for flushing) and dry (which does not require water for flushing). Pit latrines, VIPS and urine diversion (UD) toilets are all forms of on-site sanitation.

## operations and maintenance (O/M)

Operations and maintenance (O/M) in the context of water supply and sanitation provision is broad, referring to all activities required to run water supply and sanitation schemes in an efficient, effective and sustainable manner. This could include emptying pits which have filled, maintenance and preventative repairs at waste water treatment plants, ongoing maintenance of bulk sewer systems etc.

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<sup>9</sup> For more on The Mvula Trust see: <<http://mvula.org.za>>

<sup>10</sup> For more on Decentralised Wastewater Treatment Systems (DEWATS), see Eales K "Some challenges for DEWATS approaches in South Africa" (2010) *Water Practice and Technology*.

## **pit latrine**

A conventional pit latrine consists of a rudimentary top-structure built over a pit which collects waste. Pit latrines generally do not have adequate ventilation (i.e. are unimproved) and are susceptible to odours and flies. They are not an acceptable form of basic sanitation.<sup>11</sup>

## **refuse removal**

Refuse removal refers to the collection of solid waste. The 2001 White Paper on Basic Household Sanitation included refuse removal in its definition of a minimum acceptable basic level of sanitation; however the 2003 Strategic Framework for Water Services does not include refuse removal in its definition of a basic sanitation service. In June 2011, the Department of Environmental Affairs (DEA) published the National Policy for the Provision of Basic Refuse Removal Services to Indigent Households (October 2010) in order “to ensure that poor (indigent) households have access to at least basic (essential) refuse removal services from the concerned municipality”.<sup>12</sup>

## **regulation**

While local government is mandated to provide water and sanitation services, DWA is supposed to perform the function of the national regulator of water services in conjunction with relevant stakeholders, including citizens. Part E of the National Water Services Regulation Strategy (NWSRS), published in January 2010, discusses the regulation of sanitation in terms of planning, maintenance and emptying of on-site sanitation, O/M of waste water management including the management of grey water with on-site systems, and environmental health and user education. See section 4.3 below for more on the role of DWA as the national regulator.

## **reticulation**

Reticulation refers to all pipe systems, pumping systems, and components that contribute to the distribution of water, and collection and disposal of waste water in waterborne sanitation.

## **septic tank**

A septic tank is a wet on- or off-site sanitation system which comprises an in-house full flush toilet connected via pipe and plumbing fixtures to an underground watertight settling chamber or ‘digester’ with a liquids outlet to a subsoil drainage/soakaway system. In the septic tank, solid waste settles out to the bottom and undergoes biological digestion. This system requires a reliable household water connection/supply and is only applicable in low-density areas. There are different variations on the septic tank model.<sup>13</sup>

## **sanitation**

According to the 2003 Strategic Framework for Water Services, “sanitation services” refers to the “collection, removal, disposal or treatment of human excreta and domestic wastewater, and the collection, treatment and disposal of industrial wastewater.” This guide refers to domestic household sanitation and to a limited degree, institutional sanitation i.e. access to toilets in homes, schools and

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<sup>11</sup> DWAf “Sanitation Technology Options” 5.

<sup>12</sup> Department of Environmental Affairs (DEA) “National Policy for the Provision of Basic Refuse Removal Services to Indigent Households” (October 2010) 1.

<sup>13</sup> DWAf “Sanitation Technology Options” 19-23.

clinics. While the definition also refers to waste water treatment, this guide does not deal with this aspect of sanitation in detail.

## sewage

Sewage is the subset of waste water that is contaminated with human faeces or urine, however it is a term often used to refer to any waste water.

## sewerage

Sewerage refers to the physical infrastructure or system of sewers (pipes) used to remove sewage from its origin to the point of eventual treatment or disposal e.g. at a waste water treatment plant.

## Temporary Relocation Area (TRA)

Temporary Relocation Areas (TRAs) – sometimes called transit camps – have been established by some municipalities to shelter people who have been affected by an emergency e.g. fire, flood, eviction. Minimum standards for municipal engineering services, including sanitation, are set out in the EHP. In the *Joe Slovo* Constitutional Court judgment, the court stipulated certain minimum standards for the units in TRAs. See section 2.5 below.

## Urban Settlements Development Grant (USDG)

The Urban Settlements Development Grant (USDG) is a new grant mechanism facilitated by DHS to metropolitan municipalities (cities), to assist them to conduct planning in a more integrated manner with regard to the provision of bulk water and sanitation services to developments in well-located areas. See section 4.7 below.

## Urine Diversion (UD) system/toilet

A Urine Diversion (UD) toilet is a form of ecological sanitation and is a dry on-site desiccating toilet similar to a Ventilated Improved Pit Latrine (VIP), except that there is a composting element. Dry absorbent organic materials like wood, coal ash, straw and/or vegetable matter are added after each use to absorb odours, control moisture and facilitate composting (biological breakdown). It is important that there is very little moisture content in the composting chamber, and urine is separated or diverted through the use of specially adapted pedestals, where it can be collected and used as fertilizer, or drained to a soak pit where it seeps into the soil. A suitable disposal site for the waste is required.<sup>14</sup> User education and buy-in is critical to the successful functioning of this form of sanitation, which is most appropriate for rural areas.<sup>15</sup>

## Ventilated Improved Pit Latrine (VIP)

A Ventilated Improved Pit Latrine (VIP) is a dry on-site sanitation system consisting of a well-ventilated top-structure (with a ventilation pipe and fly screen) built over a pit in which organic material decomposes and is emptied approximately every five years. In some cases, two pits are dug and when one is full, it is sealed and the other used until such time as the first pit can be emptied

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<sup>14</sup> Ibid 14-15. For analysis of findings from case studies of UD toilets, see Still *et al* "Basic Sanitation Services in South Africa" 89-107.

<sup>15</sup> Mjoli N "Review of Sanitation Policy and Practice in South Africa from 2001-2008" Report to the Water Research Commission (March 2010) 13.

and reused. VIPs are appropriate in water-scarce and less densely populated areas. O/M is usually the responsibility of the local authority and consists of mechanical pit-emptying, sludge transfer, treatment and disposal. However, most municipalities do not have O/M plans for VIPs, nor have budgets for the emptying of full VIPs.<sup>16</sup> VIPs can be upgraded to other sanitation technology types. Usually this involves the closure of the pit, reuse of top-structure with the removal of the pedestal and refitting with a flush-type, additional plumbing, drainage system and facilities for the treatment and disposal of waste.<sup>17</sup>

## waste water

Waste water is water that runs off after the use of water for domestic or other purposes, which may include or exclude human excreta. Waste water that does not contain human excreta - usually from washing or cooking - is called grey water. The 2003 Strategic Framework for Water Services includes the "removal of human waste and waste water from premises" in its definition of a basic sanitation service. For households in dense urban settlements using dry on-site sanitation, grey water can pose an environmental threat if not removed or recycled. There is confusion at local government level whether grey water is storm water or a sanitation issue.<sup>18</sup> There is clearly a policy gap in terms of the disposal of grey water in areas not connected to a sewer system i.e. in most informal settlements.

## water board

Water boards are government-owned entities that mainly operate dams and bulk water supply infrastructure, but also operate some retail infrastructure and waste water systems. There are 13 water boards in South Africa, and they report to DWA.

## water services

Water services refer to water supply services and sanitation services.

## Water Services Authority (WSA)

A Water Services Authority (WSA) refers to any municipality (district, local or metropolitan) deemed responsible for ensuring access to water services. WSAs derive their authority from the Municipal Structures Act. There can only be one WSA in any specific area; however WSAs may contract with different Water Services Providers (WSPs) to deliver water services in an area. The WSA has ultimate responsibility for ensuring that everyone has access to water and sanitation services within its area of jurisdiction. There are 169 WSAs in South Africa, including water boards, district municipalities, local municipalities and municipal companies. See section 4.1 below.

## Water Services Development Plan (WSDP)

In terms of the Water Services Act, each WSA must formulate a Water Services Development Plan (WSDP) as a component of the IDP. The WSDP must *inter alia* include information on existing basic services backlogs; health and environmental impacts; consultative mechanisms to develop

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<sup>16</sup> Mjoli N and Bhagwan J "Turning Sanitation Policy into Practice" (2010) 3.

<sup>17</sup> DWAF "Sanitation Technology Options" 9-13. For analysis of findings from case studies of VIPs, see Still *et al* "Basic Sanitation Services in South Africa" 87-107.

<sup>18</sup> Mjoli "Review of Sanitation Policy and Practice in South Africa" 18.

appropriate strategies and mechanisms to remedy backlogs; priorities and targets within defined timeframes; and a financial management strategy, including funding sources, to ensure that proposed programmes are feasible and affordable. See section 2.4 below.

## Water Services Institution (WSI)

Water Services Institution (WSI) refers to a WSA, a WSP or a water board.

## Water Services Provider (WSP)

A Water Services Provider (WSP) is any entity that delivers water services (bulk or retail water or waste water services) to users or to another water services institution on behalf of a WSA. The latter can also perform these functions and be a WSP. See section 4.1 below.

## waterborne sanitation

Full or conventional waterborne sanitation is arguably the most desirable form of sanitation, and consists of a flush toilet with reticulation to a bulk sewer system that transports sewage away from a household. Water is required to flush the toilet, between 6 and 13 litres of water per flush according to DWAF.<sup>19</sup> In reality, the amount of water required is closer to 13 litres per flush for normal waterborne systems. Waterborne sanitation requires a reliable and uninterrupted household water connection and supply, as well as formal and permanent settlement. While the on-site top-structure, sewer connection and local reticulation costs about the same as a VIP, the additional costs of bulk water and bulk sewer provision, as well as the costs of waste water treatment, can increase the real cost to over R30 000 per site.<sup>20</sup> It is possible to install a shallow sewer system within the property of the household, as opposed to in the street reserve, and this can reduce the amount of water that is flushed (using a low-flush pedestal) and allow for waterborne sanitation in less formal and/or denser settlements.<sup>21</sup> The FBSan Implementation Strategy states that where there is waterborne sanitation, O/M support includes providing water for flushing, and it is recommended that 15 litres per person per day be provided. For a household of eight people, this amounts to 3 to 4 kilolitres above the FBW allocation, and more in the case of people living in the advanced stages of AIDS.<sup>22</sup>

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<sup>19</sup> DWAF "Sanitation Technology Options" 24.

<sup>20</sup> Still *et al* "Basic Sanitation Services in South Africa" vii.

<sup>21</sup> DWAF "Sanitation Technology Options" 27. For analysis of findings from case studies of waterborne sanitation, see Still *et al* "Basic Sanitation Services in South Africa" 89-96.

<sup>22</sup> DWAF "Free Basic Sanitation Implementation Strategy" (April 2009) 9.

# Chapter 1

# Introduction

Access to adequate sanitation is fundamental to personal dignity and security, social and psychological well-being, public health, poverty reduction, gender equality, economic development and environmental sustainability. Poor sanitation promotes the spread of preventable diseases like diarrhoea and cholera, places stress on the weakened immune system of HIV positive people and has a major impact on the quality of life of people living with AIDS.<sup>23</sup> According to the World Health Organization (WHO), improved sanitation reduces diarrhoea death rates by a third, encourages children, particularly girls, to stay in school, and has persuasive economic benefits. Every US\$1 invested in improved sanitation, translates into an average return of US\$9.<sup>24</sup>

The right to sanitation has been affirmed internationally. In July 2010, the United Nations (UN) General Assembly passed a resolution declaring "the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights." In September 2010, the UN Human Rights Council (HRC) reaffirmed this with a resolution confirming the right to water and sanitation as legally binding in international law.

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Sanitation includes infrastructure (sometimes called 'the hardware') to safely remove human waste e.g. technology options like Ventilated Improved Pit latrines (VIPs) or waterborne sanitation, as well as ongoing services e.g. emptying pit latrines, supplying water for flushing waterborne toilets etc. Sanitation also refers to practices or behaviour (sometimes called 'the software') and includes the promotion of sanitation as well as health and hygiene education in households and communities. In terms of the latter, personal, family and cultural hygiene practices and habits are important to take into consideration.

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Like water, sanitation has a public and a private component. In formal urban areas, household toilets are typically private, while bulk waste water reticulation and treatment

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<sup>23</sup> DWAF "Sanitation for a Healthy Nation: Questions and Answers on the White Paper on Basic Household Sanitation" (February 2002) 3.

<sup>24</sup> World Health Organization (WHO) "10 Facts on Sanitation" (2011).

of sewage is public. In rural and informal areas, toilets are often communal – public – or private, generally with some kind of on-site system. During apartheid, millions of black households were forced to use the bucket system, rudimentary pit toilets or the *veld* (open fields). In recognition of these challenges, the White Paper on Water Supply and Sanitation Policy was published in 1994, at a time when it was estimated that 21 million South Africans (50 percent) did not have access to adequate sanitation facilities. In 1995, the National Sanitation Task Team (NSTT) was constituted to coordinate sanitation interventions among the national departments in order to eradicate sanitation backlogs. In 1996, the Department of Water Affairs and Forestry (DWAF) launched the National Sanitation Programme, which aimed to eradicate the sanitation backlog by 2010, and in 2002 the National Sanitation Programme Unit was created within DWAF.

However, almost ten years on and millions of people in both rural and urban areas are still forced daily to use wholly inadequate means of sanitation.

According to the 2010 Millennium Development Goals (MDGs) Country Report for South Africa, as of March 2009 more than 10 million households (77 percent) had access to sanitation. Between 2001 and 2008, approximately 73 percent of the population had access to basic sanitation services and the basic sanitation backlog was reduced to 27 percent. By 2010, the sanitation backlog is estimated to have been reduced to 21 percent from a high of 52 percent in 1994.<sup>25</sup> According to the General Household Survey 2010 released by Statistics South Africa (Stats SA) in May 2011, a "functioning basic sanitation facility" is defined as a "flush toilet connected to a public sewerage system or septic tank or a pit latrine with ventilation pipe."<sup>26</sup> As of 2010, the total national access to basic sanitation is 70 percent of households in South Africa. Nationally, as of 2010, 2.5 million households were using an unventilated pit latrine, 110 000 households were using the bucket system and 727 000 households had no toilet at all.<sup>27</sup> According to the General Household Survey, the highest proportion of individuals having to do without toilet facilities or having to use bucket toilets is in the Eastern Cape (16.3 percent), Limpopo (8.6 percent), Northern Cape (6.8 percent) and Mpumalanga (6.6 percent).<sup>28</sup>

Initially, the target for universal access to basic sanitation was 2010; however, this has been pushed back and the current national target is 2014. According to the 2010 MDG report, while the country has made demonstrable progress in terms of sanitation and has met the MDG sanitation goal, "the goal of eliminating the full sanitation backlog by 2014 may seem too ambitious."<sup>29</sup> Thus, while some progress has been made to eradicate

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<sup>25</sup> Government of the Republic of South Africa "Millennium Development Goals: Country Report 2010" 94.

<sup>26</sup> Statistics South Africa "General Household Survey 2010" Statistical Release P0318 (5 May 2011) 48.

<sup>27</sup> Ibid 125.

<sup>28</sup> Ibid 31.

<sup>29</sup> Government of the Republic of South Africa "Millennium Development Goals: Country Report 2010" 94.

the sanitation backlog - officially South Africa has achieved the MDG for sanitation provision<sup>30</sup> and is working towards universal provision by 2014 - when it comes to implementation at the local government level, where basic services delivery is devolved, there are still major challenges.<sup>31</sup> While many take for granted the toilet(s) inside their homes - connected to a bulk sewer system that efficiently disposes of their household waste - in reality this is a luxury that many households in South Africa do not enjoy, even after 17 years of democracy and a right to basic sanitation enshrined in legislation and policy.<sup>32</sup>

This is evident in the spate of so-called 'service delivery' protests throughout the country. According to a 2010 survey conducted by the Community Law Centre (CLC) at the University of the Western Cape, in the 523 documented community protests that occurred between 2007 and mid-2010: 36 percent of the time protestors complained that they did not have access to affordable or adequate housing; 18 percent of the time protestors raised lack of access to clean water; 18 percent of protests highlighted the lack of electricity; and 15 percent of protests complained about the lack of adequate sanitation.<sup>33</sup>

Furthermore, in the recent 2011 local government election, sanitation in townships and informal settlements was a major electioneering point used by political parties – highlighting the deeply political nature of basic services provision in the country. Indeed, "toilets - or the lack of them - have come to symbolise the failures of local government and were a central theme in the municipal election campaign."<sup>34</sup> This was particularly evident in the so-called 'open toilets saga' in Makhaza in Khayelitsha, City of Cape Town and in Rammulotsi township in Moqhaka Local Municipality in the Free State province. In both these cases, the South African Human Rights Commission (SAHRC) was alerted and found that the local authority had violated a number of constitutional rights by not enclosing the toilets provided.<sup>35</sup> These public exposures of inadequate sanitation have led to a number of other cases being identified and exposed in the media, and have drawn attention to the widespread problem of inadequate toilets and lack of basic sanitation standards throughout the country.

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<sup>30</sup> In 2002 at the World Summit on Sustainable Development, a sanitation target was added to the Millennium Development Goals (MDGs): "to halve by 2015, the proportion of people without access to basic sanitation."

<sup>31</sup> These challenges are not divorced from broader problems with local government e.g. lack of skilled officials, corruption, mal-administration, which are ostensibly being addressed through the Local Government Turnaround Strategy, undertaken by the Department of Cooperative Governance and Traditional Affairs (CoGTA).

<sup>32</sup> Household sanitation is intrinsically linked to access to housing. This guide covers housing law and policy only in so far as it is directly relevant to sanitation.

<sup>33</sup> Jain J "Community protests in South Africa: Trends, Analysis and Explanations" Local Government Working Paper Series No. 1, Community Law Centre, University of the Western Cape (August 2010) 16; 29-31.

<sup>34</sup> De Lange D "State loo agency behind on work" *IOL* (31 May 2011).

<sup>35</sup> Rawoot I "Open toilets violated Moqhaka residents' rights, says HRC" *Mail and Guardian* (16 May 2011).

In July 2011, the DHS made an announcement that “the toilet saga, with reports springing-up from different provinces from time-to-time, represents a renewed community interest and participation in the politics of development as opposed to the politics of politics.”<sup>36</sup> The national department stated that “a comprehensive solution is needed” to the abandoned “toilets-in-the *veld*” projects and that a Special National Task Team would be constituted in order to deal with the matter in each province and all municipalities. The statement concludes with the following undertaking: “the poorest of the poor cannot be left in this undignified situation through a fault not of their making.”<sup>37</sup> At present, the DHS is reviewing the national sanitation policy contained in the 2001 White Paper on Basic Household Sanitation (see section 2.7 below).

While we can agree that lack of adequate sanitation is a violation of the right to human dignity, amongst other rights, there are still many questions around sanitation policy and its interpretation, basic sanitation standards, roles and responsibilities, funding and financing, appropriate technical options etc. The reality for many individuals and households is the daily affront of inadequate access to sanitation and it is this continued reality that provides the motivation for this guide, which aims to provide a useful resource on this important issue.

## Structure of the Guide

### Chapter 2: Legislative and Policy Framework for Basic Sanitation in South Africa

Chapter 2 of this guide provides an overview of the legislative and policy framework for basic sanitation in South Africa. This section examines the Constitution (1996); White Paper on Water Supply and Sanitation Policy (1994); National Sanitation Policy (1996); Water Services Act (1997); Housing Act (1997) together with the Upgrading of Informal Settlements Programme (UISP) and the Emergency Housing Programme (EHP); Municipal Systems Act (2000); White Paper on Basic Household Sanitation (2001); Strategic Framework for Water Services (2003); National Sanitation Strategy (2005); and Free Basic Sanitation (FBSan) Implementation Strategy (2009).

### Chapter 3: Sanitation and Law: Two Cases

Chapter 3 examines two cases in which courts have pronounced on basic sanitation: the *Nokotyana* case in Ekurhuleni Metropolitan Municipality, and the *Beja* case in City of Cape Town. The chapter analyses the judgments with regard to broader implications for basic sanitation provision in South Africa.

<sup>36</sup> Department of Human Settlements (DHS) “Media statement issued by the Department of Human Settlements 14 July 2011 on the toilet saga” (14 July 2011).

<sup>37</sup> Ibid.

## Chapter 4: Government Roles and Responsibilities

Chapter 4 examines government roles and responsibilities around sanitation in South Africa, specifically highlighting the roles and responsibilities of local government; provincial government; Department of Water Affairs (DWA); Department of Human Settlements (DHS); Department of Cooperative Governance and Traditional Affairs (CoGTA); Department of Health (DoH) together with Environmental Health Practitioners (EHPs); and National Treasury. In terms of the latter, the Urban Settlements Development Grant (USDG) and the Rural Household Infrastructure Grant (RHIG) are briefly examined as sources of funding for sanitation.

## Chapter 5: Fault Lines around Basic Sanitation

Chapter 5 highlights some fault lines and challenges around basic sanitation in South Africa. These are grouped under the following categories: delivery targets, data and statistics; policy-related gaps and challenges; problems with institutional arrangements at national level; systemic failures at local government level; infrastructural and technical problems; problems with the targeting of FBSan to poor households; housing delivery and informal settlements; and lack of health and hygiene education.

## Chapter 6: Conclusion

Chapter 6 provides some concluding remarks to the guide. It highlights a number of issues that need to be addressed moving forward, in order to ensure that everyone living in South Africa has access to adequate sanitation.

# 2 | Legislative and Policy Framework for Basic Sanitation in South Africa

While the right to have access to adequate sanitation is not expressly provided for in the Constitution of the Republic of South Africa, 1996 (Constitution), there are a number of clauses which directly or indirectly imply the right to basic sanitation. The 2001 White Paper on Basic Household Sanitation explicitly acknowledges that "government has a constitutional responsibility to ensure that all South Africans have access to adequate sanitation."<sup>38</sup> The Water Services Act 108 of 1997 (Water Services Act) - the primary legislation relating to water and sanitation in South Africa – also refers to a "right to basic sanitation."

The Regulations Relating to Compulsory National Standards and Measures to Conserve Water (2001) (Compulsory National Standards) published to give effect to section 9 of the Water Services Act, provides minimum standards, albeit vague, for basic sanitation. The Local Government: Municipal Systems Act 32 of 2000 (Municipal Systems Act) outlines the responsibilities of municipalities and it is clear that basic sanitation forms part of the "right to basic municipal services" outlined in section 73 of the Act. There is, however, confusion at municipal level regarding access to basic sanitation services as a human right, and current sanitation policy does not provide guidance on the interpretation of access to basic sanitation as a human right. It is worrying that the most vulnerable and marginalised in society – households living in poor rural areas and in dense informal settlements - are not enjoying access to basic sanitation services as a human right because free basic sanitation services only benefit households already connected to the sewer networks.<sup>39</sup>

This chapter summarises relevant legislation, policy and strategy in South Africa, including the Constitution, White Paper on Basic Water Supply and Sanitation Policy, National Sanitation Policy, Water Services Act, Housing Act, Municipal Systems Act, White Paper on Basic Household Sanitation, Strategic Framework for Water Services, National Sanitation Strategy and the Free Basic Sanitation (FBSan) Implementation Strategy. These documents are discussed in chronological order, with the exception of the Constitution which is discussed first in order to frame the chapter.

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<sup>38</sup> DWAF "White Paper on Basic Household Sanitation" (September 2001) 4.

<sup>39</sup> Mjoli and Bhagwan "Turning Sanitation Policy into Practice" 5.

## 2.1. Constitution of the Republic of South Africa (1996)

There are a number of clauses in the Constitution, particularly in the Bill of Rights, that implicitly refer to a right to basic sanitation or are fundamentally related to the enjoyment of this right.

### Environment

Section 24(a) of the Bill of Rights in the Constitution states that "everyone has a right to an environment that is not harmful to their health or well-being" and (b)(i) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that prevent pollution and ecological degradation." This clause has often been interpreted as implying a right to basic sanitation for all.<sup>40</sup>

### Housing

Sections 26(1) and (2) of the Bill of Rights state 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". In the landmark *Grootboom* case, the Constitutional Court interpreted the right to housing to include sanitation:

 *The right of 'access to adequate housing'...recognises that housing entails more than bricks and mortar. It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these, including the building of the house itself. For a person to have access to adequate housing all of these conditions need to be met: there must be land, there must be services, there must be a dwelling.<sup>41</sup>* 

The *Grootboom* judgment further notes that the state's obligation to provide access to adequate housing depends on context, thus while "some may need access to land and no more; some may need access to land and building materials; some may need access to finance; some may need access to services such as water, sewage, electricity and roads."<sup>42</sup>

<sup>40</sup> Mjoli N, Sykes G and Jooste T "Towards the Realization of Free Basic Sanitation: Evaluation, Review and Recommendations" (November 2009) iii; and Mjoli "Review of Sanitation Policy and Practice in South Africa" 15.

<sup>41</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) para 35 (*Grootboom*).

<sup>42</sup> *Ibid* para 37.

## Water

Section 27(1)(b) of the Bill of Rights provides that "everyone has the right to have access to sufficient water", and section 27(2) obliges the state to "take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation" of everyone's right of access to sufficient water. This is particularly relevant in the context of waterborne sanitation, as well as for hand washing, which is important for health and hygiene purposes (a component of sanitation). Further, lack of access to adequate sanitation can lead to compromised water supply sources.

## Human dignity

Section 10 highlights the importance of human dignity, providing that "everyone has inherent dignity and the right to have their dignity respected and protected." There is a clear crossover between sanitation and dignity, as being forced to relieve oneself in unhygienic, inadequate toilet facilities impairs dignity.

## Privacy

Section 14 of the Constitution states that "everyone has the right to privacy..."

## Freedom and security of person

Section 12(1)(e) states that "everyone has the right to freedom and security of the person, which includes the right not to be treated or punished in a cruel, inhuman or degrading way." This link to sanitation is especially pertinent for women, who may expose themselves to attack if toilet facilities are far from their homes. Section 12(2) states that "everyone has the right to bodily and psychological integrity" which includes the right to security in and control over their body.

## Equality

The equality clauses in section 9 of the Bill of Rights in the Constitution prohibit the state from unfairly discriminating "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, language and birth." Moreover, section 9(2) explicitly sanctions affirmative action by stating:

*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.*

In the context of sanitation, this means not only that no programme or policy may unfairly discriminate against any group of historically disadvantaged people, but also that any bias in favour of historically disadvantaged people will not amount to unfair discrimination and is acceptable.

## Local government and municipal basic services

Part B of Schedule 4 of the Constitution mandates local government responsible for "water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal." According to section 152(1) of the Constitution, the objects of local government are to:

- (a) provide democratic and accountable government for local communities;
- (b) ensure the provision of services to communities in a sustainable manner;
- (c) promote social and economic development;
- (d) promote a safe and healthy environment; and
- (e) encourage the involvement of communities and community organisations in the matters of local government.

Section 153(a) in Chapter 7 on local government describes the developmental duties of municipalities and states that a municipality must: (a) structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community; and (b) participate in national and provincial development programmes.

In the *Joseph* case, the Constitutional Court created a public law "right to receive municipal basic services", which would include access to basic sanitation.<sup>43</sup>

## 2.2. White Paper on Water Supply and Sanitation Policy (November 1994)

In the absence of a coherent policy for water supply and sanitation in 1994, the newly formed Department of Water Affairs and Forestry (DWAF) – subsequently renamed the Department of Water Affairs (DWA) – formulated the White Paper on Water Supply and Sanitation Policy. The 1994 White Paper followed on from the premises of the Reconstruction and Development Programme (RDP) and outlined a number of policy principles, which are largely repeated in the 2001 White Paper on Basic Household Sanitation (see section 2.7 below). The primary principle of the 1994 White Paper is that water services development should be "demand driven". The White Paper outlines

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<sup>43</sup> In the *Joseph* case, the Constitutional Court read sections 152 and 153 of the Constitution together with provisions contained in the Municipal Systems Act (see section 2.6 below) and the Housing Act (see section 2.5 below), creating a public law "right to basic municipal services" and outlining the duty on local government to provide these services. See *Leon Joseph and Others v City of Johannesburg and Others* [2009] ZACC 30 (*Joseph*) para 39.

the institutional framework for water and sanitation provision, which was subsequently legislated in the Water Services Act in 1997 (see section 2.4 below).

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### Definition of adequate basic sanitation

The 1994 White Paper on Water Supply and Sanitation Policy defines adequate sanitation as follows:

*The immediate priority is to provide sanitation services to all which meet basic health and functional requirements including the protection of the quality of both surface and underground water. Higher levels of service will only be achievable if incomes in poor communities rise substantially. Conventional waterborne sanitation is in most cases not a realistic, viable and achievable minimum service standard in the short term due to its cost. The Ventilated Improved Pit toilet (VIP), if constructed to agreed standards and maintained properly, provides an appropriate and adequate basic level of sanitation service.*

*Adequate basic provision is therefore defined as one well-constructed VIP toilet (in various forms, to agreed standards) per household.<sup>44</sup>*

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While the policy outlined in the 1994 White Paper stressed that sanitation services should be self-financing at a local and regional level, exception would be made where poor communities are not able to afford basic services. In these situations, government may subsidise the cost of construction of basic minimum services, but not the operating, maintenance or replacement costs. Such basic service grants were to be provided, as far as possible, directly to local authorities.<sup>45</sup>

## 2.3. National Sanitation Policy (1996)

In October 1996, DWAF published the National Sanitation Policy, which followed from the 1994 White Paper on Water Supply and Sanitation Policy and aimed to clarify issues raised in the 1994 White Paper and pave the way for the development of a national sanitation strategy.

The National Sanitation Policy defines sanitation as "the principles and practices relating to the collection, removal or disposal of human excreta, refuse and waste water, as they impact upon users, operators and the environment."<sup>46</sup> The policy lists the main types of sanitation systems used in South Africa:

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<sup>44</sup> DWAF "White Paper on Water Supply and Sanitation Policy" (1994) 15.

<sup>45</sup> Ibid 34.

<sup>46</sup> DWAF "National Sanitation Policy" (October 1996) 3.

- traditional unimproved pits;
- bucket toilets;
- portable chemical toilets;
- Ventilated Improved Pit toilets;
- low flow on-site sanitation (LOFLOS);
- septic tanks and soakaways;
- septic tank effluent drainage (solids-free sewerage) systems; and
- full water-borne sewerage.<sup>47</sup>

The National Sanitation Policy states that several of these technologies do not meet the policy's criteria for adequate sanitation: traditional unimproved pits do not provide a barrier against flies, besides their other defects which are usually related to quality of construction; the bucket system does not provide adequate sanitation, as well as being socially unacceptable to most people, and should be phased out and replaced by an appropriate and adequate system; and portable chemical toilets are not encouraged, except in emergency situations (and then only for short periods) due to the high running costs involved.<sup>48</sup>

## 2.4. Water Services Act (1997)

The Water Services Act 108 of 1997 (Water Services Act) is the primary law relating to the accessibility and provision of water services to households and other municipal water users by local government in South Africa. The National Water Act 36 of 1998 deals with the management and protection of water resources in the country. Both these pieces of legislation are currently under review.

The main objects of the Water Services Act are *inter alia* to provide for "the right of access to basic water supply and the right to basic sanitation necessary to secure sufficient water and an environment not harmful to human health or well-being."<sup>49</sup>

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### Right of access to basic water supply and basic sanitation

Section 3 of the Water Services Act states that:

- (1) *Everyone has a right of access to basic water supply and basic sanitation.*
- (2) *Every water services institution must take reasonable measures to realise these rights.*

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<sup>47</sup> Ibid 22.

<sup>48</sup> Ibid.

<sup>49</sup> Section 2(a) of the Water Services Act 108 of 1997 (Water Services Act).

- (3) Every water services authority must, in its water services development plan, provide for measures to realise these rights.
- (4) The rights mentioned in this section are subject to the limitations contained in this Act.

The Water Services Act defines basic sanitation as:

*the prescribed minimum standard of services necessary for the safe, hygienic and adequate collection, removal, disposal or purification of human excreta, domestic waste water and sewage from households, including informal households.*

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The Water Services Act acknowledges that, although municipalities have the responsibility and authority to administer water and sanitation services, all spheres of government have a duty, within their physical and financial capabilities, to work towards this object.<sup>50</sup> Section 12 of the Water Services Act states that it is the duty of the WSA to prepare a draft Water Services Development Plan (WSDP) for its area of jurisdiction, which must contain specific information (outlined in section 13 of the Water Services Act).

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Provision of basic water supply and basic sanitation has the highest priority

Section 5 of the Water Services Act states that

*If the water services provided by a water services institution are unable to meet the requirements of all its existing consumers, it must give preference to the provision of basic water supply and basic sanitation to them.*

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## Regulations Relating to Compulsory National Standards and Measures to Conserve Water (Compulsory National Standards)

On 8 June 2001, the Regulations Relating to Compulsory National Standards and Measures to Conserve Water (General Notice 22355 of 8 June 2001) (Compulsory National Standards) were published in terms of section 9 of the Water Services Act. According to Regulation 10, a WSDP should contain a water services audit, which details the implementation of the WSDP for the previous financial year.

Regulation 2 of the Compulsory National Standards elaborates on the definition of basic sanitation outlined in the Act and provides the minimum standard for basic sanitation services.

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<sup>50</sup> Preamble to the Water Services Act.

## Minimum standards for basic sanitation and water supply services

Regulation 2 of the Compulsory National Standards states that the minimum standard for basic sanitation services is –

- (a) *the provision of appropriate education; and*
- (b) *a toilet which is safe, reliable, environmentally sound, easy to keep clean, provides privacy and protection against the weather, well ventilated, keeps smells to a minimum and prevents the entry and exit of flies and other disease-carrying pests.*

Regulation 3 of the Compulsory National Standards states that the minimum standard for basic water supply services is –

- (a) *the provision of appropriate education in respect of effective water use; and*
- (b) *a minimum quantity of potable water of 25 litres per person per day or 6 kilolitres per household per month–
  - (i) *at a minimum flow rate of not less than 10 litres per minute;*
  - (ii) *within 200 metres of a household; and*
  - (iii) *with an effectiveness such that no consumer is without a supply for more than seven full days in any year.**

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Regulation 4 of the Compulsory National Standards states that a water services institution must take steps to ensure that if the sanitation services usually provided by, or on behalf of, itself are interrupted for longer than 24 hours (for reasons other than those contemplated in section 4 of the Act), a user must have access to alternative services including "sanitation services sufficient to protect health."

## Norms and Standards in Respect of Tariffs for Water Services (Norms and Standards)

On 11 June 2001, the Norms and Standards in Respect of Tariffs for Water Services (Norms and Standards) were published in terms of section 10(1) of the Water Services Act. The Norms and Standards contain a number of important provisions which relate to how municipalities charge for sanitation services, tariff setting and cross-subsidisation, categories and levels of water services.

## Tariffs

In terms of the cross-subsidisation of tariffs, section 3(2) of the Norms and Standards states that:

*A water services institution must consider the right of access to basic water supply and the right of access to basic sanitation when determining which water services tariffs are to be subsidised.*

Section 4(1) states that when setting tariffs for water services to households and other users, a water services institution must at least differentiate between the following categories: (d) sanitation services to households; (e) discharge of industrial effluent to a sewage treatment plan; and (f) any other sanitation services not specified in (d) and (e).

Section 4(2) states that a water services institution must, when setting tariffs for providing water services to households, at least differentiate between the following levels of service: (d) the provision of sanitation services to a household not connected to a sewer; and (e) the provision of sanitation services to a household connected to a sewer.

In terms of the provision of sanitation services to a household, section 7 of the Norms and Standards states that:

*A tariff set by a water services institution for the provision of sanitation services to a household must –*

- (a) support the viability and sustainability of sanitation services to the poor;*
- (b) recognise the significant public health benefit of efficient and sustainable sanitation services; and*
- (c) discourage usage practices that may degrade the natural environment.*

For more on sanitation tariffs and the targeting of FBSan to poor households, see section 2.10 below on the 2009 FBSan Implementation Strategy.

## 2.5. Housing Act (1997)

The Housing Act 107 of 1997 is the primary piece of housing legislation in South Africa, which legally entrenches policy principles outlined in the White Paper: A New Housing Policy and Strategy for South Africa (White Paper on Housing) published in 1994. The Housing Act provides for a sustainable housing development process, laying down general principles for housing development in all spheres of government; defines the functions of national, provincial and local governments with regard to housing

development; and lays the basis for financing national housing programmes. It is relevant to sanitation not only because sanitation is a fundamental part of the right to adequate housing, but also because the government has linked sanitation rollout to its housing delivery programme, through the National Housing Subsidy Scheme (NHSS).

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### The Housing Act defines housing development as:

*The establishment and maintenance of habitable, stable and sustainable public and private residential environments to ensure viable households and communities in areas allowing convenient access to economic opportunities, and to health, educational and social amenities in which all citizens and permanent residents of the Republic will, on a progressive basis, have access to-*

- (a) permanent residential structures with secure tenure, ensuring internal and external privacy and providing adequate protection against the elements; and
  - (b) potable water, adequate sanitary facilities and domestic energy supply.<sup>51</sup>
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The National Housing Code, published in 2000 pursuant to section 4 of the Housing Act and amended in 2009, sets out the underlying policy principles, guidelines, and norms and standards which apply to the National Housing Programmes. In 2001 the Housing Act was amended, and provision made for the publication of lists of national housing programmes. In 2001, the National Housing Code was made binding on all spheres of government. Since the adoption of Breaking New Ground: A Comprehensive Plan for the Development of Sustainable Human Settlements - a policy amendment to the White Paper on Housing, published in September 2004 - some of the national housing programmes have been updated or removed from the revised Code and new programmes have been included.<sup>52</sup>

In 1999 the National Norms and Standards for the Construction of Stand Alone Residential Dwellings were introduced by the Minister of Housing in terms of section 3(2)(a) of the Housing Act. These provided minimum technical specifications including environmentally efficient design proposals. On 1 April 2007, these standards were revised in the National Norms and Standards in respect of Permanent Residential Structures (National Norms and Standards), which are contained in the 2009 National Housing Code. All standalone houses constructed through application of the National Housing Programmes must at least comply with these norms and standards.

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<sup>51</sup> Section 1(vi) of the Housing Act 107 of 1997.

<sup>52</sup> For more on the Housing Act and Breaking New Ground, see SERI "A Resource Guide to Housing" 14-15; 64-70.

## Norms and Standards for Permanent Residential Structures

According to the National Norms and Standards, each house must have:

- *minimum gross floor area of 40m<sup>2</sup>;*
- *two bedrooms;*
- *separate bathroom with a toilet, a shower and hand basin;*
- *combined living area and kitchen with wash basin; and*
- *ready board electrical installation, if electricity is available in the project area.*<sup>53</sup>

While the subsidies provided under the National Housing Programmes are not meant to be used for bulk and connector services, internal reticulation services may be funded as a last resort through the provincial housing allocation. In general, all residential properties created through national housing programmes must at least comply with a minimum level of service, as per the National Norms and Standards. For water, this minimum level is a single standpipe per stand. For sanitation, the minimum level is "Ventilated Improved Pit (VIP) latrine or alternative system agreed to between the community, the municipality and the MEC".

## Upgrading of Informal Settlements Programme (UISP) Part 3 Volume 4 of the National Housing Code

The Upgrading of Informal Settlements Programme (UISP) is instituted in terms of section 3(4)(g) of the Housing Act and is contained in the National Housing Code.<sup>54</sup> The UISP provides funding to municipalities to upgrade informal settlements *in situ*, providing security of tenure and improved access to services in collaboration with communities. The UISP applies to those who qualify under the NHSS, as well as households whose monthly income exceeds the subsidy threshold, people without dependants, those who are not first-time homeowners, and so-called illegal immigrants.

Section 3.13A of the UISP states that the Programme provides for:

- interim municipal engineering services as a first phase to alleviate immediate/emergency need to access potable water, sanitation services and certain preventative measures to curtail the occurrence of disasters.

<sup>53</sup> DHS "Technical and General Guidelines" Part A of Part 3 Volume 2 of the National Housing Code (2009) 21.

<sup>54</sup> DHS "Upgrading of Informal Settlements Programme" Part 3 Volume 4 of the National Housing Code (2009).

- upgrading of such interim services into permanent municipal engineering services and/or the provision of permanent municipal engineering services from the outset of the project as may be required by local project circumstances.<sup>55</sup>

According to the UISP, where interim municipal engineering services are to be provided, they should ‘as far as possible be undertaken on the basis that such interim services constitute the first phase of the provision of permanent services.’<sup>56</sup> The nature and level of permanent engineering infrastructure should be the subject of engagement between the local authority and residents. Community needs must be balanced with community preferences, affordability indicators and sound engineering practice. The National Norms and Standards ‘should be adhered to in as far as municipal engineering services are concerned.’<sup>57</sup>

Municipalities must make a 10 percent minimum capital contribution towards an upgrading project and can use Municipal Infrastructure Grant (MIG) funding to finance their counter-funding requirements under the UISP. Municipalities must also assume responsibility for the O/M of all engineering infrastructure under the UISP, as well as all O/M of social, community and economic facilities. These O/M costs are over and above the capital contribution and should come from non-housing sources in the municipality.<sup>58</sup>

The DHS, through its National Upgrading Support Programme (NUSP)<sup>59</sup>, as well as the Housing Development Agency (HDA)<sup>60</sup>, are mandated to provide support in informal settlement upgrading. See section 4.4 below for more on the role of the DHS in basic sanitation.

The National Norms and Standards do not apply to the Emergency Housing Programme (EHP), another of the national housing programmes; however, they can act as a guideline.

<sup>55</sup> Ibid 36.

<sup>56</sup> Ibid 37.

<sup>57</sup> Ibid.

<sup>58</sup> Ibid 19-20.

<sup>59</sup> The National Upgrading Support Programme (NUSP) was launched by the DHS and the Cities Alliance to facilitate and support the fast-tracking of informal settlement upgrading in South African municipalities. See the NUSP website for more: <<http://upgradingsupport.org/>>

<sup>60</sup> The Housing Development Agency (HDA) is a national public entity created in terms of the Housing Development Agency Act 23 of 2008. It is tasked with the acquisition, management and release of state- and privately-owned land for human settlements development, and with providing project delivery support services to enhance the capacity of municipalities and provinces to deliver integrated sustainable human settlements. See the HDA website for more: <<http://www.thehda.co.za/>>

## Emergency Housing Programme (EHP)

### Part 3 Volume 4 of the National Housing Code

The National Housing Programme for Housing Assistance in Emergency Housing Circumstances – commonly referred to as the Emergency Housing Programme (EHP) – is instituted in terms of section 3(4)(g) of the Housing Act with the objective “to provide for temporary relief to people in urban and rural areas who find themselves in emergencies.”<sup>61</sup>

The EHP applies to a number of different situations, including natural disasters, evictions etc. If municipalities cannot assist those in emergency housing situations through their own resources, they can apply in terms of the EHP. Assistance is provided through grants to municipalities, administered through the provincial housing department, to enable them to respond rapidly to emergencies through the provision of land, municipal engineering services, relocation assistance and shelter to households on a temporary basis. With the approval of the MEC, the cost of consumption of “sanitation services provision” for a maximum of 3 years (in cases where the municipality presents proof of its inability to provide the services from its own resources, and the services are actually provided by the municipality) can now also be funded by the EHP.<sup>62</sup>

The EHP provides for a number of options for various emergencies, including “temporary assistance with resettlement to a permanent temporary settlement area”, in cases where a municipality chooses to establish a “permanent temporary settlement area” for affected persons until permanent housing at another location becomes available.<sup>63</sup> The EHP provides R22 416 for the repair of existing services and up to the Individual Subsidy quantum amount for the reconstruction of existing houses. In terms of temporary assistance, the EHP provides R4 230 for municipal engineering services and R47 659 for the construction of temporary shelters.<sup>64</sup>

The National Norms and Standards do not apply to the implementation of the EHP unless engineering services require reconstruction/provision at another site, or repair/ replacement of formal superstructures is required. However, section 2.5 of the EHP provides guidelines on the level of basic engineering services to be provided in temporary settlements as well as requirements for temporary shelter:

- Water: access to a water point or tap for every 25 families (1:25);

<sup>61</sup> DHS “Emergency Housing Programme” Part 3 Volume 4 of the National Housing Code (2009) 9.

<sup>62</sup> Ibid 18.

<sup>63</sup> Ibid 34.

<sup>64</sup> DHS “Subsidy Quantum – Incremental Interventions” Part 3 Volume 4 of the National Housing Code (2009) 4.

- *Sanitation:* temporary sanitation facilities must be provided, which may vary from area to area due to varying geographical and other conditions. Where possible, VIP toilets must be provided as a first option, on the basis of one VIP per five families (1:5). In circumstances where soil and other site conditions do not allow for the use of VIP toilets, alternative systems must be investigated. A small bore sewerage or other appropriate system (to be used on a shared basis with one toilet per five families within the suggested settlement pattern) could be provided. The sewerage system must as far as possible be usable in a permanent configuration or layout in situations where future upgrading is envisaged as a first option towards a permanent housing situation.<sup>65</sup>

In the *Joe Slovo* eviction case, the Constitutional Court ordered the relocation of residents of Joe Slovo informal settlement to Temporary Relocation Units (TRUs) in Delft, stipulating the standards of the TRUs. The Court ordered that existing TRUs had to comply with certain specifications, and that new ones had to be of equivalent or superior quality. In terms of sanitation, the Constitutional Court in the *Joe Slovo* judgment stated that the TRUs had to:

*be situated within reasonable proximity of a communal ablution facility; make reasonable provision for toilet facilities, which may be communal, with waterborne sewerage; and make reasonable provision for fresh water, which may be communal!*<sup>66</sup>

## 2.6. Municipal Systems Act (2000)

The Local Government: Municipal Systems Act 32 of 2000 (Municipal Systems Act) provides the machinery and procedures to enable municipalities to uplift their communities socially and economically, and guarantee affordable universal access to basic services. It seeks to empower the poor and ensure that municipalities establish service tariffs and credit control policies that take their needs into account. In 2000, a Free Basic Services (FBS) policy was adopted, followed by the Free Basic Water (FBW) Implementation Strategy in 2001 and a Free Basic Sanitation (FBSan) Implementation Strategy in 2009.

Section 4(2)(d) of the Municipal Systems Act states that the council of a municipality, within the municipality's financial and administrative capacity and having regard to practical considerations, has the duty to "strive to ensure that municipal services are provided to the local community in a financially and environmentally sustainable

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<sup>65</sup> DHS "Emergency Housing Programme" 38.

<sup>66</sup> *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* [2009] ZACC 16 (*Joe Slovo*) para 7(10).

manner." The municipal council has a duty to consult the local community about (e)(i) "the level, quality range and impact of municipal services provided by the municipality, either directly or through another service provider" and (e)(ii) "the available options for service delivery." Section 4(2)(f) states that the municipal council has a duty to "give members of the local community equitable access to the municipal services to which they are entitled."

Chapter 4 of the Municipal Systems Act focuses on community participation, outlining the mechanisms, processes and procedures to be followed by the municipality in order to "encourage, and create conditions for, the local community to participate in the affairs of the municipality". Section 16(1)(a) states that this participation should occur in the preparation, implementation and review of the Integrated Development Plan (IDP), the preparation of the municipal budget and "strategic decisions relating to the provision of municipal services."

Chapter 5 of the Act deals with the IDP in more detail. Sections 25 and 26 state that all municipalities are required to compile an IDP, which is described in section 25(1) as a "single, inclusive and strategic plan for the development of the municipality".

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### Municipal services

Chapter 8 of the Municipal Systems Act focuses on municipal services. The definition of basic municipal services according to the Act is:

*A municipal service that is necessary to ensure an acceptable and reasonable quality of life and, if not provided, would endanger public health or safety or the environment.*

Section 73(1) of the Act states that a municipality must give effect to the provisions of the Constitution and:

- (a) *give priority to the basic needs of the local community;*
- (b) *promote the development of the local community; and*
- (c) *ensure that all members of the local community have access to at least the minimum level of basic municipal services.*

Section 73(2) states that municipal services must:

- (a) *be equitable and accessible;*
- (b) *be provided in a manner that is conducive to -*
  - (i) *the prudent, economic, efficient and effective use of available resources; and*
  - (ii) *the improvement of standards of quality over time;*
- (c) *be financially sustainable;*
- (d) *be environmentally sustainable; and*

(e) be regularly reviewed with a view to upgrading, extension and improvement.

Basic sanitation forms part of the right to basic municipal services outlined in section 73 of the Municipal Systems Act.

Section 74(1) of the Municipal Systems Act states that a municipal council must adopt and implement a tariff policy on the levying of municipal services. Section 74(3) and 75(2) stipulate that a tariff policy may differentiate between different categories of users and debtors, and that any by-laws adopted must do the same. Section 97(1)(c) of the Act requires a municipality to adopt, maintain and implement a credit control and debt collection policy, which must make "provision for indigent debtors that is consistent with its rates and tariff policies and any national policy on indigents." Section 104(1)(l) states the Minister may make regulations of issue guidelines to provide for or regulate "the development and implementation of an indigent policy" in order to give effect to its constitutional obligation to provide access to basic municipal services.

To this effect, in 2005 the Department of Provincial and Local Government (DPLG) published its Framework for a Municipal Indigent Policy, as well as Guidelines for the Implementation of the National Indigent Policy by Municipalities. This policy framework is meant to provide a foundation upon which municipalities can build their own indigent policies. The guidelines are to assist municipalities with the implementation of indigent policies as defined within the national indigent policy framework. See section 5.6 below for some of the problems with the indigent policy as a mechanism to target FBS.

## 2.7. White Paper on Basic Household Sanitation (2001)

In September 2001 the White Paper on Basic Household Sanitation was approved by Cabinet, who resolved that a dedicated unit to ensure delivery of basic sanitation services in an aligned manner should be formed. In 2002, the National Sanitation Programme Unit was established within DWAF.<sup>67</sup>

The 2001 White Paper sets out the framework for the provision of sustainable sanitation in South Africa, particularly to those households who have not had adequate sanitation services in the past.<sup>68</sup> The White Paper focuses on the provision of a level of basic household sanitation to communities in low density rural areas, and in informal settlements, which it identified as the areas with the greatest need.<sup>69</sup>

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<sup>67</sup> DHS "National Sanitation Programme: Presentation to Portfolio Committee" (11 August 2010).

<sup>68</sup> DWAF "Sanitation Directory Summary of Current Sanitation Guides and Tools" Prepared by the National Sanitation Unit: Sub-Directorate for Advocacy & Roll-out (November 2007) 4. This document includes a summary of sanitation policies, guidelines and strategies produced by DWAF, as well as some references to relevant tools developed by other institutions relevant to sanitation service delivery.

<sup>69</sup> DWAF "White Paper on Basic Household Sanitation" 5.

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The 2001 White Paper on Basic Household Sanitation provides the following definition for sanitation:

*Sanitation refers to the principles and practices relating to the collection, removal or disposal of human excreta, household waste water and refuse as they impact upon people and the environment. Good sanitation includes appropriate health and hygiene awareness and behaviour, and acceptable, affordable and sustainable sanitation services.*

It further states that the minimum acceptable basic level of sanitation is:

- (a) appropriate health and hygiene awareness and behaviour;
  - (b) a system for disposing of human excreta, household waste water and refuse, which is acceptable and affordable to the users, safe, hygienic and easily accessible and which does not have an unacceptable impact on the environment; and
  - (c) a toilet facility for each household.<sup>70</sup>
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Sanitation promotion by "creating demand" is a focal point of the 2001 White Paper, and it favours a "demand responsive approach" whereby a direct contribution by each household to the construction of the toilet is taken as a proxy for demand. The White Paper draws on international best practice to argue for direct household involvement in planning and implementing sanitation improvements, and it emphasises the importance of health-focused, developmental approaches.

This policy is premised on providing households with support around provision of a basic toilet, with user education around O/M and health and hygiene improvement. From there, households are responsible for the sanitation option.<sup>71</sup> The sanitation subsidy was administered by DWAF and consisted of R600 for community development and R600 for the basic toilet structure i.e. the total subsidy was R 1200 (this increased to R6 000 and is now administered through the MIG fund).<sup>72</sup>

The 12 policy principles adopted in the 2001 White Paper on Basic Household Sanitation include the following:<sup>73</sup>

- **Demand-driven:** Household sanitation is first and foremost a household responsibility and must be demand responsive. Sanitation improvement must be supported by intensive health and hygiene education.
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<sup>70</sup> Ibid 5-6.

<sup>71</sup> South African Local Government Association (SALGA) "A Strategic Agenda for the development of a National Sanitation Policy Framework in South Africa: Concept Paper" (September 2008) 2.

<sup>72</sup> Still *et al* "Basic Sanitation Services in South Africa" 21.

<sup>73</sup> DWAF "White Paper on Basic Household Sanitation" 11-12.

- *Community participation*: Communities must be fully involved in projects related to their health, and in decisions relating to community facilities like schools and clinics.
- *Integrated planning and development*: The 2001 White Paper acknowledged that the "current lack of coherence in the sanitation sector is largely a result of uncoordinated planning."<sup>74</sup> Therefore, the Integrated Development Plan (IDP), with the WSDP as a component, must prioritise and coordinate service delivery so as to address the sanitation backlog and ensure that any new sanitation intervention will be sustainable in the long term.<sup>75</sup>
- *Sanitation is about the environment and health*: Sanitation improvement is more than just the provision of toilets; it is a process of sustained environment and health improvement.
- *Basic sanitation is a human right*: "Government has an obligation to create an enabling environment through which all South Africans can gain access to basic sanitation services."
- *Provision of access to sanitation services is a local government responsibility*: Local government has the constitutional responsibility to provide sanitation services. Provincial and national government have a constitutional responsibility to support local government in a spirit of cooperative governance.
- *"Health for all" rather than "all for some"*: The use of scarce public funds must be prioritised for assisting those who are faced with the greatest risk to health due to inadequate sanitation services.
- *Equitable regional allocation*: The "limited national resources available to support the incremental improvement of sanitation services should be equitably distributed throughout the country, according to population, level of development, and the risk to health of not supporting sanitation improvement."
- *Economic value of water*: The way in which sanitation services are provided must take into account the growing scarcity of good quality water in South Africa.
- *Polluter pays principle*: Polluters must pay for the cost of cleaning up the impact of their pollution on the environment.
- *Sanitation services must be financially sustainable*: Sanitation services must be sustainable both in terms of capital costs and recurrent costs.
- *Environmental integrity*: The environment must be protected from the potentially negative impacts of developing and operating sanitation systems.

<sup>74</sup> Ibid 17.

<sup>75</sup> The IDP must at least contain the following information: existing service levels available to households; proposed new service levels per household; provision of health and hygiene education; estimated capital and recurring costs of providing these services; cost to households for service payments; availability of grant funding; implications for the overall municipal budget; and how the service impact of the investment will be measured and monitored. DWAF "Sanitation for a Healthy Nation" 5.

The 2001 White Paper on Basic Household Sanitation differentiates between sanitation in less densely settled or rural areas, and in urban areas. In rural areas, waste disposal can usually be managed with on-site latrines e.g. VIPs, desiccating (drying) toilets or septic tanks, and local government - often district municipalities - assisted by the national department, implement rural sanitation programmes based on VIPs and health and hygiene promotion. According to a guide on the 2001 White Paper on Basic Household Sanitation:

*“sanitation decisions in new urban developments are often taken by housing specialists who put in flush toilets without considering the range of other technical options available, and without considering whether the waste treatment works has spare capacity, whether the sewer system can cope and whether the new occupants will be able to afford their monthly service charges.”<sup>76</sup>*

In urban areas, the municipality often uses MIG funding with greater emphasis on conventional waterborne sanitation.<sup>77</sup> Higher settlement densities mean the sheer volume of waste generated has to be managed closely to prevent public health problems. For this reason the local authority runs sewerage collection, treatment and disposal systems, waste collection, water treatment works etc. It has “complex administrative systems to recover the costs of these services, including meter readers, billing mechanisms, payment offices and credit control measures.”<sup>78</sup>

## Revision of the 2001 White Paper on Basic Household Sanitation

In March 2011, the National Sanitation Programme Unit (now part of DHS) published a draft conceptual framework for a new national sanitation policy, which proposes a revised policy framework to the 2001 White Paper on Basic Household Sanitation. According to many municipal officials, this White Paper was formulated without adequate consultation and does not address their needs adequately or acknowledge the role of current municipal institutions.<sup>79</sup> Further, the 2001 White Paper has a largely rural focus.

The 2011 revision document acknowledges that sanitation delivery has become a deeply political and contested issue, and recognises the importance of improved sanitation as a key developmental issue “particularly related to rapid urbanisation, emergencies,

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<sup>76</sup> Ibid 6.

<sup>77</sup> Ibid.

<sup>78</sup> Ibid 8.

<sup>79</sup> DHS “Revision of the White Paper on Basic Household Sanitation, 2001” National Sanitation Policy: Conceptual Framework, Draft Version (March 2011) 17.

and socio-economic development of poor societies.<sup>80</sup> The document further recognises the need for a review of existing policy to accommodate recent changes to the service delivery environment, and to address gaps identified in the sector. Since the 2001 White Paper was published, the 2003 Strategic Framework for Water Services (see section 2.8 below) has been published, the MIG funding mechanism introduced, and the institutional framework around sanitation altered.

Therefore, the revision document states, there is a need to reconcile changes and challenges that have occurred in the sanitation landscape over the past ten years, and to give conceptual and practical direction to municipalities going forward. According to the revision document:

*“municipalities need considerably more guidance, and government needs a sanitation policy framework which allows for more effective regulation in the national interest.”<sup>81</sup>*

The document provides a conceptual framework for a revised National Sanitation Policy in South Africa, and suggests a number of key content areas which should be covered in order to “achieve a pragmatic, user-friendly and coherent framework for action.”<sup>82</sup> Among the policy objectives is an emphasis on the need for equity and participation of all demographic and vulnerable groups, as well as the establishment of an “enabling regulatory environment for the provision of sustainable and equitable sanitation services including the mechanisms for intervention and ensuring compliance with national norms and standards.”<sup>83</sup>

The policy principles outlined in the document largely mirror those contained in the 2001 White Paper, and the document stresses a focus on “protecting the poor” through redress, access, advocacy and awareness. The revised framework also includes sections on community participation, institutional arrangements/roles and responsibilities, spatial development planning, health and hygiene education, integrated environmental management, technical considerations, financial and implementation approaches, monitoring and evaluation, and regulation.

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<sup>80</sup> Ibid 3.

<sup>81</sup> Ibid.

<sup>82</sup> Ibid 6.

<sup>83</sup> Ibid 9.

## 2.8. Strategic Framework for Water Services (2003)

The Strategic Framework for Water Services: Water is Life Sanitation is Dignity (Strategic Framework) was approved by Cabinet in 2003, and is a national umbrella framework for the water services sector. It was developed in consultation with the South African Local Government Association (SALGA)<sup>84</sup> and other key stakeholders. The Strategic Framework provides a comprehensive review of policies, legislation and strategies with respect to the provision of water services in South Africa, seeking to align them and outline the changes in approach needed to achieve policy goals.

The Strategic Framework outlines the roles and responsibilities for Water Services Authorities (WSAs) and Water Services Providers (WSPs) and different government departments, as well as other stakeholders. It specifically sets out the future role of the national department as the national water sector regulator (see section 4.3 below for more on the role of DWA in this regard).

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The Strategic Framework provides definitions for basic sanitation, defining a basic sanitation facility as:

*the infrastructure necessary to provide a sanitation facility which is safe, reliable, private, protected from the weather and ventilated, keeps smells to the minimum, is easy to keep clean, minimises the risk of the spread of sanitation related diseases by facilitating the appropriate control of disease carrying flies and pests, and enables safe and appropriate treatment and/or removal of human waste and waste water in an environmentally sound manner.<sup>85</sup>*

It further defines a basic sanitation service as:

*the provision of a basic sanitation service facility which is easily accessible to a household, the sustainable operation of the facility, including the safe removal of human waste and wastewater from the premises where this is appropriate and necessary, and the communication of good sanitation, hygiene and related practices.<sup>86</sup>*

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<sup>84</sup> SALGA derives its mandate from the Constitution, which defines it as the voice and sole representative of local government in South Africa. The association is a unitary body with a membership of 273 municipalities, with its national office based in Pretoria and offices in all nine provinces. SALGA provides advice and support to municipalities, including in relation to water services policy and implementation. See the SALGA website for more: <<http://www.salga.org.za/>>

<sup>85</sup> DWAf "Strategic Framework for Water Services" (2003) 45.

<sup>86</sup> Ibid.

While the 2001 White Paper on Basic Household Sanitation promoted measures to ensure that households are equipped to maintain and service their toilets themselves, the Strategic Framework emphasises sustainable servicing by municipalities. Therefore, since 2003 there has been a move from a demand-responsive household assistance sanitation programme, to an essentially supply-driven municipal provision programme. The 2001 White Paper is in the process of being revised to ensure full compatibility with the 2003 Strategic Framework.<sup>87</sup> As highlighted before, there is misinterpretation of sanitation policy by municipalities and, according to a 2010 study, there is a need to review and revise sanitation policy in order to resolve any contradictions with the 2001 White Paper and the 2003 Strategic Framework, as well as the need for "compulsory national standards for both basic sanitation and waterborne sanitation service levels" that meet the constitutional right to basic sanitation for all.<sup>88</sup> The current Compulsory Norms and Standards are outdated and focus mainly on water issues.

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The Strategic Framework defines sanitation services as:

*the collection, removal, disposal or treatment of human excreta and domestic wastewater, and the collection, treatment and disposal of industrial wastewater. This includes all the organisational arrangements necessary to ensure the provision of sanitation services including, amongst others, appropriate health, hygiene and sanitation related awareness, the measurement of the quality and quantity of discharges where appropriate, and the associated billing, collection of revenue and consumer care.<sup>89</sup>*

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A major emphasis of the Strategic Framework is on the provision of Free Basic Sanitation (FBSan). Its purpose is to assist in promoting affordable access by poor households to at least a basic level of sanitation service, through subsidies that cover hygiene promotion costs and O/M costs of the sanitation service (see section 2.10 below for more on the FBSan Implementation Strategy published in 2009). The Strategic Framework refers to basic sanitation provision as "the first step" and describes how, as economic affordability increases and the backlog in the provision of basic services reduces, it will become possible for more households to be provided with higher levels of services ("moving up the ladder").<sup>90</sup> This concept of the "sanitation ladder" is an important part of the Strategic Framework.

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<sup>87</sup> Still et al "Basic Sanitation Services in South Africa" 22.

<sup>88</sup> Mjoli "Review of Sanitation Policy and Practice in South Africa" vi.

<sup>89</sup> DWAF "Strategic Framework for Water Services" 65.

<sup>90</sup> Ibid 26.

The Strategic Framework further refers to the “universal service obligation” of all WSAs to ensure provision of at least a basic level of water and sanitation service to all residents within their jurisdiction, including residents living on privately-owned land.<sup>91</sup> This includes people living on commercial farms and game parks, mining land, church-owned land, industrial-owned land as well as those living in informal settlements on private land, backyard shacks and in so-called ‘bad buildings’ in inner city areas.<sup>92</sup> The Strategic Framework acknowledges that “the provision of services to people living on land without permission of the owner of the land poses a challenge to water services authorities” and advises that WSAs “should seek to address the security of tenure issues expeditiously” and provide interim basic water and sanitation services should be provided in accordance with a progressive plan that addresses both land tenure and basic services.<sup>93</sup>

The Strategic Framework does not define the technology option to be used in its definition of basic sanitation service, and this choice is left up to the WSA. The Strategic Framework does however state that waterborne sanitation is usually the most suitable technology option in urban areas with high densities, and should be regarded as the basic level of service for the purposes of the FBSan policy. In rural areas, with low densities, on-site technology options are an appropriate level of service.<sup>94</sup> In intermediate areas e.g. peri-urban areas or rural areas with high densities, the Strategic Framework states that the WSA must decide on a sanitation technology option that is financially viable and sustainable, and that in most instances, on-site sanitation systems are likely to be the most appropriate solution. If waterborne sanitation is chosen in this context, care must be taken that WSP will be able to maintain and operate the system sustainably over time with the available funds.<sup>95</sup>

The Strategic Framework sets out a number of targets related to sanitation service delivery. The first is that all people in South Africa have access to appropriate, safe and affordable basic sanitation by 2010 (inclusive of a FBSan policy implemented in all WSAs). The Strategic Framework envisages that WSAs, supported by DWA and the NSTT, are primarily responsible for delivering on this target. The second is that all schools and clinics have adequate safe sanitation by 2005 and 2007 respectively. The third is that hygiene education is taught in all schools and to households by 2010 respectively.

The household sanitation target has since been shifted to 2014, in line with the DHS target of universal access to housing by 2014. The latter targets have also been shifted.

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<sup>91</sup> Manus N and Tyers L “Provision of water services to people on privately owned land” (1 January 2007) 42.

<sup>92</sup> See DWAF “Ensuring Water Services to Residents on Privately Owned Land: A Guide for Municipalities” (July 2005) and DWAF “Guidelines for the Formulation of a Strategy and Implementation Plan for the Provision of Sanitation Services in Informal Settlements” (October 2007).

<sup>93</sup> DWAF “Strategic Framework for Water Services” 43.

<sup>94</sup> Still et al “Basic Sanitation Services in South Africa” 23.

<sup>95</sup> Ibid 109.

## 2.9. National Sanitation Strategy (2005)

The National Sanitation Strategy was published in 2005 in order to take into consideration recent developments around sanitation - including the 2001 White Paper on Basic Household Sanitation, the 2003 Strategic Framework and the establishment of the MIG for municipalities - in order to provide a coherent approach to sanitation services delivery in South Africa. The National Sanitation Strategy has the objective to facilitate the elimination of the sanitation backlog by 2010, and discusses *inter alia* the roles and responsibilities in sanitation delivery, planning for sanitation, funding sanitation, implementation approaches, regulating the sanitation sector, and monitoring and evaluation.

Interestingly, the National Sanitation Strategy states that "informal settlements must not be treated as emergency situations for the purpose of this strategy but should be provided with viable and sustainable solutions. Solutions such as communal facilities and chemical toilets should not be used where the system is expected to have a duration of more than one month."<sup>96</sup>

## 2.10. Free Basic Sanitation Implementation Strategy (2009)

On 21 March 2009, the Minister of Water Affairs approved the Free Basic Sanitation (FBSan) Implementation Strategy, which was developed to guide WSAs in "providing all citizens with free basic sanitation by 2014" and to implement their own FBSan policies in line with national policy. Provisions in the 2003 Strategic Framework provided the foundation and impetus for the development and implementation of the FBSan Implementation Strategy, which was developed by DWA, CoGTA and SALGA.

The FBSan Implementation Strategy acknowledges that there is a "right of access to a basic level of sanitation service" enshrined in the Constitution, and that municipalities have an obligation to ensure that poor households are not denied access to basic services due to their inability to pay for such services.<sup>97</sup> The FBSan Implementation Strategy adopts the principles that "national guidelines should be implemented with local choice" and that there should be local flexibility in implementation of the strategy. Indeed, local government is given considerable leeway to determine how to go about achieving access to basic sanitation, depending on geography, demographics, income distribution and institutional capacity.<sup>98</sup> The document states that the FBSan Implementation Strategy is informed by the 2003 Strategic Framework, and that its approaches are consistent

<sup>96</sup> DWAF "National Sanitation Strategy: Accelerating Sanitation Sector Delivery" (August 2005) 56.

<sup>97</sup> DWAF "Free Basic Sanitation Implementation Strategy" (April 2009) i.

<sup>98</sup> Still *et al* "Basic Sanitation Services in South Africa" 115.

with the principles outlined in the 2001 White Paper on Basic Household Sanitation. The definitions used in the document are those of the 2003 Strategic Framework.

The FBSan Implementation Strategy is deliberately vague, stating that the concept of “free” basic sanitation has become a controversial issue and acknowledging that there is no universal approach which can be adopted by municipalities.<sup>99</sup> While it is outside the scope of this guide to comprehensively cover all aspects contained in the FBSan Implementation Strategy, a few important points are listed below:

- All WSDPs should contain a municipal sanitation strategy which includes a sanitation maintenance plan.<sup>100</sup>
- In terms of FBSan provision, where there is waterborne sanitation, O/M support includes providing water for flushing. It is recommended that 15 litres per person per day be provided. For a household of eight people, this amounts to 3 to 4 kilolitres above the amount provided for in terms of FBW. This amount will be more in the case of people in the advanced stages of AIDS.<sup>101</sup>
- The primary intended beneficiaries of FBSan are poor households, and the most practical indicator of poverty for the purposes of the FBSan policy is household expenditure (in 2009, this was benchmarked nationally as household expenditure less than R1 100).<sup>102</sup>
- While the capital costs of sanitation infrastructure or rehabilitation of infrastructure are provided, households are responsible for the operating costs for the on-site component of the sanitation service. Exceptions may be possible for sludge and compost handling and removal e.g. in VIP toilets.<sup>103</sup>
- While a WSA has the obligation to conform to national policy, it is not legally bound through existing legislation to provide FBSan; however, the WSA may be open to legal challenge if it can be shown that it is not using its resources to provide services to the poor effectively.<sup>104</sup>
- Poor households living on farms can access capital subsidies for the construction of basic sanitation infrastructure, with the farmer and households responsible for O/M.<sup>105</sup>
- In terms of the technical component of sanitation, the decision-making process to decide what option to pursue for particular communities needs to consider the following: community acceptance of the service level and willingness to pay the

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<sup>99</sup> DWAF “Free Basic Sanitation Implementation Strategy” 9. See also National Sanitation Unit “Free Basic Sanitation” (1 January 2010) 104.

<sup>100</sup> DWAF “Free Basic Sanitation Implementation Strategy” 4.

<sup>101</sup> Ibid 9.

<sup>102</sup> Ibid 10.

<sup>103</sup> Ibid 11.

<sup>104</sup> Ibid 14.

<sup>105</sup> Ibid 17.

- associated tariff; viability for the WSA and WSP; environmental impact; and technical feasibility.<sup>106</sup>
- While in some areas the basic service level could be a VIP, in other areas (usually urban and well-established), waterborne sanitation could be the basic service level to be provided free to the poor.<sup>107</sup>
  - The FBSan Implementation Strategy provides little guidance on the “sanitation problem” of “illegal settlements” located on private land.<sup>108</sup>
  - Where the cost of providing FBSan to the poor exceeds the subsidy amount available, cross-subsidisation should take place, where wealthier users cover all or some of the cost of providing the service to poor users. The cross-subsidy may be substantial in rich municipalities or it may be unviable in poor or rural municipalities, in which case the ES is the only form of financing available to provide FBSan.<sup>109</sup>
  - The FBSan Implementation Strategy outlines eight targeting options for operating subsidies. The four recommended options are service level targeting; rising block tariffs linked to water consumption; setting sanitation charges based on property value; and targeted credits or subsidies.
  - The four targeting options that are sometimes used, but are not recommended include: setting the sanitation tariff as a proportion of the water bill; incorporating sanitation with property rates; using a charge based on plot size; and geographical or zonal targeting.<sup>110</sup>
  - Key criteria for selecting targeting options are: accuracy of targeting, ease of administration, equity with regard to those who do not get the service free, equity with regard to access to technology option (service level), transparency, ability of users to understand how sanitation tariffs are calculated, and finally, revenue security for the municipality.<sup>111</sup>
  - The FBSan Implementation Strategy contains a table that compares the advantages and disadvantages of the eight FBSan targeting options outlined above.<sup>112</sup>

According to the DHS, the FBSan policy was piloted in 17 municipalities in 2010, and in a further 23 municipalities in 2011.<sup>113</sup>

<sup>106</sup> Ibid 17-18.

<sup>107</sup> Ibid 20.

<sup>108</sup> Ibid 21.

<sup>109</sup> Ibid 25.

<sup>110</sup> Ibid 31. For more on targeting methods in relation to FBSan, see Centre for Applied Legal Studies (CALS), Centre on Housing Rights and Evictions (COHRE) and the Norwegian Centre for Human Rights (NCHR) “Water Services Fault Lines: An Assessment of South Africa’s Water and Sanitation Provision across 15 Municipalities” (October 2008) 38-40.

<sup>111</sup> DWAF “Free Basic Sanitation Implementation Strategy” 32.

<sup>112</sup> Ibid 35-36.

<sup>113</sup> DHS “Briefing to the Parliamentary Portfolio Committee on Human Settlements” Parliamentary Monitoring Group (11 August 2011).

# Chapter 3 | Sanitation and Law: Two Cases

Very few court cases in South Africa have dealt with the right to basic sanitation. However, there is some developing jurisprudence (case law) which will be discussed briefly in this chapter. The first case analysed is the *Nokotyana* case, heard in the Constitutional Court in 2009; and the second is the *Beja* case, heard in the Western Cape High Court in 2010. Both cases deal with access to basic sanitation in informal settlements.

## 3.1. The Nokotyana case: struggle for basic sanitation in Harry Gwala Informal Settlement

Only one case before the Constitutional Court has explicitly included the right of access to basic sanitation. In November 2009, judgment was handed down in the *Nokotyana* case, where the Constitutional Court declined to decide on the ratio of toilets per households or the type of sanitation appropriate for the Harry Gwala informal settlement.<sup>114</sup> The *Nokotyana* case is important as it highlights fault lines around the way the different spheres of government approach (or do not approach) informal settlement upgrading, the lack of access to interim basic services in informal settlements, and the lack of minimum standards for basic sanitation provision.

For many years, a large community living at Harry Gwala informal settlement, located in Ekurhuleni Metropolitan Municipality in the Gauteng province, had attempted to engage with the municipality to have the informal settlement upgraded *in situ*, as opposed to being relocated. They launched an application for services - including "temporary sanitation facilities" – in the South Gauteng High Court; however, their application was dismissed. They appealed directly to the Constitutional Court, specifically around the High Court decision not to force the municipality to provide basic sanitation. As a result of the pressure of litigation, the municipality revisited its budgets and agreed to provide one chemical toilet for every ten informal settlement households (1:10) across its jurisdiction. Shortly before the court hearing on 15 September 2009, national and provincial government offered additional funding to provide one chemical toilet for every

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<sup>114</sup> *Johnson Matotoba Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others* [2009] ZACC 33 (*Nokotyana*).

four households (1:4) in the Harry Gwala informal settlement. However, the municipality declined the offer as it would be done on the basis that "the circumstances of the applicants are exception and unique" and that it would amount to unfair discrimination against other similarly situated communities under its jurisdiction.<sup>115</sup>

The Harry Gwala community argued that expecting ten households to share one communal toilet compromised their dignity, and that one VIP toilet per household (or per two households) to replace their pit latrines, as opposed to the chemical toilets offered by the municipality, was appropriate. They relied on the section 26 right to adequate housing in their application, Chapter 12 (now the EHP) and Chapter 13 (now the UISP) of the National Housing Code, as well as the Water Services Act (including Regulation 2 of the Compulsory National Standards promulgated pursuant to the Act).

## Constitutional Court judgment

On 19 November 2009, Justice van der Westhuizen handed down a unanimous judgment in the case, dismissing the occupiers' appeal. The judgment found that the delay to make a decision around upgrading was unconstitutional, and ordered the MEC for Local Government and Housing to take a final decision on the municipality's application in terms of Chapter 13 of the Housing Code, to upgrade the settlement, within 14 months of the order. This was the time deemed necessary to commission a new feasibility study.<sup>116</sup>

The Constitutional Court found that neither the EHP nor the UISP were applicable to the Harry Gwala informal settlement, because they were "in limbo" and effectively situated in a basic sanitation 'no-man's land'. There has been much criticism of the Constitutional Court's judgment in *Nokotyana*, which, according to Marie Huchzermeyer, appeared to misinterpret Chapter 13 of the Housing Code around the provision of interim services in informal settlements and provided no clarity of the minimum standards for basic sanitation in informal areas.<sup>117</sup> David Bilchitz has written that in *Nokotyana* "the Constitutional Court took an extremely formalistic approach to the issues before it, and avoided making any decision as to whether the normative content of section 26 (of the Constitution) includes basic sanitation. The inescapable conclusion seems to be that for some reason the court was attempting to use all the tools it had to avoid giving definitive content to socio-economic rights."<sup>118</sup>

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<sup>115</sup> *Nokotyana* para 53.

<sup>116</sup> *Nokotyana* para 62(4).

<sup>117</sup> See Huchzermeyer M "A challenge to the state's avoidance to upgrade of the Harry Gwala informal settlement" in *Cities with slums: from informal settlement eradication to a right to the city* (forthcoming, UCT Press).

<sup>118</sup> Bilchitz D "Is the Constitutional Court wasting away the rights of the poor? *Nokotyana v Ekurhuleni Metropolitan Municipality*" (2010) *The South African Law Journal* 127(3) 597.

### 3.2. The Beja case: the ‘open toilets’ saga in Makhaza, Khayelitsha

In April 2011, the Western Cape High Court handed down judgment in the *Beja*<sup>119</sup> case, which provides more clarity on the provision of basic sanitation in informal settlements, as well as on the importance of meaningful consultation with communities in decision-making around basic sanitation provision. The *Beja* case revolves around 51 unenclosed waterborne toilets that were constructed at Makhaza in Khayelitsha, City of Cape Town, as part of the Silvertown Housing Project undertaken in terms of Chapter 13 of the National Housing Code (now the UISP). The City referred to these toilets as “loos with a view”, and argued that an agreement had been reached with the community, whereby the City would provide a toilet on each household/erven (1:1) and residents would provide an enclosure for each toilet.<sup>120</sup> An official complaint was lodged with the SAHRC, which argued that the rights to human dignity and privacy had been violated by the open toilets, along with a number of other rights. The SAHRC investigated the complaint and published a report in June 2010, finding that the City had violated the residents’ right to human dignity.<sup>121</sup> The City attempted to appeal the decision internally, however the appeal was dismissed.

#### High Court judgment

In September 2010, in light in the findings of the SAHRC, an application was filed by the residents in the Western Cape High Court, and the matter was heard on 29 November 2010. After an *in loco* inspection of the site, Judge Erasmus made an interim order for the City to enclose the open toilets. On 29 April 2011, judgment was handed down in the *Beja* case. The judgment discusses a number of issues, particularly: the enforceability of the so-called agreement with the community to provide toilets without enclosures; the proposed ratio of five people to one toilet; and whether or not the City had violated any constitutional rights in not enclosing the toilets.

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<sup>119</sup> *Ntombentsha Beja and Others v Premier of the Western Cape and Others* [2011] ZAWCHC 97 (*Beja*).

<sup>120</sup> In October 2010 the City of Cape Town released its forensic report into the building of unenclosed toilets, after pressure from a number of organisations. City of Cape Town “Forensic investigation into alleged irregular construction of toilets in the Silvertown Housing Project” Case No: FSD167/09-10 (30 July 2010).

<sup>121</sup> South African Human Rights Commission (SAHRC) “Report on the matter of African National Congress Youth League Dullah Omar Region o.b.o Ward 95 Makhaza Residents and City of Cape Town” Case Reference No: WC/2010/0029 (June 2010).

## Enforceability of the agreement with the community

The judgment found that, assuming the City could prove that the agreement with the community existed, there are significant procedural and substantive obstacles to enforcing the agreement. Procedurally, the City only gave the community four days notice of the meeting and the proposed agenda did not include any item about toilets or sanitation.<sup>122</sup> Less than 1 percent (60 people) of the community (6 000 people) attended the meeting.<sup>123</sup> No minutes were taken at the meeting, and the toilets were only installed two years later.<sup>124</sup> The judgment discusses the importance of community participation as outlined in the UISP, as well as the concept of "meaningful engagement." According to Judge Erasmus, the City is bound by the Constitution and the National Housing Code to ensure community participation, and the agreement was lacking in this regard.

Substantively, the City's agreement failed to take into account those with disabilities, the safety and security of the most vulnerable members of the community, as well as the potential increased risk of gender-based violence.<sup>125</sup> The judgment states that the agreement fails to uphold the section 26(2) reasonableness requirement of the Constitution. It further provides minimum guidelines for agreements with communities for the purposes of giving effect to socio-economic rights. To be enforceable, the judgment states that an agreement ought to satisfy four minimum requirements. It must be:

- (i) concluded with duly authorised representatives of the community;
- (ii) concluded at meetings held with adequate notice for those representatives to get a proper mandate from their constituencies;
- (iii) properly minuted and publicised; and
- (iv) preceded by some process of information sharing and where necessary technical support so that the community is properly assisted in concluding such an agreement.<sup>126</sup>

Even if all these requirements are met, an agreement may not circumscribe the rights of a minority within the community, even if the agreement promotes the rights of a majority.<sup>127</sup>

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<sup>122</sup> *Beja* para 80.

<sup>123</sup> *Ibid* para 81.

<sup>124</sup> *Ibid* para 83.

<sup>125</sup> *Ibid* para 102.

<sup>126</sup> *Ibid* para 98.

<sup>127</sup> *Ibid* para 99.

## Proposed ratio of one toilet per five families

The City defended its actions by relying on its provision of communal toilets in addition to the open toilets at Makhaza. The City asserted that the National Housing Code sets a ratio one toilet per five households (1:5) as the minimum required for a housing project, relying on the EHP for this minimum (see section 2.5 above). Judge Erasmus noted that the City wrongly conflated the EHP with non-emergency housing, as provided by the City in the UISP project at Makhaza.<sup>128</sup> This finding was based on submissions made by the DHS in the case.<sup>129</sup>

Moreover, Judge Erasmus noted that the communal toilets were in an unusable condition, and that while the City was pursuing a “laudable” programme, the City’s actions were “not in line with the provisions of section 26” and “no thought was given to the outcome of their decision and how it would affect the lives of the community.”<sup>130</sup> He found that section 73(1)(c) of the Municipal Systems Act requires a municipality to provide “the minimum level of basic services”, which includes the provision of sanitation and toilet services.<sup>131</sup>

Regardless of whether the City built individual or communal toilets, the City must ensure that they provide safety and privacy of the users and be compliant with the fundamental rights guaranteed in the Constitution.<sup>132</sup>

## Violation of constitutional rights

Judge Erasmus found that there was a violation of rights in terms of sections 10 (human dignity), 12 (freedom and security of person), 14 (privacy), 24 (environment), 26 (housing) and 27 (healthcare) of the Constitution. He further found that the provision of unenclosed toilets is unlawful as it is inconsistent with Regulation 2 of the Compulsory National Standards promulgated in terms of the Water Services Act.<sup>133</sup>

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<sup>128</sup> Ibid para 114.

<sup>129</sup> Ibid para 110.

<sup>130</sup> Ibid paras 144-145.

<sup>131</sup> Ibid paras 142-143.

<sup>132</sup> Ibid para 143.

<sup>133</sup> Ibid paras 149-150.

The previous chapters have summarised legislation, policy and case law relevant to basic sanitation in South Africa, touching on various institutional arrangements for basic sanitation service delivery. This chapter provides an overview of the current institutional arrangement for the various aspects of sanitation provision in South Africa, examining government roles and responsibilities more closely and highlighting some of the challenges experienced at present. One of the main obstacles to the effective delivery of basic sanitation in the past has been the lack of clarity on the roles and responsibilities of the various role-players.<sup>134</sup> The roles and responsibilities of the three levels of government were outlined in the 2001 White Paper on Basic Household Sanitation; however, ten years later these roles and responsibilities need to be reviewed and revised.

This chapter examines the roles and responsibilities of local government and provincial government, as well as the five national departments in relation to sanitation provision, which include DWA, DHS, CoGTA, Department of Health and National Treasury.

## 4.1 Local Government

The primary responsibility for providing water and sanitation services in South Africa lies with local government i.e. municipalities, in terms of Part B of Schedule 4 of the Constitution. The Water Services Act and the Municipal Systems Act clearly outline this obligation, while the Municipal Structures Act and the 2003 Strategic Framework for Water Services describe the institutional relationships at local level in more detail.

Whether a metropolitan, district or local municipality, a Water Services Authority (WSA) has executive authority to provide water services within its area of jurisdiction. This power is derived from the Municipal Structures Act or the ministerial authorisations made in terms of this Act. According to the Water Services Act, every WSA must draft a WSDP for its area of jurisdiction. WSAs must also regulate water services provision and water services providers within their areas of jurisdiction, and within the policy and

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<sup>134</sup> DWAF "The Development of a Sanitation Policy and Practice in South Africa 2002: Preliminary Draft Paper" (3 July 2002) 7.

regulatory frameworks set by DWA through the enactment of by-laws and the regulation of contracts.<sup>135</sup>

A Water Services Provider (WSP) is any entity that has a contract with a WSA to assume operational responsibility for providing water services to one or more end users within a specific geographic area. A WSA may perform the functions of a WSP, enter into a written contract with a WSP, or form a joint venture with another water services institution to provide water services to end users. However, a WSA may only enter into a contract with a private sector WSP after it has considered all known public sector WSPs which are willing and able to perform the relevant functions. A WSP, if not the same as the WSA, must be approved by the relevant WSA in order to provide water services and may be local or regional, depending on whether it provides water services to more than one WSA. A WSA may act as a WSP outside its area of jurisdiction if contracted to do so by the WSA for the area in question.

District and metropolitan municipalities have the primary responsibility for health and hygiene education and promotion related to sanitation.<sup>136</sup> In 2004, the National Health Act 61 of 2003 was passed, delineating the responsibility for municipal health services to district and metropolitan municipalities.<sup>137</sup> See section 4.6 below for more.

## 4.2. Provincial Government

According to the 2003 Strategic Framework on Water Services, provincial government, together with national government, has the constitutional responsibility to support and strengthen the capacity of local government in the fulfilment of its functions, and to regulate local government to ensure effective performance of its duties. Provincial government departments (e.g. Public Works) may undertake or oversee the construction of water and sanitation infrastructure on behalf of other departments in the province. Typically this will include setting design standards for water and sanitation facilities in schools, hospitals and clinics.<sup>138</sup>

In terms of housing delivery, which is closely linked to sanitation, provincial housing departments have until present been largely responsible for developing housing projects across the country in terms of the Constitution and the Housing Act. In future, this role will be taken over by municipalities who are accredited to undertake the housing function and administer national housing programmes in terms of section 10 of the Housing Act. See the Explanation of Terms section above for more on accreditation.

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<sup>135</sup> DWAf "Strategic Framework for Water Services" 11.

<sup>136</sup> Ibid 22.

<sup>137</sup> Naidoo N, Chidley C and McNamara A "The Implementation of Hygiene Education Programmes in Informal Settlements" Report to the Water Research Commission (November 2008) 39.

<sup>138</sup> Ibid 21.

## 4.3. Department of Water Affairs (DWA)

*"Water is life, sanitation is dignity."*<sup>139</sup>

The Department of Water Affairs (DWA) – formerly the Department of Water Affairs and Forestry (DWAF) - is the water and sanitation sector leader in South Africa. DWA is the custodian of South Africa's water resources and of the National Water Act and the Water Services Act. Until 2009, DWAF was responsible for coordinating the involvement of national government in the sanitation sector, and the National Sanitation Programme Unit was situated within the department. This function has since been transferred to the DHS, along with all the concomitant officials, funds, tools, legislation etc. See section 4.4 below for more.

DWA is primarily responsible for the formulation and implementation of policy governing the water and sanitation sector. Section 155(7) of the Constitution, as well as section 62(1) of the Water Services Act, mandates national government to monitor the performance of the water sector, and specifically grants DWA the mandate to monitor the performance of all water services institutions, including municipalities who perform the function of water services authorities (WSAs).

According to the 2001 White Paper on Basic Household Sanitation, DWAF had the following responsibilities, together with other national level role-players:

- developing norms and standards for the provision of sanitation;
- providing support to the provinces and municipalities in the planning and implementation of sanitation improvement programmes;
- co-ordinating the development by the municipalities of their WSDPs as a component of their IDP;
- monitoring the outcome of such programmes and maintain a database of sanitation requirements and interventions;
- providing capacity building support to provinces and municipalities in matters relating to sanitation;
- providing financial support to sanitation programmes until such time as these are consolidated into a single DPLG programme; and
- undertaking pilot projects in programmes of low cost sanitation.<sup>140</sup>

Since the National Sanitation Programme Unit was transferred to the DHS in 2009, there has been confusion over functions, and a lack of cooperation and collaboration between departments. It appears that the DHS is responsible for household sanitation infrastructure, while DWA is responsible for bulk reticulation.<sup>141</sup> DWA is also the national water services regulator in the country.

<sup>139</sup> DWAF's slogan contained in the Strategic Framework for Water Services.

<sup>140</sup> DWAF "White Paper on Basic Household Sanitation" 22-23.

<sup>141</sup> DHS "Briefing to the Parliamentary Portfolio Committee on Human Settlements" Parliamentary Monitoring Group (11 August 2011).

## DWA as the national water services regulator

In the past, DWA's mandate did not encompass a role as the national water services regulator, however the National Water Services Regulation Strategy (NWSRS) (January 2010) is aimed to fill this critical regulatory gap by establishing DWA as the national regulator of the water services sector. Section 155(7) of the Constitution gives national government the mandate to regulate water services. This mandate shifts the department's role from water services provider and "player", to that of regulator or "referee", a vision that was advanced in the 2003 Strategic Framework for Water Services. As the national regulator, DWA has legal recourse against non-compliance by WSAs, as well as the ability to hand over water services functions to different departments or spheres of government if there is a major problem. DWA will also be able to intervene in service delivery if there is a gross failure on the part of a WSA and where lives and/or the environment are at risk.

Part E of the National Water Services Regulation Strategy defines the approach to the regulation of sanitation. The following list is a summary of some of the relevant provisions contained in Part E of the NWSRS.

- *Planning:* In terms of planning, the NWSRS describes what should be contained in a WSDP, particularly in relation to sanitation.<sup>142</sup> DWA monitors compliance of WSAs in developing the WSDP.
- *Financing:* In terms of financing, DWA monitors all MIG applications for sanitation projects and is supposed to monitor adherence to MIG conditions in the execution of projects. The NWSRS acknowledges that this is not happening at present.<sup>143</sup> DWA can reject MIG applications which do not comply with policy requirements, but has no power of sanction if project execution is flawed. Further, where WSAs or WSPs are shown to be financially non-viable, DWA has no direct mandate to intervene but can make requests and recommendations. More power needs to be given to DWA to intervene in these situations.<sup>144</sup>
- *Design and construction:* In terms of design and construction, sanitation infrastructure must be consistent with national protocols, regulations and legislation, as well as local water services by-laws. The NWSRS outlines a number of issues relating to sanitation infrastructure including: the problem of temporary facilities being used for longer than desirable; chemical toilets, when required as a last resort, should be used by limited households and be well-maintained; and lack of clarity on how many households per toilets is acceptable in informal settlements. The NWSRS poses the question whether a sub-basic standard should be developed for certain contexts.<sup>145</sup>

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<sup>142</sup> DWA "National Water Services Regulation Strategy" (January 2010) 89.

<sup>143</sup> Ibid 90.

<sup>144</sup> Ibid.

<sup>145</sup> Ibid 91.

- *O/M:* A WSA must keep an up-to-date asset register and asset management plan for sanitation infrastructure. The WSP must maintain all assets proactively e.g. through regular cleaning of sewers and maintenance of pump stations, and respond to breakages and spills timeously. DWA is supposed to monitor that this occurs, and intervene to request remedial action where necessary.<sup>146</sup>
- *Maintenance of on-site sanitation:* The distributed nature of on-site sanitation poses a challenge to the regulator, however DWA should be monitoring trends in the useful lives of VIPs, for example, and alert the responsible authorities when necessary. Often when toilets are built using MIG funding, responsibilities for pit emptying are not specified, which is problematic. Households are in the first instance responsible for monitoring the status of pits or other collection chambers, while the WSA must at least put in place monitoring mechanisms around on-site sanitation systems and environmental conditions. DWA will monitor WSAs to ensure they comply with this monitoring programme.<sup>147</sup>
- *Management of grey water where there is on-site sanitation:* WSAs are responsible for ensuring that national grey water guidelines are adhered to, and DWA monitors this adherence. There is, however, no enforcement mechanism to ensure compliance, and legislative reform around the Compulsory National Standards is needed to address the issue of grey water.<sup>148</sup>
- *Environmental health and education:* In terms of the Health and Hygiene Education Strategy for Water Services, the WSA is responsible for ensuring that health education is implemented in communities whenever a sanitation project is constructed, as well as on an ongoing basis. DWA monitors WSA's adherence in this regard.<sup>149</sup>

## 4.4. Department of Human Settlements (DHS)

The Department of Human Settlements (DHS) – formerly the National Department of Housing (NDoH) - is the custodian of the national Housing Act and the National Housing Programmes contained in the National Housing Code. The 2001 White Paper on Basic Household Sanitation outlined the responsibilities of the NDoH, which included developing national policy, including norms and standards, in respect of housing development, as well as coordinating the application of the NHSS through the housing subsidy system (administered by the provincial housing departments). See section 2.5 above for more on the national housing programmes.

In May 2009, the President made the announcement of the transfer of the sanitation function to the DHS, and the line function for the provision of sanitation in the country has since been transferred from DWA. The DHS now has the mandate to deliver on the

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<sup>146</sup> Ibid 92.

<sup>147</sup> Ibid 93.

<sup>148</sup> Ibid 94.

<sup>149</sup> Ibid 94-95.

National Sanitation Programme, and the National Sanitation Programme Unit has moved to this department. The department oversees the new Rural Household Infrastructure Grant (RHIG) as well as the new Urban Settlements Development Grant (USDG). See section 4.7 below for more on these grants.

In 2010, the Minister of Human Settlements signed the delivery agreement for Outcome 8 of the presidential service delivery outcomes which focuses on ensuring "sustainable human settlements and improved quality of household life." This delivery agreement includes Output 1 – "accelerated delivery of housing opportunities" – which has a Sub Output 1: the "upgrading of 400 000 households in well located informal settlements with access to basic services and secure tenure" by 2014.<sup>150</sup> In terms of Output 1, the Minister has since signed performance agreements with the nine MECs as per the Intergovernmental Relations Framework Act 13 of 2005 (IGR Act). DHS plays a support function to CoGTA for Output 2 in terms of an agreement signed between the Minister of Human Settlements and the Minister of Cooperative Governance and Traditional Affairs.

## 4.5. Department of Cooperative Governance and Traditional Affairs (CoGTA)

The Department of Cooperative Governance and Traditional Affairs (CoGTA) – formerly the Department of Provincial and Local Government (DPLG) - is the custodian of the Municipal Systems Act and the Municipal Structures Act. In 2000, the President announced the intention to provide poor or "indigent" households with free access to basic services. This resulted in a Free Basic Services (FBS) policy being designed to provide indigents with free basic water, electricity, sanitation and refuse removal. The FBS programme is a cross-cutting initiative that requires cooperation between all spheres of government (national, provincial and local). The responsibility for the development of policies for the different services, as well as the communication thereof, lies with the respective sector departments e.g. DWA. CoGTA's role is to coordinate and oversee the implementation of the FBS policy.<sup>151</sup>

According to the 2001 White Paper on Basic Household Sanitation, DPLG (now CoGTA) has primary responsibility for:

- promoting the development by the municipalities of their IDP;
- ensuring that provincial and local governments have the capacity required to fulfil their functions;
- the coordination, together with the National Treasury, of the provincial and local governments ES and MIG grants;

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<sup>150</sup> See DHS "Annexure A: For Outcome 8 Delivery Agreements: Sustainable Human Settlements and Improved Quality of Household Life" (19 September 2010) 14. See The Presidency's Programme of Action website for more on the presidential outcomes: <<http://www.poa.gov.za/>>

<sup>151</sup> Damons C "Government's Free Basic Services Programme" (1 January 2008) 52.

- provision of financial support to sanitation programmes; and
- monitoring of such programmes and maintaining a database.<sup>152</sup>

The Minister of Cooperative Governance and Traditional Affairs is responsible for delivery on Outcome 9 of the presidential outcomes – “to achieve the vision of a responsive, accountable, effective and efficient local government system” – which includes Output 2 which is to “improve access to basic services.”<sup>153</sup> This is the primary responsibility of CoGTA, with DHS playing a support role. The target of Output 2 is universal access to water and sanitation by 2014, which means an increase from 92 percent to 100 percent for water, and from 69 percent to 100 percent for sanitation.<sup>154</sup>

## 4.6. Department of Health (DoH)

According to the 2001 White Paper on Basic Household Sanitation, the national Department of Health (DOH), in cooperation with the provinces, takes primary responsibility for the following:

- coordinating information relating to public health (this includes media liaison and communication);
- coordinating the planning and interventions aimed at influencing the health and hygiene behaviour of communities and at creating a demand for sanitation services through health and hygiene awareness and education programmes;
- standardising existing and preparing new norms and standards relating to health aspects of sanitation and water supply;
- preparing educational curricula relating to health and sanitation;
- supporting municipalities in employing sufficient and appropriately skilled Environmental Health Practitioners (EHPs);
- providing development-orientated training and other capacity building interventions to EHPs;
- monitoring compliance with health legislation, regulations and norms and standards;
- coordinating interventions when a crisis poses a regional or national health risk (such as a cholera epidemic);
- providing a systematic approach to the provision of sanitation facilities in clinics, hospitals and other health installations.<sup>155</sup>

The 2005 National Health and Hygiene Education Strategy outlines a comprehensive approach to the delivery of effective and sustainable health and hygiene education. In terms of this Strategy, DoH is the custodian for health and hygiene education in South

<sup>152</sup> DWAF “White Paper on Basic Household Sanitation” 23.

<sup>153</sup> CoGTA “Delivery Agreement for Outcome 9: A responsive, accountable, effective and efficient local government system” (30 September 2010).

<sup>154</sup> Ibid 12.

<sup>155</sup> DWAF “White Paper on Basic Household Sanitation” 24.

Africa, with WSAs and municipal health services responsible for the delivery of health and hygiene education.<sup>156</sup>

## Environmental health and hygiene promotion in South Africa

Environmental health comprises aspects of human health, including quality of life, that are determined by chemical, physical, biological, social and psychosocial factors in the environment. There has been some debate over the years about where the environmental health function lies in South Africa; however, since 2002 this confusion has been clarified and environmental health is a municipal function, with the responsibility assigned to district municipalities or metropolitan municipalities and overseen by the DoH.<sup>157</sup>

In terms of Regulation 3 of the recently amended national Regulations Defining the Scope of the Profession of Environmental Health (General Notice 32334 of 26 July 2009), EHPs are responsible for *inter alia*:

- (d) *sampling and analysing any waste or waste product such as sewage or refuse;*
- (e) *investigating and inspecting any activity relating to the waste stream or any product resulting therefrom;*
- (f) *advocating proper sanitation;*
- (h) *ensuring safe usage of treated sewage sludge and ensuring that reclaimed waste is safe for health;*
- (i) *ensuring waste management including auditing of waste management systems and adherence to the 'cradle-to-grave' approach.*

EHPs are assigned the responsibility for health and hygiene promotion and education, which has been referred to throughout this guide and which is a fundamental component of basic sanitation. The current institutional arrangement around this aspect of sanitation poses problems when, in some areas, the responsibilities for sanitation and environmental health lie within different municipalities, resulting in the need for close cooperation and collaboration between EHPs (in district municipal health units) and WSAs in local municipalities. District municipalities can delegate the sanitation-related element of the environmental health function to the local municipality.<sup>158</sup>

Some of the challenges around health and hygiene education are outlined in section 5.8 below.

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<sup>156</sup> Naidoo *et al* "The Implementation of Hygiene Education Programmes in Informal Settlements" 42.

<sup>157</sup> DWAF "Free Basic Sanitation Implementation Strategy" 16.

<sup>158</sup> *Ibid.*

## 4.7. National Treasury

The responsibility of National Treasury in terms of sanitation relates to the funding of the different departments and spheres of government. According to the 2001 White Paper on Basic Household Sanitation, National Treasury takes primary responsibility for the following:

- funding arrangements such as the allocation of the ES and the various grants to provinces and municipalities;
- monitoring of the financial policies and performance of national departments, provinces and municipalities; and
- development of financial policies, norms and standards and guidelines.

There is an inherent tension between national policy and delivery targets, and policy implementation and the achievement of these targets in the context of decentralised service delivery. National government can increase budget support to local government but does not control local service delivery choices, which are subject to local democratic processes within a national legislative framework e.g. ES is an unconditional operating grant.<sup>159</sup>

### Funding for sanitation in South Africa

Previously there have been three main sources of funding for the provision of basic sanitation in South Africa: the Municipal Infrastructure Grant (MIG) for capital costs of infrastructure development,<sup>160</sup> the Equitable Share (ES) for O/M costs,<sup>161</sup> as well as internal revenue generated by municipalities through tariff cross-subsidisation etc. The MIG and ES are described in the Explanation of Terms section at the beginning of this guide.

Recently, National Treasury announced that two new grants would be administered through the DHS. These are the Urban Settlements Development Grant (USDG) and the Rural Household Infrastructure Grant (RHIG).<sup>162</sup>

<sup>159</sup> DWA "Water Supply and Sanitation in South Africa: Turning Finance into Services for 2015 and Beyond: An AMCOW Country Status Overview" (30 July 2010) 14.

<sup>160</sup> For the formula used to calculate the MIG, see Still *et al* "Basic Sanitation Services in South Africa" 110. The MIG was first introduced in the 2005/2006 financial year, and each year the Division of Revenue Act (DORA) sets out the allocation of MIG. In the past, DWA has used cost guidelines contained in its document entitled Guidelines for the Costing of Household Sanitation Projects (2007) and, as of 2009, cost ceilings allowed for basic sanitation ranged from R 5000 (for Ventilated Improved Pit latrines) to R15 000 (for waterborne sanitation).

<sup>161</sup> For the basic formula to calculate the ES, see Still *et al* "Basic Sanitation Services in South Africa" 112.

<sup>162</sup> National Treasury "Presentation to the Parliamentary Portfolio Committee on Human Settlements on the Urban Settlements Development Grant and the Rural Household Infrastructure Grant" (23 March 2011).

The Urban Settlements Development Grant (USDG) is aimed at assisting metropolitan municipalities (cities) to plan in a more integrated manner, with regard to the provision of bulk water and sanitation services to housing developments in well-located areas near social and economic facilities and opportunities. The grant is intended to integrate the release of well-located land to the function of planning and funding of the built environment, and aims to address inequality and poverty alleviation as well promote economic growth. The grant is aligned to Outcome 8 of the presidential service delivery outcomes, as described above, and is linked to the target of upgrading 400 000 households in well-located informal settlements with tenure security and basic services by 2014. The USDG will augment and support grant allocations from provinces to municipalities under the Human Settlements Development Grant.<sup>163</sup> The aim of the USDG is to "create flexibility in the way cities could plan in order to restructure the city space."<sup>164</sup> Metropolitan municipalities have to sign an Intergovernmental Relations Protocol with the DHS, and develop Built Environment Performance Plans (BEPPs) in order to receive the USDG.

The Rural Household Infrastructure Grant (RHIG) aims to address the backlogs in water supply and sanitation in rural areas. In response to the prioritisation of rural development by government, National Treasury had established the new grant; however it had not been spent because of confusion in the wake of the sanitation function moving to the DHS from DWA. The RHIG is administered, managed and implemented by the DHS for the provision of on-site sanitation and water facilities (where necessary) to rural communities. The RHIG aims to address the backlogs in water and sanitation services within the next three years.<sup>165</sup>

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<sup>163</sup> Ibid.

<sup>164</sup> Ibid.

<sup>165</sup> Ibid.

This guide has raised a number of fault lines around basic sanitation policy and provision in South Africa. This chapter summarises these fault lines and challenges, referring to other research and studies conducted on water and sanitation services in South Africa.

The fault lines are: delivery targets, data and statistics; policy-related gaps and challenges; problems with institutional arrangements at national level; systemic failures at local government level; infrastructural and technical problems; problems with the targeting of FBSan to poor households; housing delivery and informal settlements; and lack of health and hygiene education.

## 5.1. Delivery targets, data and statistics

In South Africa there has been a focus on constructing toilets and meeting the political imperative to deliver on targets, regardless of the actual *outcome* or *impact* of the intervention (and often at the expense of community consultation and participation). This is evident by the number of unacceptable "toilets-in-the *veld*" projects built across the country which are not being used by people. According to the 2009 Water Dialogues-South Africa report, there is too much focus on targets and numbers at the expense of infrastructure that really works. There is not enough focus on *quality* and *access* or on O/M i.e. *sustainability*.<sup>166</sup> The 2011 Infrastructure Report Card produced by the South African Institution of Civil Engineering (SAICE), shows that access to sanitation has reached 67 percent of households in South Africa. Since the 2006 SAICE Report Card was published, 3.3 million additional households gained access to basic sanitation. However, according to the report, while these statistics reveal the rapidity of sanitation access, users are "often not receiving the full benefit because of high failure rates."<sup>167</sup>

Linked to this is the fact that available statistics and data on sanitation provision are highly unreliable, which means that accurate, up-to-date information on basic services backlogs, working infrastructure and finances at local government level is largely non-

<sup>166</sup> Water Dialogues-South Africa "Straight talk to Strengthen Delivery in the Water Services Sector" WD-SA Synthesis Report (August 2009) 2.

<sup>167</sup> South African Institution of Civil Engineering (SAICE) "Infrastructure Report Card for South Africa 2011" (2011) 16.

existent. This affects the ability of all spheres of government to plan effectively. Thus, while official statistics from Stats SA, DHS, DWA and CoGTA are available, these do not provide an accurate or adequate picture of the state of basic services delivery in South Africa.<sup>168</sup> Municipalities require more support around data collection and analysis in order to plan effectively for service delivery, often in the context of increasing migration, urbanisation and population growth to cities and towns.

## 5.2. Policy-related gaps and challenges

According to the NWSRS, "the White Paper on Basic Household Sanitation is inconsistent with the more recent Strategic Framework for Water Services. The national sanitation policy is in urgent need of revision."<sup>169</sup> While sanitation policy and implementation guidelines are outlined in various government documents, in practice:

*approaches not only vary widely between municipalities and provinces, but in many municipalities knowledge of policy is almost non-existent. In these cases, technical managers base their implementation approaches on standard civil engineering models, which are highly inappropriate for on-site household sanitation.<sup>170</sup>*

In addition to lack of knowledge of policy, there are particular policy gaps in relation to those living in dense urban informal settlements (particularly those situated on private land) and marginalised groups i.e. people with physical disabilities, people living with HIV/AIDS, child-headed households etc. There is a lack of compulsory national standards for basic sanitation service levels that meet the constitutional right to basic sanitation for all.<sup>171</sup> In relation to sanitation in informal settlements, there is a range of provision being pursued throughout the country – VIPs, chemical toilets, bucket system, Mobisan approach (communal sanitation in containers)<sup>172</sup>, DEWATS etc – and there is a need for more guidance to municipalities on the cost and efficacy of these approaches, and preconditions for success. In terms of the FBSan policy, a worrying finding from a recent WRC study is that "FBSan services were benefitting the 'haves' while the 'have-nots' continued to live in squalid conditions with poor or no access to adequate sanitation

<sup>168</sup> SAHRC "7<sup>th</sup> Report on Economic and Social Rights: Millennium Development Goals and the Progressive Realisation of Economic and Social Rights in South Africa 2006–2009" (2011) 45.

<sup>169</sup> DWA "National Water Services Regulation Strategy" 96.

<sup>170</sup> Rall M "The MIG Programme, Sanitation Targets and Sustainability" (December 2006) 112.

<sup>171</sup> Mjoli "Review of Sanitation Policy and Practice in South Africa" 42.

<sup>172</sup> For more on the Mobisan pilot project in Cape Town, see Naranjo A et al "The MobiSan approach: informal settlements of Cape Town, South Africa" (2010) *Water Science and Technology* 61(12) 3078-3090.

services.<sup>173</sup> The current revision of the 2001 White Paper on Basic Household Sanitation by the DHS is an opportunity to review, revise and align sanitation policy to the realities faced by municipalities in South Africa.

### 5.3. Problems with institutional arrangements at national level

There is currently a lack of clarity on the national institutional framework around basic sanitation, particularly as the DHS took over the National Sanitation Programme from DWA in 2009. This has resulted in a lack of regulation at the national level.<sup>174</sup> The challenges around institutional alignment and collaboration have been acknowledged by high level politicians and were recently outlined in the delivery agreement for Outcome 9 of the presidential outcomes (see section 4.5 above).

The delivery agreement describes how DHS and DWA are responsible for developing and monitoring compliance with regard to provision of sanitation services, "but are not structured adequately at present to provide sufficient levels of support."<sup>175</sup> Since the sanitation function and programme was transferred from DWA to the DHS in 2009, along with all the concomitant officials, funds and tools, there have been numerous problems and the process has neither been smooth, nor particularly effective. It remains unclear which functions DWA retains and how the two national departments coordinate their efforts. In the meantime, there is very little national regulation of local water services provision, particularly around basic sanitation.

According to the DHS the transfer process took over 10 months to complete and:

*delays in the movement posed serious challenges to the functioning of National Sanitation Programme as neither the Department of Water Affairs nor Department of Human Settlements was willing to accept responsibility for the National Sanitation Programme during the preparatory stage of the move.<sup>176</sup>*

In August 2010, the DHS reported numerous problems with the institutional arrangement of the National Sanitation Programme, including lack of personnel, lack of office space, lack of operational budget and a shortfall of R61 million.<sup>177</sup> The department stated that its biggest challenge was the fact that it is a policy-oriented department, while the

<sup>173</sup> Mjoli et al "Towards the Realization of Free Basic Sanitation" vii.

<sup>174</sup> Paton C "It's still the pits" *Financial Mail* (19 August 2010).

<sup>175</sup> CoGTA "Delivery Agreement for Outcome 9" 26.

<sup>176</sup> DHS "National Sanitation Programme: Presentation to Portfolio Committee" (11 August 2010).

<sup>177</sup> Ibid.

National Sanitation Programme's focus is on implementation. This has "seriously slowed down the implementation of National Sanitation Programme."<sup>178</sup>

In a June 2011 briefing to the Parliamentary Portfolio Committee on Human Settlements, the Minister of Human Settlements admitted challenges with the transfer process, and with the fact that the provision of water fell under a different department entirely. In August 2011, a briefing by the National Sanitation Programme Unit identified "ineffective collaboration at all government levels" as a problem, highlighting the need to revive the NSTT which has experienced challenges.<sup>179</sup> These institutional challenges at national level must be resolved as a matter of urgency, in order to ensure optimum guidance and support to local government around basic sanitation provision.

## 5.4. Systemic failures at local government level

Local government is responsible for water services in South Africa, including sanitation. However, there are myriad challenges at the local government level, including the following:

- failure of many municipalities to implement FBW and FBSan policies, and to ensure access to basic services for poor households;<sup>180</sup>
- inadequate national financing to address sanitation backlogs, particularly in small towns and rural areas;
- municipal tariff structures generally not well developed outside metropolitan municipalities;
- shortage of critical skills and competencies in most municipalities, especially rural and poor municipalities;
- lack of strong leadership and management at the local level;
- involvement of political representatives/politicians in the management of service provision, and the need to limit these inappropriate political interventions in service delivery,<sup>181</sup>
- financial viability deteriorating in many municipalities due to poor revenue collection and management, coupled with the inability of those living in poverty to pay for services and the challenges of providing free basic services sustainably in this context.<sup>182</sup>

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<sup>178</sup> Ibid.

<sup>179</sup> DHS "Annexure A: Programme Delivery and Actions by the National Sanitation Programme Unit" Briefing document presented to the Parliamentary Portfolio Committee on Human Settlements (11 August 2011) 19.

<sup>180</sup> Across the country FBW and FBSan are provided in an ad hoc manner by municipalities, with widely varying compliance with national standards. Some municipalities do not supply FBS at all, while some supplied only the minimum FBW amount without any FBSan. There is a lack of national monitoring or enforcement of the implementation of FBS policies at the local level. See CALS, COHRE and NCHR "Water Services Fault Lines" 3.

<sup>181</sup> Water Dialogues-South Africa "Straight talk to Strengthen Delivery in the Water Services Sector" 6. Ibid 2-3.

In general terms, municipalities are failing to perform, and this affects water and sanitation delivery. This failure is evident by increasing community protests throughout the country as well as by the recent municipal audit reports published by the Auditor-General. Of the 237 municipalities and 49 municipal entities audited in South Africa, only seven municipalities and 10 municipal entities received clean audit reports.<sup>183</sup>

In terms of the provision of water and sanitation specifically, the Outcome 9 delivery agreement highlights the need for an improved understanding of integrated planning for service delivery at the local level, using the example of the provision of water and sanitation as interrelated processes that must be planned in parallel. The delivery agreement states that:

*the implementation of sanitation projects should not happen randomly as in cases where reticulation work is undertaken without bulk infrastructure. Whilst water management systems are in place within delegated district and local municipalities (i.e. WSAs and WSPs), the current arrangements are often, in practice, causing constraints in the provision of water infrastructure and services due to poor overall functionality and lack of technical readiness and skills in this field.*<sup>184</sup>

The delivery agreement goes on to state that a "thorough evaluation of existing institutional arrangements in the water sector with regard to WSAs and WSPs must be undertaken to improve the provision of water and sanitation services" and that "the powers and functions of WSAs and WSPs and the management thereof, will need to be reviewed".<sup>185</sup> Further, the delivery agreement states that the structural arrangements for support, with respect to the delivery of services at local level, need to be challenged. The "disjuncture between the policy and regulatory environment and execution at municipal level requires intervention to close the gap".<sup>186</sup>

Indeed, it has been shown that the distinction between the WSA and the WSP in non-urban areas is largely theoretical, and in reality the distinction is generally not made or is not working in practice, with implications for regulation at the local level. According to a comprehensive report compiled by Water Dialogues-South Africa, since the regulatory strategy at the local level is based on the distinction between WSAs and WSPs, which does not hold in practice, it is flawed and most likely unworkable in its current form.<sup>187</sup>

<sup>183</sup> Downing R "230 municipalities fail clean audit report" *Business Day* (29 June 2011).

<sup>184</sup> CoGTA "Delivery Agreement for Outcome 9" 25.

<sup>185</sup> Ibid 27.

<sup>186</sup> Ibid.

<sup>187</sup> Water Dialogues-South Africa "Straight talk to Strengthen Delivery in the Water Services Sector" 5.

## 5.5. Infrastructural and technical problems

A finding from a 2009 WRC report on basic sanitation services is that across case studies of sanitation types in different provinces in South Africa, "there was no single type of sanitation that fared uniformly well".<sup>188</sup> There are a number of problems around sanitation infrastructure and technology options:

- sanitation facilities not compliant with appropriate technical design standards and are built in a manner susceptible to quick failure and extreme maintenance difficulties;<sup>189</sup>
- lack of clarity with regard to sanitation standards and appropriate technical options at the local level;<sup>190</sup>
- lack of adequate sanitation provision in informal settlements, particularly newer settlements and those not in the pipeline to be upgraded in terms of the UISP;
- confusion over differing technical options for urban, peri-urban and rural areas;
- lack of bottom-up planning, proper consultation and participation by communities as well as consistent lack of communication on why and how to use facilities, which compounds maintenance problems;<sup>191</sup>
- lack of buy-in and use of infrastructure from communities, especially with regard to the use of alternative technologies;
- neglect of health and hygiene education, which negates the impact of sanitation provision on improved health outcomes;<sup>192</sup>
- lack of privacy and security issues at sanitation facilities, which causes people not to use them;<sup>193</sup>
- poor or non-existent sanitation facilities in many rural clinics and schools throughout the country,<sup>194</sup> and
- insufficient O/M of existing infrastructure, particularly around the emptying of VIPs in rural areas;
- lack of clarity around responsibilities for the emptying of full VIPS.

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<sup>188</sup> Still et al "Basic Sanitation Services in South Africa" v.

<sup>189</sup> SAICE "Infrastructure Report Card for South Africa 2011" 16.

<sup>190</sup> For a comprehensive overview of sanitation technology options in South Africa, complete with detailed descriptions and diagrams, see DWAf "Sanitation Technology Options" (2002).

<sup>191</sup> SAICE "Infrastructure Report Card for South Africa 2011" 16.

<sup>192</sup> Many sanitation facilities lack hand washing facilities. This simple, avoidable problem threatens all hygiene improvements and restrictions of disease achieved through proper sanitation. It has been suggested that hand washing alone acts as a quasi-vaccine, cutting diarrhoeal deaths almost in half. Ibid.

<sup>193</sup> Ibid.

<sup>194</sup> According to the National Education Infrastructure Management System (NEIMS), produced by the government in 2009, of the 24 460 public ordinary schools: 2 444 have no water supply, while a further 2 563 have unreliable supply; 7 847 have municipal flush toilets, while 970 still do not have any ablution facilities and 11 231 still use pit latrine toilets. For more on DWA's efforts to provide water and sanitation services to rural schools and clinics, see DWA "Schools and Clinics Water and Sanitation Programme" (1 January 2010).

Linked to basic sanitation provision is the maintenance of waste water infrastructure, particularly municipal treatment plants. According to the 2011 Infrastructure Report Card produced by SAICE, waste water infrastructure - which comprises 850 municipal treatment plants throughout South Africa - is in "urgent need of maintenance and replacement" and there is a worrying lack of wastewater monitoring in many plants due to lack of trained personnel.<sup>195</sup> According to DWA's 2011 Green Drop assessment report on the performance of waste water treatment and management in South Africa, of the 821 systems assessed in 2011 only 40 received Green Drop certification from DWA. Also extremely worrying is that 20 of the previous recipients of the Green Drop certificates in 2010 lost their certification status in 2011.<sup>196</sup>

## 5.6. Problems with the targeting of FBSan to poor households

Most municipalities target FBS (including FBSan, when it is provided) through the indigent policy and indigent register which is administered by the municipality. There are, however, a number of challenges encountered by municipalities in formulating indigent policies and managing indigent registers, including the following:

- problems with defining the poor and the narrow definition of 'indigent' e.g. some municipalities use income equal or less than two state pensions or social grants per household per month as the qualifying criteria for indigent, while others use property/land value to determine if a household qualifies;
- ineffectiveness of targeting to reach those in the most need, as evidenced by the chronic under-representation of those who actually qualify on the indigent register;
- onerous and stigmatising process to apply as an indigent;
- increased administrative burdens on municipalities.<sup>197</sup>

Despite the existence of a national FBSan policy and an FBSan Implementation Strategy, many municipalities have not implemented FBSan, and "there is no common approach to the interpretation of free basic sanitation service policy by different municipalities."<sup>198</sup> Rollout of this policy needs to be fast-tracked in municipalities. In terms of the provision of additional free water for poor households connected to waterborne sanitation, the FBSan Implementation Strategy recommends 15 litres per person per day for flushing;

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<sup>195</sup> SAICE "Infrastructure Report Card for South Africa 2011" 16.

<sup>196</sup> "Statement by the Minister of Water and Environmental Affairs Mrs. Edna Molewa at the release of the Blue Drop and Green Drop assessment reports" (30 June 2011). See also Waldner M "Dirty water for many parts of SA" *City Press* (27 March 2011).

<sup>197</sup> CALS, COHRE and NCHR "Water Services Fault Lines" 37.

<sup>198</sup> Mjoli *et al* "Towards the Realization of Free Basic Sanitation" 17.

however, given that one flush of the toilet consumes approximately 13 litres of water, the suggested allocation for waterborne sanitation is insufficient to meet the basic needs of large households. At present, the most vulnerable and marginalised in society – households living in poor rural areas and in dense urban informal settlements – are not enjoying access to basic sanitation services as a human right because FBSan only benefits households already connected to the sewer networks.<sup>199</sup>

## 5.7. Housing delivery and informal settlements

The national government has linked basic sanitation rollout to its housing delivery programme through its National Housing Subsidy Scheme (NHSS), which effectively means that the same long delays experienced in housing delivery are experienced in people's access to improved sanitation, and people are forced to wait to be allocated a housing subsidy (and a house) before their access to sanitation is improved. For many South Africans this has been a long wait indeed, with still no house being allocated or any hope on the horizon for the elusive "RDP house". One reason for delays in housing development, have been the myriad problems around inter- and intra-governmental relations relating to human settlements developments throughout the country. Housing projects have been stalled because of a lack of an integrated, planned and co-ordinated approach. According to a statement by the Minister of Human Settlements in 2010, the main risk to meeting housing delivery targets in South Africa is the challenge of providing bulk services infrastructure to developments, like the "construction of new water treatment, and sewage processes plants, including pipelines to bring fresh and clean water to the people."<sup>200</sup>

Providing adequate sanitation in growing urban informal settlements poses a specific sanitation challenge. According to a recent report by DWA:

 Arguably, this is the single greatest challenge facing the water and sanitation sector in South Africa. The latest data shows that between one and two million households live in informal settlements in South Africa. High settlement densities, insecurity of tenure and complex community dynamics make planning and implementing standard infrastructure solutions difficult, if not impossible. The willingness to explore new delivery models, together with careful planning, reflective learning and engagement with local communities are needed.<sup>201</sup> 

<sup>199</sup> Mjoli and Bhagwan "Turning Sanitation Policy into Practice" 5.

<sup>200</sup> "Sexwale concerned by rate of delivery" *IOL* (25 November 2010).

<sup>201</sup> DWA "Water Supply and Sanitation in South Africa" (30 July 2010) 25.

The *Nokotyana* and *Beja* cases outlined in chapter 3 highlight the challenges faced by those living in informal settlements, as well as by local government to ensure access to basic sanitation in informal areas. The provision of interim basic services in informal settlements is critical, and services should be provided regardless of whether there is a long-term plan for upgrading the settlement or not, or whether the settlement is situated on state- or privately-owned land. Ideally, *in situ* upgrading in terms of the UISP should be pursued, unless this is not possible due to exceptional circumstances.

## 5.8. Lack of health and hygiene education

There are problems around health and hygiene education in South Africa, due in part to current gaps in policy and institutional confusion over the roles and responsibilities between WSAs and municipal environmental health services.<sup>202</sup> According to a WRC report, "ongoing hygiene education and awareness appeared to be falling between the cracks, with both environmental health department and water services department assuming that the other was responsible for this component of a basic sanitation service."<sup>203</sup> While most municipalities provide hygiene awareness programmes as a once-off intervention during the implementation of basic sanitation infrastructure, they do not include ongoing health and hygiene education as a component of FBSan.

Clarifying roles and responsibilities around ongoing health and hygiene education is critical to ensuring that attention is given to this area. It has been shown that ongoing health promotion and hygiene education can have a positive impact on environmental integrity, lower health costs and reduce health risks, particularly for people living with HIV/AIDS, and can also reduce O/M costs and ensure long-term sustainability.<sup>204</sup>

<sup>202</sup> Naidoo N and Chidley C "Guideline for the Implementation of Sanitation and Hygiene Education Programmes in Informal Settlements" Report to Water Research Commission (March 2009) 1.

<sup>203</sup> Mjoli *et al* "Towards the Realization of Free Basic Sanitation" v.

<sup>204</sup> Naidoo and Chidley "Guideline for the Implementation of Sanitation and Hygiene Education Programmes in Informal Settlements" 5; 28.

Access to adequate sanitation is fundamental to personal dignity and security, social and psychological well-being, public health, poverty reduction, gender equality, economic development and environmental sustainability. This guide has outlined key legislation, policy, strategy and case law related to basic sanitation in South Africa, as well as the roles and responsibilities for different spheres of government. It has also highlighted some of the current challenges and fault lines around the provision of sanitation.

The Constitution, Water Services Act and Municipal Systems Act set out the local government obligations to provide basic municipal services, with a particular focus the basic needs of the community and the promotion of social and economic development of the community. Section 73 of the Municipal Services Act explicitly refers to a "right to basic municipal services" and, while the Constitution does not contain an explicit right to basic sanitation, this right has been inferred from a number of other constitutional rights including the right of access to adequate housing, the right to human dignity and the right to a safe environment. National water and sanitation policy repeatedly refer to a "right to basic sanitation", most often linked to the latter constitutional right. There is, however, still confusion at the local (and national) level regarding access to basic sanitation as a human right, and current sanitation legislation or policy does not provide guidance on this.

Institutional and financial challenges at the local government level, coupled with a lack of political will, are causes for concern, and contribute to continued compromised access to sanitation by millions of people living in South Africa. This lack of access is particularly acute in informal settlements, inner city buildings, townships in rural areas, and on farms. Women, the disabled and people living with HIV/AIDS are most affected by a lack of access to adequate basic sanitation. The latter are particularly prone to diseases like diarrhoea, and require ease of access to sanitation facilities, as well as a continuous supply of safe water. Lack of adequate sanitation at schools and clinics (together with ongoing O/M) across the country is cause for concern. For households living with waterborne toilets, access to sanitation requires a continuous supply of water for flushing. Without access to sufficient water that is affordable, households can have extremely compromised access to sanitation. The effectiveness of the indigent policy and register as the mechanism for targeting FBS, including FBSan, is questionable and alternative targeting methods need to be explored.

At present there is a worrying absence of regulation around sanitation at all levels of government. While DWA is the national regulator for the water and sanitation sector, the sanitation function has recently been moved from this department to the DHS, causing institutional confusion over roles and responsibilities. These departments, together with CoGTA, need to work closely together to ensure that the issue of sanitation provision and regulation is prioritised. The current review of the 2001 White Paper on Basic Household Sanitation is a welcome endeavour, and will hopefully produce a simple, accessible policy framework as well as instructional guidelines that are relevant to municipalities and their current political, policy-related, financial, institutional and technical challenges.

Yet, much needs to be done to ensure universal access to decent, affordable and safe sanitation across South Africa.

## Government Documents, Reports and Statements

- City of Cape Town "Forensic investigation into alleged irregular construction of toilets in the Silvertown Housing Project" Case No: FSD167/09-10 (30 July 2010)  
<<http://www.politicsweb.co.za/politicsweb/en/page71639?oid=207397&sn=Detail&pid=71639>>
- CoGTA "Delivery Agreement for Outcome 9: A responsive, accountable, effective and efficient local government system" (30 September 2010)  
<<http://www.info.gov.za/view/DownloadFileAction?id=134079>>
- DEA "National Policy for the Provision of Basic Refuse Removal Services to Indigent Households" (October 2010)  
<<http://www.sawic.org.za/documents/807.pdf>>
- DHS "Subsidy Quantum – Incremental Interventions" Part 3 Volume 4 of the National Housing Code (2009)  
<<http://www.dhs.gov.za/Content/The%20Housing%20Code%202009/CD%20purposes%20=%20Code,%202009/4%20Incremental%20interventions/6%20Volume%204%20Subsidy%20Quantum%20-%20Incremental%20Interventions.pdf>>
- DHS "Technical and General Guidelines" Part A of Part 3 Volume 2 of the National Housing Code (2009)  
<<http://www.dhs.gov.za/Content/The%20Housing%20Code%202009/CD%20purposes%20=%20Code,%202009/2%20Technical%20&%20General%20Guidelines/1%20Vol%202%20Part%203%20Technical%20and%20General%20Guidelines.pdf>>
- DHS "Annexure A: For Outcome 8 Delivery Agreements: Sustainable Human Settlements and Improved Quality of Household Life" (19 September 2010)  
<<http://www.info.gov.za/view/DownloadFileAction?id=135746>>
- DHS "Media statement issued by the Department of Human Settlements 14 July 2011 on the toilet saga" (14 July 2011)  
<<http://www.dhs.gov.za/Content/Media%20Desk/2011%20Media%20Statements/14%20July%202011.htm>>
- DHS "Revision of the White Paper on Basic Household Sanitation, 2001" National Sanitation Policy: Conceptual Framework, Draft Version (March 2011)  
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This guide aims to provide a simplified yet comprehensive overview of legislation, policy and practice relating to basic sanitation in South Africa. The guide focuses on access to household sanitation by poor communities. While some progress has been made since 1994 in terms of the provision of basic sanitation, challenges remain in the formulation and implementation of policy by municipalities. The guide does not claim to be an exhaustive analysis of legislation, policy and practice. It outlines the legislative and policy framework, relevant case law, government roles and responsibilities, and highlights key challenges faced by various departments and communities. It hopefully provides a tool for those working on sanitation issues in South Africa e.g. social movements, community-based organisations (CBOs), non-governmental organisations (NGOs), lawyers, development practitioners, planners, government officials, academics and scholars.

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