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REGISTRATION NUMBER: 2012/064213/08
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COMPLAINT

A INTRODUCTION

1. The Organisation Undoing Tax Abuse (“OUTA”) is a proudly South African non-profit organisation acting on behalf of the public’s interest as well as the interest of its members.¹ Furthermore, OUTA is passionate about improving the prosperity of the country the wellbeing of its citizens.
2. OUTA submits that a widespread violation of the public’s constitutional right to access to clean and sufficient water as contemplated in section 27(1)(b) of the Constitution had taken place due to the Department of Water and Sanitation’s (“DWS”) failure to comply with the Water Services

¹ Section 38 of the Constitution of the Republic of South Africa.

Act² and the National Water Act,³ which gives effect to this significant constitutional provision. The prolonged inaction of the department amounts to a constitutional violation on a continuous basis, utterly lacking in transparency and accountability.

3. In interpreting the right of access to sufficient water, consideration must be given to international law. The Constitution provides that international law must be considered in interpreting the rights contained in the Bill of Rights⁶.
4. Access to water implies that water should be both economically and physically accessible. Physical accessibility means that water should be available within a distance accessible to everyone including vulnerable individuals such as children, elderly persons and persons with disabilities.
5. There should be adequate infrastructure and the effective maintenance of facilities and equipment, and equitable access even for under-serviced areas. Economic access refers to the financial costs associated with accessing water.
6. The right of access to sufficient water in terms of section 27(2) of the Constitution should be understood to mean that the Government of

² Act 108 of 1997.

³ Act 36 of 1998.

⁶ Section 39(1)(b) of the Constitution.

South Africa is not obliged to provide water freely, but is under an obligation to create mechanisms that enable people to have access to sufficient water. In the event of resource constraints, which limit the ability of the Government of South Africa to fulfil its obligations, the Government of South Africa is still obliged to provide a plan of action that demonstrates that the full realisation of the right shall be achieved over time. Furthermore, available resources should be utilised effectively so as to give maximum results, with priority being given to assuring to everyone, the satisfaction of the most basic requirements as well as the provision of essential services, including access to sufficient water.

7. Sufficient water refers to the quality and quantity required to satisfy basic domestic needs. The quantity refers to the minimum amount of water required to meet basic needs, and the quality refers to the minimum standards acceptable to consumers in terms of health related characteristics. Water quality implies that it should be free from adverse substances such as toxins, bacteria and other harmful substances. This is important because safe drinking water is an essential part of the human diet and is necessary for survival, and should therefore be within acceptable standards with regards to potability (taste, odour and appearance). It should be safe enough for food preparation, bathing, and for washing laundry⁷.

⁷ 3rd Economic and Social Rights Report by the South African Human Rights Commission

8. The quantity of water refers to the cartage distance, availability, assurance of supply, and upgradability of services. Availability refers to the flow rate of water from the outlet, which should be available on a regular basis. Assurance of supply refers to the security in the supply, through regular maintenance of the system and ensuring clean water supply, 98% of the time. Upgradability refers to the extent to which communities can upgrade a basic service to a higher-level household connection. According to the World Health Organisation (WHO), the quantity of safe water required is 20-40 litres per person per day. In South Africa, the Department of Water Affairs and Forestry has set the minimum quantity at 25 litres per person per day, the minimum cartage distance at 200 metres, with consideration for varying landscapes. This is considered to be the minimum requirement for direct consumption, food preparation and personal hygiene, but not adequate for a full, healthy and productive life.

9. As mentioned above water rights are inter-linked with several other rights: the right to food, health, housing and a healthy environment. This places an obligation on the Government of South Africa to provide clean drinking water for human consumption, conserve water and provide basic services for sanitation for the protection of the environment.

10. South Africa is not prepared for the new Sustainable Development Goals (“SDGs”), in that it did not score so well on one of the Millennium Development Goals (“MDGs”). The new SDGs is posing an even more formidable task and it would seem that the Minister of the Department of Water and Sanitation (“DWS”) are ready for this. The nation is unaware of these targets and DWS has not started to plan on how to tackle the SDGs. Goal no. 6 talks about “sustainable management” which by implication mean proper planning, funding, execution and regulation of all water and sanitation issues and not merely “stumbling along” by political whims or priorities.
11. When compared with the MDGs that merely talked about access to water there is now an emphasis on safe drinking water which implies that water supplies must be safe to drink and comply with national standards, in our case to SANS 241. Implications are that the regulatory function and the Blue Drop certification process will become even more important as the DWS must provide numbers to the United Nations (“UN”) not only on the number of people with access to services but also the number of people getting safe water.
12. Concerns about drinking water quality and DWS ineffectiveness as the regulator for water services entail the following. The DWS is the water services regulator with the task to monitor performance of all water services institutions. One of key elements is the regulation of drinking

water quality as safe drinking water is of utmost importance for the health of the nation and for this purpose the Blue Drop ("BD") Certification process had been introduced. At a recent DWS meeting it was reported that 55% of the 2013/14 BD report should have been completed by the end of the 2014/15 financial year (but DWS had to admit in Parliament that the report was only 32% completed by 31 March 2015)⁸.

13. The Minister's answer to a question on the release of these reports are as follows: "The 2013/14 reports will be completed by the end of June 2015."⁹ Unfortunately, this did not happen yet. Due to the fact that the 2013/14 BD had not been released by end of October 2015, the only logical conclusion was that DWS had failed as the national regulator supplying water and sanitation in ensuring safe and sustainable drinking water supplies and safe treatment of waste water in many towns in South Africa.
14. The BD 2014 Report was released in January 2017, three years late. A total of 44 systems out of just over 1093 drinking water systems achieved BD status. The report indicates a reduction of 8% in the national average score from 87,6 % in 2012 to 79,6% in 2014 which clearly indicates a

⁸ Parliamentary Monitoring Group, 2015(a) Reports on hearings of the Water and Sanitation Portfolio Committee on the DWS Annual Report and Audit Reports, October 2015.

⁹ Parliamentary Monitoring Group 2015 (b). (NA-Q1631) National Assembly Question number 1631 raised by Ms TE Baker of the DA in Parliament with response by the Minister.

decline in performance. Drinking water quality compliance showed that approximately 20% of the supply systems did not comply with microbiological standards as per SANS 241: 2006 whilst 76% of systems did not comply with chemical compliance standards.¹⁰

15. It is also clear in the introduction of the BD 2013 Executive Summary that DWS has no intention to take action against criminal municipal officials. "It is not the purpose of this assessment to criminalise poor or high risk drinking water services and water quality, but rather to act as a precautionary tool, warning the Water Services Institutions in the country about the level of risk at which water services and water quality is delivered to the citizens of South Africa."¹¹

- 16.1 With regards to the growing unreliability of water supplies it should be noted that it is of no real value if taps are provided but the taps run dry for days on end and the citizens must revert back to unsafe sources with huge implications for health and also additional cost to families. Often the poor suffer most as they must buy water from scrupulous water vendors. The South African Cabinet has set a target of reliable water supplies by 2019 (The Government of South Africa as response to a

¹⁰ 2014 Blue Drop Report.

http://www.ewisa.co.za/misc/BLUE_GREENDROPREPORT/GREEN%20BLUE%20DROP/2014BlueDropReportExecutiveSummary_ToPDF.pdf

¹¹ 2013 Blue Drop Report Summary

question (Question no 401) in Parliament by Mr M G P Lekota¹² which is only two years from today. Despite Cabinet's undertaking, it is clear from reality on the ground in South African towns that reliability is sliding backwards. StatsSA is measuring this reliability of municipal supply in their annual General Household Survey ("GHS") as well as the consumers' perception of quality of the water supply. The following has been extracted from the 2014 GHS as was published in May 2015:

"The functionality of municipal water supply services measures the extent to which households that received water from a municipality had reported, over the 12 months before the survey, interruptions that lasted more than 2 days at a time, or more than 15 days in total during the whole period. Households in Mpumalanga (63,1%) and Limpopo (61,4%) consistently reported the most interruptions, while Gauteng (8,2%) and Western Cape (3%) experienced the least interruptions. More than one-quarter (25,7%) of South African households reported some dysfunctional service with their water supply in 2014. Since 2010, the percentage of households that had reported interruptions increased strongly..."¹³

¹² Parliamentary Monitoring Group, 2015 (c). (NA-Q401) National Assembly Question number 401 raised by Mr M G P Lekota of Cope in Parliament with response by the Minister of Water and Sanitation.

¹³ Statistics South Africa (StatsSA, 2015) Statistics South Africa, P0318 General Household Survey, 2014 as published May 2015

16.2 This StatsSA survey (StatSA, 2014) therefore shows that:

- In provinces such as Mpumalanga and Limpopo every 2 out of 3 households have regular interruptions in supply (Mpumalanga (63,1%) and Limpopo (61,4%) as reported in GHS, 2014)
- For South Africa on average every 1 out of 4 households have regular interruptions in water supply. (25,7% from GHS, 2014)
- This worrying trend is increasing every year.

17. Widespread public dissatisfaction with water services created a public perception of quality of the water related services also measured by StatsSa and the following has been reported in the 2014 GHS report:

“Nationally, 61,4% (less than two-thirds) of households rated the quality of water-related services they received as ‘good’. Satisfaction has, however, been eroding steadily since 2005 when 76,4% of users rated the services as good.”

“The percentage of users who rated water services as average increased from 15,8% in 2005 to 31,8% in 2009, before it eventually declined to 26,4% in 2014. The percentage of households that rated water services as ‘poor’ increased from 7,8% in 2005 to 12,2% in 2014. This deterioration in levels of satisfaction is mirrored by an increase over time in the percentage of households who feel that their water is not clean, clear, does not taste or is free of bad smells”.

18. Insufficient planning and adaptation plans for drought is a known fact as the level of all major storage dams in South Africa is declining annually and the recent drought has been a clear indication of the threat of this to society and the economy as a whole. Off- channel storage dams had been built for raw water supply for towns like Kroonstad and Lindley in the Free The Government of South Africa as dams in the Vals River had silted up. Intensive pumping into these off- channel dams is required during the few summer months when those rivers are flowing. Lately insufficient pumping took place as pumps were broken so dams ran dry and water had to be trucked. Many towns with own raw water supplies draw dams empty without putting restrictions in place well ahead- then when the dam is empty as seen during the drought period, it is too late or no plans are in place to equip boreholes and use underground water. Water specialists from water rich countries such as the Netherlands and Cuba are roped in to work with DWS whilst local experts that have practical knowledge of the country and droughts are ignored.

19. National Water Resource Infrastructure desperately needs a National Infrastructure Agency. Based on reports in Parliament the Minister of DWS and her department is not able to plan, fund, operate, collect sufficient revenue and maintain a highly sophisticated water supply system of major dams, pumping works and inter basin transfers with an annual turnover of billions of Rand.

Current arrangements include the Water Trading Entity (“WTE”) within DWS as a separate branch in DWS as the National Water Act makes provision for cost recovery on services rendered by the department to water users. The main function of the WTE was development, operation and maintenance of national water resources infrastructure and managing water resources in certain water management areas.

20. The WTE seems to be struggling to fulfil its mandate based on the reporting in October 2015 in Parliament that debtor days increased, there was a delay in project execution and “overall the Water Trading Entity achieved 27% of what was planned.”¹⁴ It is no surprise that more than five years ago the National Development Plan (“NDP”) of 2011 recommended in order to achieve the goals for water between 2011 and 2013 that “a National Water Resource Agency must be established (by 2013) that would develop and manage large economic infrastructure systems”.
21. The National Water Resource Strategy 2 (“NWRS2”) supported this proposal by the Government of South Africa. “It was recognised that the Water Trading Entity was not the most appropriate or efficient institutional arrangement for managing national water infrastructure. Thus, the intention was to establish an alternative and appropriate

¹⁴ Parliamentary Monitoring Group (PMG); (PMG, 2015(a) Reports on hearings of the Water and Sanitation Portfolio Committee on the DWS Annual Report and Audit Reports, October 2015.

National Water Resources Infrastructure institutional model for developing, financing and managing national water infrastructure.”¹⁵ Since 2013 there was slow movement within DWS to move towards an agency and it was recently reported in Parliament that: “The planned 50% completion of establishing a proto-national Water Infrastructure Agency and approved Agency Bill was not achieved.”

22. Insufficient progress to curtail water demand and reduce water losses by reducing the steeply growing demand curve and conserving water as been identified in the NWRS2¹⁶ as one of the key strategies to avert a water crisis. Other studies such as the report “Parched Prospects- the emerging water crisis in South Africa by the Institute for Security Studies (ISS) also stressed this point by quantifying: “South Africa currently use 27% more municipal water than we would expect given the size of the urban population. World average water consumption is 173 litres per person per day; the average per capita water consumption in South Africa is 235 litres. “

23. There is much talk about this aspect and President Jacob Zuma said in his 2010 the Government of South Africa-of-the-nation address that, “We will be putting in place measures to reduce our water loss by half by

¹⁵ Republic of South Africa (RSA, 2013): National Water Resource Strategy 2 (NWRS2): Pretoria. Department of Water Affairs

¹⁶ Republic of South Africa (RSA, 2013): National Water Resource Strategy 2 (NWRS2): Pretoria. Department of Water Affairs

2014"¹⁷. The new DWS program "War on Leaks" was a very good initiative where it planned to train 15000 young people as plumbers and artisans. Progress in this area of water conservation and demand management (WCDM) is however far too slow e.g. during October 2015 it was reported in Parliament that only: "A 4% reduction versus the planned 6% reduction of projected demand for eight large water supply systems was achieved. Lack of water conservation and water demand management funding within municipalities resulted in under-achievement on this target." The effect of this within the drought period in 2016, also put severe pressure on the water users and businesses, however, most water was lost by municipal leakage and not because of user consumption.

24. DWS is not enforcing measurement of water losses as it is often reported that on average South African municipalities have a massive 37% water losses. This figure is quoted from the Water Research Commission Report¹⁸ but what is seldom mentioned is that this figure of 36,8 % was based on the results of those 132 out of the possible 237 municipalities that provided data to the researchers. This means that we do not know what the losses are in the other 85 municipalities (or 34% of towns that

¹⁷ Hedden Steve and Cilliers Jakkie (Hedden and Cilliers, 2014) "Parched Prospects: The Emerging Water Crisis in South Africa" published by the Institute for Security Studies (ISS) in September 2014.

¹⁸ McKenzie R, Siqalaba ZN and Wegelin WA (McKenzie et al,2012) "The Government of South Africa of Non-Revenue Water in South Africa (2012)". Report to the Water Research Commission. Report no TT 522/12.

were unable to supply information to the researchers i.e. those that do not even measure or know how much water is lost).

25. Estimates show that losses in the other municipalities may be anything between 37% and 50%. A simple first step would be for the DWS to start forcing municipalities to measure and report on water losses and not neglects its work as water services regulator.
26. To date, no explanation of envisaged end user tariffs has been provided and how it will affect water users in Gauteng regarding the Lesotho Highland Water Project Phase 2. With the Minister delaying the project in 2016, it is estimated that this project's cost will increase by around R2 billion. We must ensure that there are no further delays and that the Minister is held accountable for any future delays. It is worrying that a delay within a project can have such dire consequences and that the taxpayer must bear the cost, whereas the Minister is not held accountable for a cent.
27. In 2016 various newspaper articles documented systematic attempts by businesspeople close to the Minister to hijack key water infrastructural projects such as the R26-billion Lesotho Highlands Water Project Phase 2, the R5-billion Giyani Emergency Project, and the 'Mhlathuze Water' and 'Umgeni Water' boards.

28. Target 6.3 of the SDGs speaks especially about the reduction of pollution and improving of water quality by treatment of waste water flows (sewage). The current status where GD Reports have not been released (full report last published in 2012) and where more than 248 Waste Water Systems in South Africa "are in crisis"- flies in the face of this international commitment. For the 2013 GD Report only an Executive Summary was released. This report was rightly proud about the increasing number of GD Certificates but also honest about the Purple Drops (Waste Water Systems scoring less than 30%).
29. The Report mentioned above indicated the following: "The most impressive statistic is the number of Green Drop Certifications that were achieved in 2013, totalling at 60 systems compared to 40 systems in 2011 and 33 in 2009. What makes this figure remarkable, is that the 2013 Green Drop criteria were significantly more stringent than the 2011 criteria. In addition, it is noted that 6 systems missed the 90% cut off mark by a few decimal points and the Regulator trust that these systems will cross this boundary with the next GWSA cycle. A wastewater system that achieved more than 90%, can truly be regarded as 'excellent' and has achieved a level of mastery that will compete with the best wastewater systems in the world."
30. The report continues: "Regrettably, a number of systems have been issued Purple Drops in 2013. These 248 systems received <30% GDC scores

(less than 30 percent on the GD Score card) during 2013, thereby earning the undesirable status of 'systems in crisis'." These 248 "purple drops", or "systems in crisis" as phrased in the 2013 GDES, were however (and unfortunately) not mentioned by name in the GDES.

31. OUTA is also concerned about the current state of disrepair of the Municipal Waste Water Treatment Works ("WWTW") and the harmful effects that this may have on community health and well-being and on the surrounding environment as well as the contamination of water resources.
32. The DWS website provides a glimpse on GD compliance for the period of February 2017 to March 2017 (the latest information after 2013 GD ES had been released). The website indicated that only 24.78% of all public (municipal) wastewater treatment plants in South Africa submitted wastewater quality data. This GD compliance report over the last 12 months indicates that only 29% of waste water discharged comply with microbiological waste discharge standards.
33. A total flow of 5258 MI/day is received at the 821 treatment facilities, which has a collective hydraulic design capacity of 6614 MI/day. This means that 80% of the design capacity is taken up by the current operational flows, leaving 20% to meet the future demand without creating new capacity.

34. However, the findings of the GD assessment suggest that a significant portion of this existing 'surplus capacity' might not be readily available, as result of inadequate maintenance and operational deficiencies, especially at lower capacity municipalities. The total flow and surplus can also be criticised as it seems that there is an increasing amount of dysfunctional sewage pipe infrastructure due to blockages, leaving excessive amounts of raw sewage flowing out of manholes and pipes. These spillages are not accounted for due to the total flow being measured as waste water entering the treatment facilities.
35. This means that more than 71% of waste water treatment facilities is non-compliant, discharging more than 3 734 million (3,7 Billion litres) litres of waste water (Toxic Waste) that is partially treated or untreated raw sewage causing severe pollution to the water resources of the country and placing the health of all our people at risk.
36. The number of manholes discharging raw sewage into storm water drains, streams, rivers and dams increased. This raises concerns about the transparency and accuracy of the GD Report Results of 2013 due to the fact that some WWTW may not receive the full amount of sewage in their service areas, which may have a direct effect on the outcome of the GD Audit and its results. This also raises the question whether we really do have a surplus capacity in sewage treatment infrastructure.

37. Coincidentally the Minister did not seem phased by the pollution occurring throughout the country, seemingly instructing enforcement officials to step down and not take action against municipalities before the 2016 municipal elections.
38. It is clear that the root cause of the problem is the failure of the regulator to act as custodian and hold polluters accountable. Politics are ruining our water quality which poses severe risks to the economy, health, environment, food security and every person in this country.
39. The persistence of the government's indifferent attitude towards the public's most basic human needs, undermines the public's enshrined constitutional rights as contemplated in sections 24 and 27 and the public's right to human dignity.
40. The prescribed standards indicated in Government Notice R509 in Government Gazette 22355 dated 8 June 2001, particularly regulation 9 entitled "Management practices applicable to the discharging and disposing of waste";
41. The obligations with respect to the fluoridation of water as required by the Health Act¹⁹ are set out in Government Notice R797 in Government

¹⁹ Act 63 of 1977.

Gazette 18960 of June 1998 and Government Notice R873 in Government Gazette 21533 of 8 September 2000;

42. The general duty of care as prescribed in the National Water Act and the obligations of a water services institution which must, by law, comply with prescribed standards; and
43. In addition, the National Environmental Management Act²⁰ indicated that the pollution of a water resource is a criminal offence.
44. Over and above the National Water Act where protection of our water resources is legislated, the new SDGs will bring international focus to pollution of the South African water resources as target 6.6 of the SDGs has the objective to “...*protect and restore water related eco-systems including ...rivers, aquifers and lakes.*”²¹ When the Minister and senior officials of DWS appeared in Parliament on 14 October 2015 before the Water and Sanitation Portfolio Committee for a review of the DWS 2014/15 Annual Report the PMG noted the following from that meeting “*10% of Environmental Impact Assessments (EIAs) were completed, falling short of the target of 20%, in respect of the Western Cape Water Supply system. There were delays in the procurement process. ...None of the planned four river systems had determined resource quality*

²⁰ Act 107 of 1998.

²¹ United Nations (UN,2015) The Sustainable Development Agenda and Development Goals, UN Website, 2015.

objectives (RQOs) as only draft RQO reports were developed. During the course of the project, it was realised that the draft numerical limits of the upper, middle and lower Vaal needed to be aligned. After gazetting the classes, the stakeholders requested that both the resource and RQOs be gazetted simultaneously, hence the delay. None of the planned compulsory licences in Mhlathuze catchment area were issued, as 500 draft licences and record of recommendation were developed. Lack of dedicated personnel to undertake the task resulted in the under-achievement."

45.1 Huge Economic, Health and Social Implications of the Water Crisis have not been recognised. It is a well known fact that South Africa is a water scarce and fairly dry country but also water constrained as put in the ISS report: "Low and unpredictable supply, coupled with high (and growing) demand and poor use of existing water resources, make South Africa a water constrained country". This is not a mere house or two that may be without water for a few hours but a crisis that has severe implications on the economy, health and social development of the country.

45.2 When industry cannot expand, new mines cannot open and the tourists cannot be ensured of safe water or hotels and guest houses run out of water this has a severe impact on the economy. Jayne Mammatt (Price Waterhouse Cooper) said to Engineering News that "Water has a place

on the risk agenda for every business – either as a direct operational issue or in the supply chain. Business needs to have effective monitoring and management in place, both from its own perspective and that of its stakeholders”.²² She cautioned that “Not only is production at stake, reputation and licence to operate are too, so the decisions around water have far-reaching consequences,”

45.3 The positive impact on health by adequate and safe drinking water supply and improved sanitation has been well documented by researchers and international institutions such as the World Health Organisation (“WHO”) and the United Nations Children’s Fund (“UNICEF”), UN-Water and others. Providing safe water and improved sanitation can lessen the load on the medical system as many illnesses and disease can be prevented.“ The full benefits of improvements in access to sanitation and drinking water cannot be realized without good hygiene”²³ When drinking water is not safe, poor people revert back to dirty streams because taps are dry and sewage spills in the streets, the nation will face an increasing health risk.

45.4 The socio-economic effects of a water crisis was summarised in the ISS Report: “Over-exploitation of water will also constrain growth, employment and general human development, since hydrology is a

²² Mamat Jayne (Mamat, 2015) Report in Engineering News, 7 May 2015. Kramer Media.

²³ UNICEF and WHO (JMP-2015) Progress on sanitation and drinking water- 2015 Report by the Joint Monitoring Program (JMP) by UNICEF and the WHO

defining variable of the potential performance of water –constrained countries' economies."

46. Water is essential for human survival and must be protected against contamination and unhygienic environmental practices for drinking purposes. The right to a healthy environment requires the appropriate disposal of sewage where basic sanitation services should at the very least provide on-site services such as ventilated pit latrines.

47. The prolonged inaction of the department and the absence of transparency and accountability amounts to a constitutional violation on a continuous basis. Moreover, OUTA submits that the conduct (or lack thereof) by the DWS, as will be explained in subsequent paragraphs, constitutes a violation of the public's constitutional rights in terms of sections 24 and 27 of the Constitution. The DSW's failure to adhere to relevant water legislation is in direct contrast to its constitutional duties. As such, it is our submission that this complaint falls within the constitutional and statutory mandate of the South African Human Rights Commission ("SAHRC").

B LEGISLATIVE BACKGROUND AND THE DUTIES OF GOVERNMENT

48. In terms of section 3 of the National Water Act, the national government of the Republic of South Africa, acting through the Minister of Water and Sanitation, is the trustee of the country's water resources. In addition to this enshrined custodianship, the government must ensure that water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner, for the benefit of all persons and in accordance with its constitutional mandate.²⁵
49. In exercising its constitutional mandate, the DWS (and the Minister) must pursue the purpose of the National Water Act, which *inter alia* entails the meeting of basic human needs of present and future generations; the promotion of equitable access to water, the promotion of the efficient, sustainable and beneficial use of water in the public interest, the facilitation of social and economic development and provision for growing demand for water use.²⁶
50. In terms of current water regulations, each person has the right to a minimum quantity of 25 litres of potable water per day, or 6 kilolitres per household per month, at a minimum flow rate of not less than 10 litres per minute. The access point at which a person is to receive such water

²⁵ Section 3 of the National Water Act 36 of 1998.

²⁶ Section 2.

may be no less than 200 metres from the household and may not be interrupted for a full 7 days per year.²⁷ Not only must government, acting through various authoritative bodies constituted in terms of the Water Services Act, adhere to this minimum threshold, but must do so in a sustainable manner.

51. Section 137 of the National Water Act requires the Minister to establish a national water monitoring system, providing for information on the following:

51.1 the quantity of water in the various water resources;

51.2 the quality of water resources;

51.3 the use of water resources;

51.4 the rehabilitation of water resources;

51.5 compliance with resource quality objectives;

51.6 the health of aquatic ecosystems; and

51.7 atmospheric conditions which may influence water resources.

52. The mechanisms²⁸ implemented to give effect to a monitoring system as contemplated in section 137, is that of the BD and GD certification system.²⁹ These systems aim to give effect to section 27 of the Constitution and allows for proper compliance measures to be taken

²⁷ Gazette Notice R509, Government Gazette 22355 of 8 June 2001.

²⁸ Section 138 of the National Water Act.

²⁹ For purposes of this complaint, reference to the Purple-, Red- and No-Drop Certification Programmes have been omitted.

upon the identification of non-compliance with the applicable water legislation. OUTA does not dispute that such systems are in place, however, the lack of proper implementation thereof has detrimental repercussions throughout the country.

53. Akin to the provisions laid down in section 137 of the National Water Act, section 67 of the Water Services Act requires the Minister to ensure that there is a national information system in place that supplements the effectiveness of the national monitoring system.³⁰ In pursuit of achieving this objective, section 62(2) requires every Water Services Institution (“WSI”)³¹ to furnish the Minister with data necessary to determine the level of legislative compliance. Data submissions and analyses must be made to the Minister monthly, failure of which may render the person responsible for such failure, criminally liable.³²

54. As the national regulator, the DWS acting through the Minister is ultimately responsible to enforce compliance of water legislation. In terms of section 62(1), the Minister and any relevant province must monitor the performance of every WSI to ensure compliance with all applicable national standards prescribed by the act, compliance with all norms and tariffs prescribed by the act and compliance with every

³⁰ Section 67 of the Water Services Act.

³¹ Water Service Institutions mean a water services authority, a water services provider, a water board and a water services committee.

³² Section 82(1)(e) – (f) and section 82(2) of the Water Services Act.

applicable development plan, policy statement or business plan adopted in terms of the act.

**C CONTRAVENTIONS OF GOVERNING LEGISLATION AFFECTING THE PUBLIC'S
HUMAN RIGHTS IN TERMS OF SECTION 27 OF THE CONSTITUTION**

55. As indicated above, the implementation of the BD and GD systems gives effect to section 137 of the National Water Act and section 67 of the Water Services Act. Adherence to these significant provisions, in turn, gives effect to section 27 of the Constitution. Non-compliance with these provisions, however, infringes upon the constitutional right as contemplated in section 27.

56. The BD and GD Certification Programme was introduced in 2008 by the DWS (previously Department of Water Affairs) as compliance mechanism giving effect to the provisions referred to in paragraph 12 above. It should be noted that the DWS had not BD and GD reports since 2013, due to lack financial constraint and lack of human resources. OUTA submits that the current monitoring system used by the DWS does not the true situation pertaining to compliance with water legislation, as no accurate conclusions can be drawn from absent information by the water services institution and/or service providers.

57. The Minister's duty to establish a national information and monitoring system is equal to providing the public with reliable information and adhere to the principle of transparency. This constitutes an obligation³³ on the Minister to perform a positive act, and as such she is in contravention as she failed or refused to give data or information, or gave false or misleading data or information when required to give information under this act.³⁴ The failure to comply with these provisions may constitute a criminal offense, and if found guilty, the Minister may be liable to a fine or imprisonment not exceeding five years, or both.
58. Furthermore, the failure of the Minister to act and implement its duty to ensure monitor and enforce compliance, is likely to cause water pollution and inimically affect water resources, which may have been avoided were there proper compliance mechanisms in place. Such failure also constitutes an offense and is prosecutable in the same manner as the conduct set out above.³⁵
59. Notwithstanding the existence of compliance mechanisms, OUTA submits that the implementation thereof on an infrequent basis is not a true reflection of the state of water affairs in the country and is detrimental to the public's health and safety.

³³ Section 151(1)(h) of the National Water Act.

³⁴ Section 151(1)(f).

³⁵ Section 151(2).

D PUBLIC ADMINISTRATION

60. As the DWS forms part of the country's public administration, it is subject to additional constitution principles laid down in section 195 of the Constitution, which include *inter alia* that:

60.1 People's needs must be responded to, and the public must be encouraged to participate in policy-making;

60.2 Public administration must be accountable;

60.3 Transparency must be fostered by providing the public with timely, accessible and accurate information.

61. In terms of section 14 of the Public Administration Management Act³⁶, the DWS (the Minister as the head of the institution), must acquire and use information and communication technologies in a manner which, *inter alia*, ensures the interoperability of its information systems with information systems of other institutions to enhance internal efficiency or service delivery. In addition, such information systems must be used to develop and enhance the delivery of its services, which includes performing in terms of its constitutional mandate.³⁷

³⁶ Act 11 of 2014.

³⁷ Section 14(b) of the Public Administration Management Act 11 of 2014.

62. To date, the DWS's information systems and compliance mechanisms had not been used optimally in advancing the delivery of sufficient water to the public – which falls short of its constitutional obligation as envisioned in section 195.

E REQUEST FOR ACCESS TO INFORMATION

63. On 9 January 2017, OUTA submitted a request for access to information in terms of the Promotion of Access to Information Act³⁸ (“PAIA”) in which it requested, *inter alia*, all comprehensive BD, GD for the periods of 2015 to 2016. This request is attached hereto and marked **ANNEXURE “OUTA1”**. In response to our request, the DWS indicated that the reports could not be compiled due to financial constraint and lack of manpower within the department. The DWS's passive attitude towards monitoring the quality of water of this country adds to current water crisis and diminishes the sustainability thereof. A copy of the response is attached hereto and marked **ANNEXURE “OUTA2”**.

64. It should be noted that the DWS's ill attempt at bypassing accountability based on a lack of a sufficient budget is frivolous and downright misleading, as the DWS's annual report for the period of 2014/2015

³⁸ Act 2 of 2000.

proved otherwise. The report concluded that the DWS had underspent approximately R 2 billion, of which R 1,3 had been returned to National Treasury. Furthermore, the Auditor General had indicated that the primary reasons for underspending were, *inter alia*, attributed to the lack of management response in addressing the presence of poor audits, vacancies and instability in key positions.

F RELIEF SOUGHT

65. In line with the SAHRC's constitutional mandate as contemplated in section 184 of the Constitution, OUTA request the following relief from the SAHRC:

65.1 that a comprehensive investigation be conducted into the alleged violation of the public's constitutional rights in terms of sections 24 and 27;

65.2 to take appropriate steps to secure redress where it is determined that the public's constitutional rights in terms of sections 24 and 27 had been or are continuously being violated;

65.3 request that the DWS provide it with sufficient information relating to legislative compliance;

65.4 make recommendations to the DWS where it considers such action advisable for the adoption of progressive measures for the

promotion of human rights within the framework of the Constitution and the law;

65.5 to bring proceedings in a competent court or tribunal in its own name, or on behalf of the public and/or the complainant.