

# EXECUTIVE SUMMARY



Mr Kgalema Motlanthe



South Africa's statute books tell the story of the country's history of conquest, domination and racial segregation. The Masters and Servants Act No 15 of 1856, which subjugated black workers, the Mines and Works Act No 12 of 1911, which kept black people out of skilled occupations in the most significant sector of the economy at the time, the Natives Land Act No 27 of 1913, which etched racial segregation onto the land, and the absurd Prohibition of Mixed Marriages Act No 55 of 1949 all illustrate the ferocious efforts of colonial and apartheid law to keep South Africa separate and unequal.

With the fall of apartheid, the country began its journey towards a constitutional, democratic order. The Constitution, the supreme law of the land, was adopted in 1996. It provides a vision for a new society that is a clear break with the past, one based on 'democratic values, social justice and fundamental human rights'. In its Preamble, we also find the commitment to improve 'the quality of life of all citizens and free the potential of each person'. In Section 1, the Constitution enshrines respect for human dignity, the achievement of equality and the advancement of human rights and freedoms. The Constitution recognises that equality will not be achieved merely by a declaration of formal equality before the law. Rather, there will necessarily be a process, of uncertain duration, during which human rights and freedoms will be advanced, guided by the fundamental value of human dignity. The Bill of Rights spells out a range of fundamental rights, including second-generation socioeconomic rights that promote equal life chances.

Since 1994, a substantial body of new laws has emerged from all levels of government to fulfil the mandate presented by the Constitution. This great effort has created new institutions, repealed some old exclusionary arrangements and changed the lived experience of many South Africans. More still needs to be done to change the course of society towards inclusive development.

The High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change (HLP) has been called upon by the Speaker's Forum to assess this legislative output. In its Legacy Report, the Fourth Democratic Parliament identified the assessment of the impact of legislation as a key priority to be undertaken by the Fifth Democratic Parliament. After an extensive process of multiparty consultation, both Houses of Parliament adopted the Parliamentary Strategic Plan (2014 – 2019) in February 2015. This Strategic Plan identified a review of the impact of legislation as being of paramount importance to improve the governance practices of Parliament.

In December 2015, the Speakers' Forum, as the representative body of the South African legislative sector, moved to establish an independent high-level panel of eminent South Africans to undertake the task of assessing the content and implementation of legislation passed since 1994 in relation to its effectiveness and possible unintended consequences. The Panel's mandate has been to review legislation, assess implementation, identify gaps and propose action steps with a view to identifying laws that require strengthening, amending or change. In other words, this intervention entails the identification of existing legislation that enables the transformational agenda and pursuit of the developmental state, as well as laws that impede this goal.

The Panel is chaired by Mr Kgalema Motlanthe, former President of the Republic of South Africa. The Panel's work has been divided into three main thematic areas: (i) poverty, unemployment and the equitable distribution of wealth, (ii) land reform: restitution, redistribution and security of tenure; and (iii) social cohesion and nation-building.

These were constituted as follows:

- Dr Olive Shisana, President and CEO – Evidence Based Solutions
- Prof Haroon Borat, Professor of Economics and Director of the Development Policy Research Unit, University of Cape Town
- Prof Alan Hirsch, Director - Graduate School of Development Policy and Practice, University of Cape Town
- Mr Paul Harris, FirstRand founder
- Mr Thulani Tshefuta, President of the South African Youth Council
- Dr Aninka Claassens, Land Reform Specialist, University of Cape Town
- Rev Malcolm Damon, CEO of Southern African Network on Inequality and founder member of the Economic Justice Network (EJN)
- Dr Terence Nombembe, Former Auditor-General
- Judge Navi Pillay, Former United Nations Human Rights Commissioner
- Ms Brigitte Mabandla, Former Cabinet Minister



- Prof Eddy Maloka, CEO of the Secretariat of the African Peer Review Mechanism
- Prof Vivienne Taylor, Social Policy & Development, University of Cape Town
- Dr Yvonne Muthien, non-executive Director and Chairperson of companies

The Panel held public hearings in all nine provinces to receive input directly from the public. It also commissioned reports from experts and senior researchers on selected topics. In addition, small consultation round tables and workshops were held to delve deeper into certain issues. The substantial record that has been generated by this work is available online.

Has the legislative output of the post-apartheid state been equal to the challenges already entrenched in society? The evidence presented shows that the ills of the past are being reproduced in post-apartheid society, despite extensive legislative reform. In answering this question, it is important to note that the evidence also highlights some improvements in outcomes. For example, the mortality rate of children under five has improved, as has access to education (Stats SA, 2014). But the observed changes have not dented the deep inequities in the quality of services received in many instances, nor have they made fundamental shifts in outcomes as seen in evidence presented in the report. Thus, in some areas society appears to be ‘progressively realising’ the inclusive vision of the Constitution, while in others there is a need to accelerate fundamental change, as the very title of the Panel suggests. Legislation can have both positive and negative impacts on people’s lives, as we know from the legislative history of colonialism and apartheid. In focusing on positive interventions to bring about change, the Panel remains vigilant about the possible unintended consequences of recent laws, and the need to ‘first do no harm’.

The recommendations presented here, which cover specific legislation and the state of execution and governance, offer some direction in relation to how to bring about accelerated change in relation to poverty and inequality, land reform and social cohesion and nation-building. In some instances, the legislative interventions recommended by the Panel are specific and urgent, to address urgent societal problems, or because the Panel has identified problems with Bills that are currently before Parliament. In other instances, the Panel recommends integrated process-based approaches to cross-cutting, deeply embedded problems such as the legacy of spatial inequality.

In Chapter 7 we discuss the prioritisation of the various recommendations, and the need to find a balance between possible ‘quick fixes’, and the longer-term and more complex work that is needed to address the stubbornly entrenched dualities and inequalities that continue to characterise South Africa.

### **Poverty, unemployment and the equitable distribution of wealth**

Despite a progressive Constitution that guarantees a range of socioeconomic and related rights, redistributive fiscal policies, and an extensive social safety net, poverty, unemployment and inequality (the triple challenge) remain deeply etched in South African society. Though the diagnostic analysis reveals some improvements in people’s lives, the triple challenge still reflects the racial, spatial and gender character bequeathed by apartheid.

The Panel makes a range of recommendations that aim to help unlock the growth and development impasse, by improving the quality of public health and education, lowering barriers to entry into the economy, improving the climate for business (especially small business), promoting labour-intensive growth and skills development, and improving government’s capacity to implement its laws and policies, including through enhanced accountability and governance measures.

### **Land reform: restitution, redistribution and security of tenure**

The Constitution provides for three rights to land: the right to equitable access to land, the right to tenure security and the right to restitution. The Panel’s work, including submissions from the public and expert reports, reveals that the record on the progressive realisation of these rights is concerning. The pace of land reform has been slow. The development of policy and law has drifted away from its initial pro-poor stance and lacks a vision for inclusive agrarian reform. There are also significant gaps, such as on tenure security, where legislation has not been passed, putting the lives and livelihoods of many rural dwellers in peril. The government’s interpretation of customary law, centred on traditional leadership and away from living custom, has added to insecurity. The Panel’s recommendations combine a range of high-level, but also detailed, inputs to the formulation of legislation. The recommendations include legislation to provide a framework for land reform, particularly on redistribution. The Panel also makes specific recommendations on various pieces of



legislation to improve their clarity, to enhance the prospects of successful implementation and to provide mechanisms to gather information and to monitor and evaluate policy outcomes.

### **Spatial inequality**

Colonialism and apartheid have left South Africa with a deeply divided and inequitable distribution of people and economic activity. This spatial inequality traps disadvantaged communities in poverty and underdevelopment, creates inefficient cities, and robs poor, rural people of secure livelihoods. The Panel makes recommendations that seek to break this damaging spatial pattern that is built on past laws, which marginalised the black majority to the outskirts of the cities and to Bantustans to preserve key assets, economic opportunities and the wealth of the country for the white minority. The legacy of spatial inequality appears intractable despite the National Development Plan and the Spatial Planning and Land Use Management Act's (SPLUMA's) focus on it. This issue needs an integrated solution that goes beyond the mandate of any one government department or specific level of government. Thus, the Panel recommends creating a structure that can operate and craft solutions in an integrated fashion, while also recommending some specific urgent interventions to address barriers that continue to deny property rights to the majority and marginalise them from the core economy. The release of well-situated urban land to mitigate the legacy of the apartheid city is an urgent priority. The Panel further makes recommendations for the enactment of laws to recognise and administer a continuum of land rights. Finally, the Panel recommends amending problematic legislation that perpetuates insecurity of tenure in rural areas.

### **Social cohesion and nation-building**

South Africa recently achieved democracy, following more than three centuries of colonial and apartheid rule. The previous dispensations were characterised by an absence of social cohesion because of structural and institutionalised opposition to any efforts at nation-building. These were characterised by the denial of socioeconomic rights to the black population, high levels of racial discrimination, the denial of political and civil rights, and the creation of distrust and segregation between members of the different race groups. This chapter argues that social cohesion and nation-building can be encouraged through the progressive realisation of socioeconomic rights for all, the elimination of all forms of discrimination, building democracy through active citizenship and governance, and elimination of all threats to nation-building. The recommendations made

by the Panel are aimed at removing obstacles to the achievement of these objectives in existing legislation, and challenges that arise in the implementation of the legislation that aims at these objectives.

### **Implementation, governance and oversight**

To realise the vision of the Constitution requires a capable and developmental state. The Panel has been confronted, from the testimony of the public and experts alike, with evidence of weaknesses on the part of government to execute policy and legislation. There are many areas where submissions to the Panel lauded the direction and the substance of policy and legislation, and found no fault with its content, but raised fundamental concerns about the implementation and enforcement of existing laws.

The consensus appears to be that financial resources are not the main binding constraint to the realisation of positive outcomes. Instead, there are instances where weak outcomes reflect a lack of political will to pursue stated policy objectives, such as in land reform, where policy has shifted away from Constitutional imperatives such as equitable access to land, towards state ownership, which echoes apartheid-style notions of custodianship.

These breakdowns in execution occur despite an extensive machinery designed to monitor the executive and to hold it accountable for outcomes. This brings into focus questions concerning the effectiveness of governance and accountability mechanisms, including the role of Parliament in providing oversight.

The Panel makes many recommendations about the implementation of specific laws and policies. It also makes recommendations in relation to the workings of Parliament. Effective Parliamentary oversight is dependent on Members of Parliament acting in the best interests of the people of South Africa without fear, favour or prejudice. In that context, the Panel has considered the role of the electoral system in moderating the extent to which the public are able to hold their representatives to account. At the heart of whether government delivers on its Constitutional mandate, and whether Parliament legislates to bring about change and exercises oversight effectively, are issues of accountability. The Panel proposes ways to deepen the relationship between constituencies and their representatives so as to assure more direct accountability to the public.



## **Accelerating fundamental change to realise the vision of the Constitution**

The main challenge facing South African society is the path dependency of socioeconomic outcomes, which are predictable along the cleavages of race, class, spatial location and gender. The current state of affairs at national level can also be characterised, from an economic viewpoint, as a middle-income growth trap. The country has been classified as being middle-income since the 1970s, proving unable, thus far, to transition from middle-income to high-income status. The borders between insiders and outsiders remain fixed. This translates into a lack of trust in society and the absence of a common vision for the development of the country.

In the face of this deeply problematic state of the nation, the Panel proposes the key interventions summarised below to accelerate fundamental change. The nation's efforts should concentrate on these areas to achieve a significant shift in outcomes, in the Panel's assessment. There are, no doubt, legitimate variations to this set of initiatives. Nonetheless, the Panel believes it is important to commit to a set of priorities informed by evidence (including the perspectives of ordinary citizens), and to pursue that set vigorously. The priority initiatives are as follows:

### **Build human capabilities to enable economic participation, social cohesion and an engaged citizenry**

1. Access to quality education and skills – the Panel would like to see a renewed focus on government building a public education and training system that equips all South Africans with the basic capabilities to participate in a modern, rapidly evolving economy. It goes without saying that education, on its own, is not a panacea for developmental challenges and the Panel advances solutions in other areas as outlined before. But without a high-performing public education system, millions of people will remain trapped in poverty and locked into dependency on the state. The Panel makes recommendations that focus on improving the governance of schools and the skills of teachers and principals. Legislation and oversight should address itself to delivering a system worthy of learners' potential and aspirations, irrespective of socioeconomic status. The Panel's recommendations also direct efforts towards sharpening tools for skills development post-school and involving the private sector in delivering workplace-based learning.



2. Access to quality health care – The population is saddled with the ‘quadruple burden of disease’: HIV and Aids, and tuberculosis; high maternal, neonatal and child morbidity and mortality; the rising prevalence of non-communicable disease; and high levels of violence and trauma. Though the public health system provides basic health care services to all, there are serious deficiencies in the quality of care that is provided. The health system is also bifurcated between a private health care system funded by medical schemes, medical insurance arrangements and out-of-pocket payments entered into or made by individuals and families; and a tax-financed public sector system. There are strengths and weaknesses in both systems, but the Panel supports the introduction of National Health Insurance that optimises the public and private resources of the country to achieve universal health care coverage for all.
3. Wealth redistribution: South African society is a stand-out when it comes to levels of both income and asset inequality. The democratic state has delivered a progressive tax system, with a focus on income and consumption taxes, and some taxes on wealth. Though income clearly influences access to opportunities, wealth is more stable over time and significant wealth can perpetuate itself for generations. The Panel supports measures to deepen existing taxes on wealth and to introduce new ones.

### **Accelerate economic growth**

1. Remove barriers to entry in the economy – the South African economy is highly concentrated, with many studies pointing to significant barriers to entry into formal economic activity. The country is also struggling to overcome anti-competitive behaviour, particularly collusion, some of which is the legacy of apartheid-era economic policy. The Panel would like to see the economy opened up for participation by the formerly excluded to support meaningful small enterprise and high-potential entrepreneurship. Parliament should enact amendments to competition legislation that enrich the powers of economic regulators to promote competition, based on fact-based inquiries and investigations, and also to discourage government policy and action that stifles competition.
2. Break the spatial legacy of apartheid, which separates the majority of people from economic activity and does not allow informal forms of activity to thrive where people are,



traps disadvantaged communities in poverty and underdevelopment, creates inefficient cities and robs poor, rural people of secure livelihoods. The Panel makes recommendations that seek to break this damaging spatial pattern. This demands an integrated solution that goes beyond the mandate of any one government department or specific level of government. Thus, the Panel recommends creating a structure that can operate and craft solutions in an integrated fashion, while also recommending some specific urgent interventions. The Panel also makes recommendations for the enactment of laws to recognise and administer a continuum of land rights. Finally, the Panel makes recommendations that aim to rectify problematic legislation that perpetuates insecurity of tenure in rural areas.

3. Develop (or sharpen) instruments to finance high-growth economic activities through appropriate financing – lack of access to finance is a common refrain by new and small business operators. Established private financial institutions, especially ones that rely on deposits from the public to advance loans are constrained by the need to maintain low default rates. The risk of default is often assessed to be high, given the rate of failure of small business in South Africa, though this partly reflects lack of access to finance (and to markets). To resolve this dilemma, the Panel recommends legislative efforts to support the advancement of patient capital to new or small businesses, with emphasis on equity and royalty-based financing schemes, in addition to loans.

### **Land reform and recognising the property rights of the poor and previously excluded**

1. Enact a new framework law for land reform. New legislation is needed to provide a coherent framework for the various components of land reform, with a focus on pro-poor redistribution. Evidence presented to the Panel shows how land reform policy has drifted from its initial pro-poor focus to one marked by signs of elite capture. Implementation has also been dysfunctional. To ensure that land reform delivers the land rights set out in the Constitution, the Panel recommends that Parliament enacts framework legislation that addresses the deficiencies of law and policy. No law currently exists to give meaning to, or set standards for measuring whether land reform enables citizens to gain access to land on an equitable basis. This law will provide guiding principles and definitions for terms such

as 'equitable access'. It will also provide for institutional arrangements, requirements for transparency, reporting and accountability and other measure to ensure good governance of the land reform process.

2. Amend the Restitution of Land Rights Act of 1994 in ways that address current capacity, resource and accountability constraints before July 2018. The Constitutional Court struck down a 2014 amendment to the Act in 2016. The Court interdicted the Restitution Commission from processing land claims lodged in terms of the invalid 2014 Act until Parliament introduces a new Amendment Act. Parliament was given until 28 July 2018 to enact the new law. The poor outcomes and slow pace of restitution have been confirmed by numerous government reports. The public hearings testified to the divisions and disappointments restitution has sown on the ground. The Panel identifies lack of capacity, inadequate resources and failures of accountability as key constraints that must be urgently addressed. The Private Member's Amendment Bill currently before Parliament fails to engage with these constraints. The Panel puts forward legislative amendments to address the problems it identifies.
3. Recognise, record and administer effectively a continuum of rights to land. There are too many South Africans, in rural and urban areas, who have insecure tenure to the property that they occupy. Government-sanctioned interpretations of customary law are often not consistent with living customary law as practised by communities. This means that layered and interconnected property rights, as understood by communities, are not recognised. In urban areas, programmes such as RDP housing have failed to transfer title to beneficiaries. The Panel proposes the creation of a robust land recordal system that gives visibility to a continuum of rights in property. This is intended to be simpler, more accessible and to recognise a wider range of rights than the deeds registry system. This is described in Chapter 5 on spatial inequality.
4. Put measures in place to ensure equal citizenship rights for urban and rural people under municipal councils.

In the process of developing this Report, the Panel learned that the National Assembly



passed the Traditional Leadership and Governance Framework Amendment Bill and referred it to the NCOP for concurrence on 22 August 2017. The Panel calls for an urgent review of this Bill (as well as, specifically, the Traditional and Khoi-San Leadership Bill that is currently being debated by the Portfolio Committee on Co-operative Governance and Traditional Affairs), based on the public contributions received by the Panel. Current and proposed legislation on traditional leadership denies people living in areas under traditional leaders several constitutional rights, distinguishing them from those living in the rest of the country who enjoy the full benefits of post-apartheid citizenship. Such legislation also poses a threat to social cohesion by entrenching and promoting ethnic identities. Comments made by members of the public at public hearings indicate a clear concern about the different conditions under which people live in areas under traditional leaders, as compared to those living elsewhere in South Africa.

Parliament is encouraged to pass legislation within the constitutional framework that clarifies the status of both land and governance structures in order to provide certainty and avoid ongoing tension and contestation. Constitutionally, elected local government exists throughout South Africa, including in rural areas, and customary law is recognised by the Constitution. The Constitutional Court has found that customary law provides for ownership of land. People in rural areas are entitled to the same rights as all South Africans, including the recognition of their customary ownership of land. Parliament must ensure that no laws or policies abrogate these rights and a law is introduced to secure customary land rights as required by Sections 25(6) and (9) of the Constitution.

### **Effective oversight by Parliament to improve legislation and implementation**

1. A recurrent theme emerging from research, public voices and expert round tables is that while good laws have been made, failed implementation has resulted in poor outcomes. This raises the question of how the executive is able to, simply put, get away with poor implementation. The Panel is of the view that part of the answer lies in the narrow interpretation by Parliament of its powers of oversight. The Panel would like to see a more active Parliament, one that ensures the strict enforcement (or, where lacking, the introduction) of

- penalties for lack of performance by the executive. Parliament should also facilitate meaningful and effective public participation in the legislative and policy-making cycle.
2. A process should be in place to appoint key officials in a transparent manner. The challenge of implementation is also linked to the capabilities and values embodied by key leaders at state institutions. Parliament should consider opening up debate on the desirability and feasibility of a system that incorporates public participation and Parliamentary oversight for certain categories of appointments to public office to increase independence (where required) and accountability, to achieve the objectives of a capable developmental state.
  3. The legislative process should be overhauled. There have been a series of judgments from the Constitutional Court about the need for effective public participation in the legislative process. The Panel is concerned about repeated failures to sufficiently engage those directly affected through inclusive public hearings, as evidenced by these judgments. Many experts also warned of developing laws ‘in silos’, rather than adopting a cross-sectorial and integrated approach to deep-seated structural problems such as spatial inequality. Parliament currently appears overly dependent on government departments to develop Bills, which reinforces the problem of siloed interventions. We recommend that more use be made of ad hoc committees spanning several interconnected areas, and that legal drafting capacity be developed in Parliament.
  4. The accountability of Parliament to the public should be strengthened, by more direct linkages between Members of Parliament and their constituencies. The feedback loop from communities to legislation depends in part on the electoral system in place. The Panel recommends that Parliament amend the Electoral Act to provide for an electoral system that makes members of Parliament accountable to defined constituencies in a proportional representation and constituency system for national elections.

### **Summary of recommendations**

In the previous section, we highlighted the key interventions proposed by the Panel to accelerate fundamental change and realise the vision of the Constitution. Below, we provide a list of the key recommendations made by the Panel.



## **Poverty, unemployment and the equitable distribution of wealth**

Poverty, unemployment and inequality, the triumvirate of challenges that defines South African society, is the legacy of apartheid and colonialism. Despite making progress within some dimensions of social and economic deprivation and despite having established a set of fiscal policies (taxation and spending) that are among the most redistributive in the world, substantial challenges remain. Public hearings were dominated by the demand – expressed in many ways – that legislators and policymakers address the deep and widespread suffering underlying the socioeconomic situation.

### **Poverty**

The most efficient way to take a large number of people out of poverty is to create jobs that can absorb most of the unemployed. Here we summarise the main recommendations to tackle poverty. The Panel recommends that Parliament reviews the implementation of the Special Economic Zones Act 16 of 2014 to see how it could be optimised to create special zones for manufacturing production destined for export, with appropriate incentives and exemptions.

Parliament is urged to encourage government to prioritise agricultural development because it could generate more jobs for rural people and also contribute to economic growth. The tourism sector should receive renewed attention. Parliament is urged to pass legislation that will require the state to invest resources to gradually develop low-end tourism destinations in rural areas and the periphery where the majority of the population lives in order to attract tourists.

Impediments to competition and high entry barriers impose a structural constraint on growth. Parliament should enact amendments to competition legislation that enrich the powers of economic regulators to promote competition, based on fact-based inquiries and investigations, and also to discourage government policy and action that stifles competition.

The role of the informal sector in poverty alleviation is crucial. Parliament should ensure that the next budget appropriations include resources for supporting informal traders and upgrade their trading places, for example by creating low-cost kiosks, cubicles and stalls with suitable infrastructure and storage space.

Lack of access to finance is a consistent theme when it comes to the constraints facing new and

small businesses. The Panel supports legislative efforts to foster the advancement of patient capital to new or small businesses, with emphasis on equity and royalty-based financing schemes, in addition to loans.

## **Inequality**

Apart from high levels of poverty, South African society is also marked by very high levels of inequality, much of it racialised. Since 1994, the overall level of income inequality (as measured by the Gini coefficient) has changed from 0.59 to 0.69 in 2014, suggesting that inequality has grown (World Bank, 2017). There have also been changes in what drives inequality. Inequality between races has diminished to some extent, while inequality within race groups has increased.

South Africa does not have a comprehensive data set that can provide robust estimates of wealth inequality. A recent study suggests that the wealth gap in inequality is much wider than that of income inequality. New tax and survey data suggest that 10% of the South African population owns at least 90–95% of all assets, which is much higher than in developed countries, where the 10% own 50-75% of the assets (Orthofer, 2016).

Land redistribution is a key element to reducing wealth inequality. Land dispossession relegated Africans to the periphery of both urban and rural areas, with a concentration in the former Bantustans, townships and informal settlements. Apartheid spatial planning placed most of the land in the hands of few commercial farmers. The redistribution of land is governed by a policy and legislative regime that is analysed in Chapter 3, with recommendations made to give full effect to Section 25 of the Constitution. Oxfam has recommended a number of interventions to reduce wealth inequality that can inform legislation. The proposals start from the premise that the state can reduce inequality by using its power to introduce progressive policies aimed at addressing this social ill. The proposals accept that some level of inequality is needed to encourage innovation. A combination of these measures, which are outlined in Chapter 2, can go a long way towards reducing wealth inequality and growing the economy.

## **Unemployment**

A key driver of both poverty and inequality in South Africa is the fact that a very large proportion of the adult population is unemployed. There are many reasons why South Africa is marked by such



high levels of unemployment. Foremost among them are: low levels of employment in agriculture, low rates of economic growth, and skill and capital biases in economic policy. The Panel makes a range of recommendations to free up small business and to make it easy for it to employ unskilled and lower-skilled labour.

An active attempt to improve the ease of doing business, especially for small and medium-size business, would contribute to encouraging entrepreneurship. This report discusses in greater detail the ways in which small, informal businesses are located far from the main centres of economic activity and how their efforts are frustrated by regulation in Chapter 5. The Panel recommends that emphasis should be given to reducing the time to register a new business, getting appropriate permits, i.e. construction permits, getting telephone and electricity services, registering a property and accessing state sources of business development funding. Currently, all these actions are fragmented and time-consuming but could easily be centralised through a single e-governance portal.

Research has consistently indicated that registered small and medium enterprises face high costs of doing business. These are often, though not exclusively, related to those regulations which constrain growth in output and employment. The Panel recommends that enterprises below a certain size (in terms of number of employees) be exempted from certain regulations, including the obligation to pay the minimum wage and specific components of BEE legislation.

Young unemployed individuals and the disabled, as well as those in rural areas, constitute a large share of the unemployed who have never worked before. Yet, a first-time, inexperienced employee bears the same cost to the employer as an experienced worker.

The Panel recommends that people below a certain age, those that have been unemployed for a long time, people in rural areas and the disabled be employed without the firm being required to pay the minimum wage on the same terms. In effect, we recommend here the setting of a separate wage for the vulnerable in the labour market.

In terms of the Labour Relations Act, small companies in the same bargaining council as large companies are compelled to abide by the terms of the collective bargaining agreement reached by these employers and representative unions. In essence, the LRA calls for the 'extension to non-parties' noting that all agreements reached by representative parties during the bargaining process be extended to those parties not represented



at the bargaining council. In practice, what this clause in the LRA has done, unintentionally, is to force the terms of an agreement reached by large employers and large unions onto SMEs. The result is higher than manageable wages for SMEs, arising out of agreements reached by larger firms and employers – with negative consequences for the growth of, and employment generation among, SMEs in the relevant sectors.

The Panel recommends that Parliament amend the Labour Relations Act to remove the ‘extension to non-parties’ clause or to prescribe that the extension to non-parties will not be applicable to small and medium enterprises (SMEs).

The Panel commissioned an extensive review of the legislative and policy system for skills development to assess how it enables or constrains South Africa from meeting its developmental goals of decreasing poverty, inequality and unemployment, which are inextricably linked to low levels of education particularly among Africans compared to other race groups.

When the three policy goals most directly dealing with the production of skills are considered, it is evident that the emphasis of policy goals and instruments established to achieve them is skewed to the production of intermediate and high-level skills, and much less so to developing vocational skills which have the greatest potential for promoting employability. The Panel makes a range of recommendations that respond to the imperative of global competition that requires a high skills base and a local context that requires low-wage jobs.

### **Access to quality education**

Although analysis suggests that progress towards developing a system of basic education that delivers quality education to all has been slow, this does not appear to be a result of any significant legislative gaps. There are some differences of opinion about some aspects of the legislative framework – the relative power of school governing boards, principals and provincial departments, for example – but there do not appear to be significant gaps in the existing legislation.

To improve the quality of primary and higher education and training, which will contribute to a skilled workforce, five key priorities are recommended:

- a. More reliable national assessments of learning are required. Standardised testing, in the form of the Annual National Assessments (ANA) programme, was halted in 2015 due to



disputes between government and teacher unions over the programme’s design and purpose. While ANA was problematic in many respects, it appears to have sent vital signals to actors in the system about the importance of mastering basic language and mathematics skills, and constituted a unique tool at the primary level to gauge which schools were coping least, and which could be considered role models, in particular among township and rural schools. Since 2015, it appears as if better policies for standardised testing have been developed. In this regard, a 2016 proposal by the Department of Basic Education is important. A new national assessment should be instituted that contains both (a) a system of universal testing that makes it possible to gauge how well individual schools perform, particularly at primary school level, and (b) a sample-based testing system with highly secure tests with ‘anchor items’ or test questions that are repeated from year to year. The latter can be used to gauge system performance and to track it over time. The DBE has committed to such a system and it appears that unions are also broadly willing to accept this if the purpose of the different assessments is spelt out clearly. There is a need to implement these assessments as soon as possible across all schools annually as a basis for better school-level accountability. On the policy side, Parliament will need to revisit the 2007 amendments to the South African Schools Act (SASA), plus related notices and regulations falling under the National Education Policy Act (NEPA), to ensure that a solid framework exists for the national assessment system.

- b. New ways of teaching basic reading skills should be implemented with urgency. Given that literacy forms the basis of academic comprehension and expression it is critical to improve the reading skills of South African learners. Given the impact that technology development is having on the labour market, literacy and learning competency have been identified as worker survival skills given that 47% of current jobs are destined for redundancy due to technological changes such as automation and artificial intelligence requiring workers to retrain for new jobs that will be created by these new technologies. Evidence from around the world points to a particularly powerful obstacle to educational progress: poor teaching methods in the earliest grades, in particular as far as reading acquisition is concerned. Guidance in this area has improved, largely through better curricu-

lum documents, yet government's own reports point to gaps, such as a lack of attention to norms around how much writing learners should produce, or what the word count per minute should be for reading out aloud in specific languages. Legislators should push for the introduction of additional tools to strengthen early grade teaching and insist that these tools be properly quality assured, preferably through engaging with international experts. But the exceptionally large classes in the lowest grades in parts of the school system warrant special attention, as large classes limit the extent to which innovative teaching practices can be explored.

- c. Broader access to quality and standardised early childhood development programmes. This will require expansion of support to Early Childhood Development (ECD), with strong emphasis on the quality of such provision in the sense of cognitive, social and emotional development of children. For this reason, the ECD programme should be transferred from the Department of Social Development to the Department of Basic Education, which is the logical institution to concentrate its efforts on standardised cognitive development programmes, which can be monitored and evaluated for their effectiveness in improving readiness for Grade R. Currently around three-quarters of children are attending some early childhood development institution, but only around a quarter receive public funding. Parliament should use its right to allocate funding to ECD to stabilise this programme by increasing funding and developing appropriate training for ECD practitioners. With regard to access to ECD, it may be best to support the rural and marginalised communities by lowering eligibility requirements for infrastructure as many children live in communities with poor services such as lack of running water, electricity and sanitation. Such children should not be deprived early childhood development services by depriving them funding. Instead, the state should offer subsidy and simultaneously improve sanitation, access to water and electricity to the communities where these children live.

- d. Tightening up school management and governance.

Across the world, a key lever for improving schooling systems is seen to be 'decentralisation' or 'school autonomy', linked to adequate central funding and strong accountability of the school to the state. In South Africa, there are often simultaneous moves to take powers



to the centre, while also devolving powers to schools. For instance, widespread concerns around corruption in the appointment of school principals often lead to the assumption that principals are weak and should be ‘micro-managed’. The culture of provincial and national departments is often centralist, which can lead to the notion that it is primarily the duty of the province to monitor whether teachers engage in professional development activities or arrive in time at school, and so on. At the same time, the NDP and South African Schools Act clearly see the ideal as being relatively empowered school principals who act as powerful agents of change in the schooling system. The NDP in fact advocates shifting more powers to meritocratically appointed principals. Legislators can assist in bringing about a more coherent environment for school principals by passing legislation that requires that management autonomy should be devolved to school principals, who in turn hold heads of schools and teachers accountable, while central and provincial departments monitor and evaluate the performance of schools. Thus, decentralisation of the management and governance of schools should rest with the principal.

e. Improve the extent of returns on our investments in education

Only the completion of Matric seems to bear any noticeable return on investment in education in terms of labour market earnings and the probability of finding a job. Obtaining a Matric certificate raises the probability of being employed by 8 percentage points, and after controlling for many factors, individuals with Matric earn on average 39% more than those who have not obtained a Matric certificate. Furthermore, as individuals attain tertiary education, their employment prospects increase substantially. Investments in basic education bear measurable returns only insofar as they enable individuals to complete Matric and attain tertiary qualifications. Unfortunately, due to high dropout rates, less than half of the children who enter Grade 1 will, on average, make it to Matric. Considering that about 20% of those will not pass Matric, this further reduces the proportion of learners who will eventually complete Matric and thus enjoy high returns on their education in the labour market. For this reason, labour market efficiency, particularly co-operation between labour and government, inflexible labour laws and pay in relation to productivity, is important.

## Access to quality healthcare

In relation to health care, Section 27 of the Constitution provides that ‘everyone has the right to have access to health care services, including reproductive health care’. It furthermore provides that ‘the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights’, but also provides that ‘no one may be refused emergency medical treatment’. While Section 27 focuses on the right to ‘access to health care services’, Section 28 provides that every child has the right to basic health care services (i.e. not just to access to basic health care services, but to the services themselves).

All the platforms on which the Panel engaged (public hearings, written submissions, and workshops) unanimously agreed on the need and support for the implementation of National Health Insurance (NHI) as a matter of urgency. Differences of opinion were expressed on the implementation modalities. An alternative model to implement the NHI was presented to the Panel and is discussed in chapter 2 (the Hybrid Model), with further details available on the Panel’s webpage for reference.

There is sufficient consensus that NHI should seek to achieve the following:

- i. *Right to access healthcare*: NHI will ensure access to healthcare as enshrined in the Bill of Rights, Section 27 of the Constitution
- ii. *Social solidarity*: NHI will provide financial risk pooling to enable cross-subsidisation between young and old, rich and poor, as well as the healthy and the sick.
- iii. *Equity*: NHI will ensure a fair and just healthcare system for all; those with the greatest health needs will be provided with timely access to health services.
- iv. *Healthcare as a public good*: Healthcare shall not be treated as any other commodity of trade but as a social investment.
- v. *Affordability*: Health services will be procured at reasonable cost, taking into account the need for sustainability within the context of the country’s resources.
- vi. *Efficiency*: Healthcare resources will be allocated and utilised in a manner that optimises value for money that combines allocative and productive efficiency by maximising health outcome for a given cost while using the given resources to maximum advantage, and by maximising the welfare of the community by achieving the right mixture of healthcare programmes for the entire population.



- vii. *Effectiveness*: The healthcare interventions covered under NHI will result in desired and expected outcomes in everyday settings. NHI will ensure that the health system meets acceptable standards of quality and achieves positive health outcomes.
- viii. *Appropriateness*. Healthcare services will be delivered at appropriate levels of care through innovative service delivery models and will be tailored to local needs.

The Panel urges Parliament to consider the substantive inputs that have been submitted through the Panel process when it deliberates on the NHI Bill.

Parliament should express its support for the introduction of a system of universal health care underpinned by the principles articulated in the report and abbreviated here for reference: access to health care as a right, social solidarity, equity, health care as a public good and social investment, affordability, efficiency, effectiveness and appropriate levels of care.

To monitor equitable service provision, there should be a national patient information system that augments existing health information systems that will track patients as they receive services across the country. The system should include items that will help to monitor service provision for different groups using the following items: race, sex, age, belonging to a medical scheme and/or insurance, locality type, public or private facility, and socioeconomic status as well.

Monitoring use of the health care system, in both the public and the private sector, requires that data be systematically collected. Although the National Department of Health has been working with the Health Information Systems Programme (HISP) to develop a National Health Information Repository and Data Warehouse (NHIRD) which collates information from various vital statistics and other health indicator data sets, the facility-based District Health Information System, the BAS public financial management system, the PERSAL human resource system and a range of household survey data sets, this data is not in the public domain, nor does it include comprehensive data on the private sector. Moreover, the data does not include the patient medical record that will allow health care providers to access the information for treatment purposes regardless of where the services are provided.

Various initiatives have been introduced in the last few years, such as 'PHC re-engineering' and the 'Ideal Clinic' programmes to increase access to health care. However, there are aspects of these ini-

tiatives that require more attention, particularly institutionalising the Ward-based Outreach Teams (WBOTs; i.e. community health workers) and reaching agreement on their status within the public health system. Community health workers are critical in promoting equitable access to health care through their 'close to client' service provision; international evidence demonstrates that they make considerable contributions to improved health outcomes. Community health workers are also key providers of preventive and promotive health services. The long-term sustainability of a universal health system is closely linked to the effectiveness of preventive and promotive interventions, particularly in relation to the growing burden of morbidity related to non-communicable diseases.

### **Maldistribution of human resources for health between the public and private health care facilities**

Accurate data on the number of health care professionals working within the private health sector are not available, nor is it feasible to calculate accurate private provider-to-population ratios due to a lack of data and repeated stakeholder contestation of estimates. The only data available is the total number of health professionals registered with their respective councils; these include those working in the public sector, those working in the private sector as well as those no longer practising in South Africa.

Parliament should enact legislation that

- requires that the National Health Act regulations are developed and promulgated in order to introduce a certificate of need for newly certified professionals to ensure that underserved populations access quality health care, particularly medical specialists.
- regulates the licences for pharmacies to ensure new ones are located where the need is. This can be achieved by amending the Medicines and Related Substances Control Act and the Pharmacy Act.

### **Land reform: Redistribution, restitution and security of tenure**

The Panel is reporting at a time when some are proposing that the Constitution be amended to allow for expropriation without compensation to address the slow and ineffective pace of land reform. This at a time when the budget for land reform is at an all-time low at less than 0.4% of



the national budget, with less than 0.1% set aside for land redistribution. Moreover, those who do receive redistributed land are made tenants of the state, rather than owners of the land. Experts advise that the need to pay compensation has not been the most serious constraint on land reform in South Africa to date – other constraints, including increasing evidence of corruption by officials, the diversion of the land reform budget to elites, lack of political will, and lack of training and capacity, have proved more serious stumbling blocks to land reform.

The Panel is of the view that government has not used the powers it already has to expropriate land for land reform purposes effectively, nor used the provisions in the Constitution that allow compensation to be below market value in particular circumstances. Rather than recommend that the Constitution be changed, the Panel recommends that government should use its expropriation powers more boldly, in ways that test the meaning of the compensation provisions in Section 25 (3), particularly in relation to land that is unutilised or underutilised. The lack of well-situated land for urban settlement remains a stark legacy of apartheid planning and discrimination. Well-situated state-owned land needs to be made available for housing for the poor, and well-situated privately owned land targeted for expropriation.

The Constitution provides for positive land rights in Sections 25(5), (6), (7) and (9). These are the rights to equitable access (redistribution), tenure security and restitution. These rights are not being adequately promoted, enforced and protected. Instead, they appear to be under attack from policies and practices that redirect the benefits of land reform to potential political alliances with specific elites.

In its recommendations, the Panel has proposed amendments to existing laws to ensure that these rights are effectively promoted, enforced and upheld. Laws to be amended urgently include the Restitution of Land Rights Act and the Communal Property Associations Act, among others. Of particular concern are recent laws that have been used to dispossess vulnerable South Africans of customary land rights in former homeland areas. As the people who bore the brunt of the Land Acts and forced removals, those living in the former homelands deserve particular protection and redress. The Panel has accordingly proposed that the Interim Protection of Informal Land Rights Act (IPILRA) be urgently amended and properly enforced, and also that other laws that have been interpreted to enable land grabs, such as the Traditional Leadership and Governance Framework Act,



Mineral and Petroleum Resources Development Act and Ingonyama Trust Act, be explicitly made subject to IPILRA and amended in other ways as well. The problems facing people living on farms were raised in all the hearings. We have recommended that the Extension of Security of Tenure Act (ESTA) and the Labour Tenants Act be amended slightly. However, our main recommendation is that they be properly enforced, particularly their neglected redistributive components.

In addition to specific amendments to the laws mentioned above, we recommend two major new initiatives.

- 1 *A new land framework law, as discussed earlier, that would focus on the right to equitable access to land, while articulating the different components of land reform with one another:* The right to equitable access to land should be what animates the redistribution of land. Yet, to date, there has been no law that defines the meaning of equitable access to land or sets targets and reporting requirements in relation to redistribution. This has enabled elites to profit disproportionately from land reform. It has also meant that people see the restitution process, which is based on the loss of provable historical rights, as their only hope of getting land. As a result, restitution has been overrun with claims it cannot accommodate. The problems that currently beset restitution cannot be addressed without effective, forward-looking redistribution taking place at scale.

The Panel has found that in many instances the problems identified do not arise from the terms of the law per se, but rather from failures of implementation and enforcement. The Framework Bill proposes integrated, district-level committees of local stakeholders to ensure more direct participation by people on the ground to balance the power of officials. It also proposes mechanisms that would enable the public and Parliament to measure delivery better, so that they can hold the executive to account. It provides for the establishment of the Office of a Land Rights Protector, to provide more accessible forms of redress to rural people when things go wrong. A draft outline of such a Bill is included as an annexure to the report.

- 2 *A new Land Records Act to support an inclusive and robust land administration system that caters for all South Africans across a full spectrum of coexisting land rights:* As long as the majority of South Africans have no recorded land rights, they remain vulnerable to eviction



and dispossession. They also remain largely invisible to the formal economy. Apartheid attempted to aggregate black people into tribes. Unfortunately, after 1994 land reform initiatives have also tended to aggregate people into large groups under Communal Property Associations. This form of group property was used to reach targets quickly and avoid the expense, complexity and delays of subdivision. But it has locked people into imposed group identities against which it has proved increasingly difficult to assert specific land rights or enforce accountability. There is an urgent need to record existing off-register rights and give them more content based on inclusive decision-making processes involving local stakeholders. The rights must be recorded in a way that reflects customary understandings of land rights as family property, and lists all family members, with special protections for women.

The Land Records Act would be a crucial component of a land administration system that provides robust forms of recourse to ordinary people seeking to assert and protect their land rights. Designing an integrated land records system as a component of a strong land administration system is an ambitious but necessary task. Without it, the other components of land reform are unlikely to deliver enforceable land rights to beneficiaries. In the chapter on spatial inequality we recommend that a permanent institution such as the South African Law Reform Commission, or an inter-ministerial commission be established to drive the process.

The Panel is aware that the malaise in land reform cannot be reversed overnight and that there are no quick fixes. The challenges facing the new government in 1994 were daunting and fundamental. It was confronted with the reality of massive racial and wealth disparities in relation to ownership of land. The agricultural economy was dominated by large commercial farms owned by white farmers who had been heavily subsidised to monopolise a market that black farmers were systematically excluded from. Only a small minority of South Africans had formal ownership rights. Most people, even those who had occupied their land and homes for generations, had no registered rights to the land they de facto owned. Many people had no formal addresses, making them vulnerable to eviction and invisible to the formal economy.

This did not happen by accident. It was the result of laws designed to dispossess black people of land and mineral rights, and exclude them from the drivers of the central economy, the benefits

of which were ring-fenced for the white minority. Law was used to create segregated systems of property rights, with black people confined largely to ‘conditional use rights’ under state trusteeship. Law was also used to create segregated citizenship rights with black people confined to the status of chiefly subjects in the Bantustans. This was used to justify the denial of basic political rights in white South Africa. Black people living in what was to become the white countryside were systematically downgraded from owners, into labour tenants, and ultimately into wage labourers with no rights to the land.

It is of great concern to the Panel that recent policy shifts appear to default to some of the key repertoires that were used to justify the denial of political and property rights for black people during colonialism and apartheid. These repertoires include the assumption that customary and de facto land tenure systems do not constitute property rights for the poor. The State Land Lease and Disposal policy, and the CPA Amendment Bill default to the model of state trusteeship put in place by the Development Trust and Land Act of 1936 as the most appropriate form of land rights for beneficiaries of land reform. This model previously applied only in the former homelands, but now appears to have been extended to all land made available through restitution and redistribution.

The Communal Land Tenure Bill, together with the TLGFA and Traditional Courts Bill (TCB) defaults to the assumption that people living in the former homelands are primarily tribal subjects, as opposed to equal citizens. The underlying assumption appears to be that people in the former homelands are more appropriately governed by traditional leaders rather than elected local government. Recent laws and Bills propose prohibiting countervailing ownership rights held by individuals and families, and locking people under the sole jurisdiction of traditional courts by prohibiting them from using other courts instead. We question why such legal prohibitions are necessary if the version of customary law used to justify these Bills is legitimate and widely adhered to as claimed by the lobby supporting the Bills.

In addition, recent policy appears to have defaulted to the commercial farming model as the only viable and appropriate form of agricultural production. The implementation of early laws that sought to facilitate the subdivision of agricultural land for redistribution, and to secure the de facto land rights of vulnerable categories of people such as farmworkers and those in former homeland areas appears to have been put on hold. Instead of focusing on changing the structure of the



agrarian and mining economy to include those who were marginalised in the past, the emphasis seems to have shifted to retaining the barriers that lock poor people out and preserve key assets for a small elite.

These shifts appear to indicate that recent land policy is being driven by opportunities for political alliances and elite enrichment (particularly in mineral-rich areas) rather than focusing on the structural drivers of enduring inequality in ownership and control over land. These trends need to be confronted and addressed at a political level if the recommendations we make in chapters 3 and 5 are to have any hope of being implemented. That said, the Panel is of the view that Parliament can play an important role in ensuring secure access to land for millions of South Africans in ways that make a meaningful impact on their quality of life.

The current budget for land reform is woefully inadequate to bring about structural change, at less than 0.4 of the national budget. The task of recording existing rights and providing for efficient land administration is urgently necessary for poor people to be able to protect their current rights and benefit from land reform. This requires a significant investment of resources to develop and administer a system that addresses the failure to record both urban and rural land rights historically. Land administration, crucial as it is, is not enough to address the demand and hunger for equitable redistribution of land, which was powerfully expressed in the public hearings. The problem, however, is that as long as the outcomes of land reform remain as poor as those measured by various reports of the Department of Planning, Monitoring and Evaluation and the Financial and Fiscal Commission, it is difficult to make a convincing case that more people would acquire secure land rights were there to be a bigger budget allocation. The problems that currently bedevil land reform need to be acknowledged and addressed so that it can be shown that land reform will redress poverty and inequality, and so deserves a meaningful increase in its share of the national budget.

### **Spatial inequality**

The Panel makes various recommendations to reverse the spatial legacy of the past to create integrated, inclusive spaces.

### **Urban spatial inequality**

Well-situated urban land must be prioritised for low-cost housing and services that target the poor

to address the legacy of past exclusion and spatial inequality before it can be released for other purposes. The Government Immovable Asset Management Act No 19 of 2007 (GIAMA) provides a uniform framework for the management of immovable assets held or used by a national or provincial department. It ensures the co-ordination of the use of an immovable asset with the service delivery objectives of a national or provincial department. This is an important law that should be made better use of, to free up well-situated state-owned land for low-cost housing.

The Panel recommends that Parliament can and should provide effective oversight and evaluation of current assets, and public inspection of custodian and user immovable asset management plans as a mechanism to facilitate and promote transparency and accountability.

However, GIAMA does not govern land owned by state-owned enterprises (SOEs), and much well-situated, vacant urban land is owned by SOEs rather than by government departments. Such enterprises are regulated by specific laws, which often stipulate how assets may be disposed of. The panel proposes that each such law should be reviewed and amended to ensure that where well-situated vacant urban land is owned by SOEs, the land should be released to address the legacy of spatial inequality, in particular for the provision of low-cost housing. The amendment should provide that well-situated SOE land cannot be left unused or sold to the highest bidder.

The Panel also recommends the expropriation of well-situated private land where landowners are holding it for speculative purposes. Section 25(3) of the Constitution specifies that the current use of a property should be considered when determining compensation.

In addition, regulations that place too onerous a burden on informal housing and informal economic activities should be reviewed with a view to providing exemptions for some areas. Building regulations are complicated and place unnecessary burdens on enterprise, investment and development. The Panel recommends that Parliament take the initiative in inviting relevant government departments to set up committees to scope out the work required to ensure that building regulations are standardised, simplified and streamlined.

We recommend rules and procedures that are more consistent, less burdensome, more responsive to socioeconomic realities and more developmental in orientation, to avoid the current tick-box approach that causes interminable delays in housing provision. The Panel recommends that the



current detailed prescriptive approach be adapted to become more flexible and responsive to the realities of informal housing and the informal economy.

Government departments tasked with implementing SPLUMA are characterised by ways of operating that are compliance-centred and punitive in nature, and are therefore not open to creative approaches to inclusionary housing. Rather than creating an enabling environment for informal enterprises, they tend to respond to the growth of such enterprises with evictions and confiscation. The Panel recommends that government departments responsible for planning issues develop codes of conduct allowing for smarter, more proactive, and problem-solving practices aimed at empowering local government and front-line staff.

Informal traders are often sidelined by the regulations that govern shopping mall developments in townships. Parliament should review regulations governing mall developments in townships to increase the scope for the economic empowerment of informal traders.

Cumbersome policies on environmental impact studies and the issuing of water licences are slowing and inhibiting development. The panel recommends that regulatory requirements affecting low-cost housing provision should be streamlined and made concurrent. Development could be expedited considerably by cutting the red tape in current approval processes and consolidating the four separate approval processes for environment, heritage, water use and land-use planning.

Business registration in South Africa is complex and time-consuming compared with other middle-income countries. Government entities also act independently of each other without adequately communicating the processes of business registration and licensing to informal enterprises. The Panel recommends that Parliament should encourage government departments, such as the Department of Trade and Industry, the Treasury and the Department of Small Business Development, to undertake a joint endeavour to streamline the processes for registering businesses. These government departments should engage with agencies in the private sector on this issue.

The Panel also recommends a better system of law and oversight to regulate private development on well-situated public land to protect public interests, specifically in relation to addressing the legacy of spatial inequality in the cities.

Given the intractable legacy of spatial inequality, the Panel recommends that a co-ordinating structure like that of the South African National AIDS Council be established among all role-players in land, housing and urban development at national, provincial and local level. This structure would include key government departments, non-governmental organisations, the private sector and research organisations, and it should be chaired by the Deputy President.

At present, Parliament is overly dependent on government departments with siloed interests for the drafting of law. This manifests in the lack of an integrated approach to address urban land needs, especially in relation to the following departments: Rural Development and Land Reform (DRDLR), Co-operative Governance and Traditional Affairs (COGTA), and Public Works (DPW) and Human Settlements (DHS). Such a council would be in an ideal position to drive the review and amendment processes suggested above, and also the development and piloting of the proposed Land Records Act.

### **Rural spatial inequality**

Chapter 5 documents that the former homelands continue to suffer the worst poverty in South Africa. The levels of deprivation in these areas are far higher than for the rest of South Africa across material deprivation, employment deprivation, education deprivation and living environment deprivation. The Panel makes a series of recommendations to address the enduring spatial inequality between the former Bantustans and the rest of South Africa. It makes specific recommendations in respect of the standing of women and security of tenure in such communities.

### **Women in traditional communities**

- Government must ensure women's equitable representation in decision-making bodies in traditional communities.
- Government must ensure that women (who make up 59% of people living under traditional leadership) are always robustly consulted in the making of laws for customary communities.
- Laws meant to govern traditional communities should be tailored to the reality posed by the social and political economy of rural areas wherein women are not only (or even primarily) wives.



### **Proposal for a Land Records Act**

The failure to give legal effect to the tenure security provisions of the Constitution has emerged as a foundational issue throughout the Panel process. The Panel motivates for the enactment of a Land Records Act to enable compliance with the Constitution. The motivation is for national legislation and executive capacity to develop a robust, inclusionary land rights administration system to address the gap in the current state apparatus to recognise and administer land tenure rights that are insecure. This law will make different categories of rights visible, and elevate such rights to constitute property. The Act is conceived as enabling legislation that will trigger a range of appropriate and interrelated measures and mechanisms to build up a comprehensive institutional framework. It aims to put in place a model of land administration with capacity to underpin the rights-based approach to the land tenure laws passed after 1994 and to create capacity to resolve disputes where land rights are contested.

The new institutional structure could be attainable by re-engineering existing structures and assigning new functions to existing personnel. Land recordal is seen to be a national competency that should be devolved to local levels, but linked within an overall data management system. In this regard, technological innovation – particularly the development of blockchain technologies for land registry – offer enormous opportunities.

### **Recommendations on the Traditional Leadership and Governance Framework Act (TLGFA)**

The Panel makes a set of recommendations about how the current Traditional Leadership and Governance Framework Act (TLGFA) should be amended to ensure it is implemented and enforced in ways that ensure accountability, and do not undermine existing rights.

The first set of recommendations relates to ensuring the Act upholds the voluntary and living version of customary law that the Constitutional Court has recognised and upheld in various judgments involving the ascertainment of customary law.

The second set of recommendations addresses the entrenchment of apartheid tribal boundaries by Section 28 of the TLGFA. We argue for a definition of ‘traditional community’ that reflects the voluntary affiliation of groups of people who share customary laws and governance structures, rather than the superimposition of tribal identities according to apartheid geography.



The third set of recommendations provides for mechanisms that enable accountability and consultation within traditional communities and so prevent the abuse and violence that was reported at public hearings. Foremost among these recommendations is that the TLGFA be explicitly made subject to the Interim Protection of Informal Land Rights Act that requires that no-one can be deprived of an informal land right (as defined in the Act) without their consent, except by expropriation. Another important recommendation is that agreements signed by Traditional Councils be invalid unless customary law consultation requirements have been described, complied with, and recorded. Furthermore, that the composition and financial accountability requirements set out in the TLGFA must have been complied with for such agreements to be valid and enforceable. Other recommendations relate to amending the Act to stop the imposition of tribal levies, clarifying the legal standing of groups and individuals within traditional communities and increasing the proportion of women and elected members of traditional councils.

### **Recommendations on the Mineral and Petroleum Resources Development Act**

The Panel also proposes specific amendments to the MPRDA to address the way it is being implemented to undermine customary land rights and customary accountability requirements in the former homelands. As a result, mining has led to land dispossession and loss of livelihoods, while there are no real benefits for mine-hosting communities. Hundreds of millions of rands paid over to traditional councils by mining houses have not been accounted for. The Panel makes recommendations for amendment in relation to compensation for loss of land and livelihoods, for the transparent sharing of benefits accruing from mining, and for explicit compliance with IPILRA before the granting of a mining-related right. The Panel makes specific detailed recommendations to address the pattern of serious problems described during the public hearings, specifically that the DMR advises mining companies to transact directly with traditional leaders even where they have no legal authority to do so, and have not complied with the financial oversight and composition requirements set out in law.

### **Social cohesion and nation-building**

The Panel makes recommendations about various pieces of legislation and policy on various aspects of social cohesion (progressive realisation of socioeconomic rights, rights and discrimination, building democracy through active citizenship, and governance and nation-building). Here, we highlight some key recommendations on social cohesion and nation-building.



## **Progressive realisation of socioeconomic rights**

The Panel found that because of persistent racial differences in access to socioeconomic rights and constraints on life opportunities for certain vulnerable groups, the progressive realisation of socioeconomic rights in South Africa is possible only if government continues to place emphasis on designated groups in existing affirmative action legislation, policies and programmes. Thus, emphasis must be placed on realising socioeconomic rights for black people in general, women, and people with disabilities with the objective of achieving representivity and inclusion. The Panel supports the constitutional principle of privileging the disadvantaged but is cognisant of the need to assign opportunities on the basis of merit, and representatively. Furthermore, legislating the progressive realisation of socioeconomic rights should mainstream and capture the needs of the poor to facilitate access to employment, education, housing and health. As such, the concept of representivity should explicitly reference the poor of all race groups, together with members of designated groups.

Parliament should actively engage in the process of realisation of socioeconomic rights by monitoring and facilitating implementation of legislation, policies and programmes aimed at the progressive realisation of these rights, placing emphasis on designated groups – black people in general, women, and people with disabilities – as well as the poor of all race groups, in the relevant policies and programmes.

## **Social assistance**

It is important to develop and maintain an effective social security system based on solidarity, since this is an indication of one of the principal means of fostering social cohesion. The Social Assistance Act was enacted to help secure the well-being of all citizens and to provide effective, transparent, accountable and coherent government in respect of social assistance. However, the Act prevents certain sectors of society that need it the most, from benefiting from social assistance.

There are several challenges with the Act itself. A mother under 18 years cannot be registered as both a Child Support Grant (CSG) beneficiary and a caregiver recipient who receives the CSG on behalf of her infant. There is no provision in the Act for supervising adults designated to assist child-headed households to access the CSG. Lapsing of foster care grants is not addressed by the Act. For example, it is impossible for social workers managing high caseloads to have all docu-

ments and attachments to reports for extending orders ready for courts on due dates. It is therefore inevitable for orders to lapse.

Currently, there is no common definition for what constitutes a disability. The eligibility criterion for the disability grant marginalises people suffering from HIV and other chronic illnesses. The Panel makes some recommendations to remedy these deficiencies of the Social Assistance Act. The Act should be amended to enable teen mothers and child-headed households to receive the Child Support Grant (CSG) simultaneously for themselves and the children in their care; to allow supervising adults supporting child-headed households to apply for the CSG on behalf of the children under their supervision; to deal with lapses of foster care grants; and to include a widely accepted definition of disability.

## Rights and discrimination

### **Equality**

Despite the existence of several laws aimed at eliminating racism and other forms of discrimination, the Panel found that South Africa continues to experience high levels of incidents of racism, racial discrimination and xenophobic attacks. South Africa is in the process of developing a National Action Plan (NAP) to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance, to deal with various lines of fracture related to rights and discrimination, that has not yet been finalised, consequently undermining the capacity to deal with these issues.

The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA) is the country's central mechanism to protect the dignity and ensure equality for all citizens, in particular the most vulnerable. However, several sections of the Act have not yet been promulgated, and the Act needs to be strengthened in several areas to make it more effective.

Parliament should use its powers to introduce legislative changes to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 to strengthen the Act by promulgating certain outstanding sections of the Act, such as the requirement that each department develop equality plans, or putting in place a procedure to ascertain why these sections cannot be promulgated and what measures will be taken to ensure that these problems are addressed. The hate speech section of the Act



should be strengthened, and Parliament must ensure that definitions contained in the Act improve on the definitions currently contained in the Prevention and Combating of Hate Crimes and Hate Speech Bill (by ensuring that it is not overbroad and does not unconstitutionally limit the rights to freedom of expression). The tasks currently placed on the Equality Review Committee should be transferred to Chapter 9 institutions alongside the required funding to fulfil this responsibility effectively.

### **Gender-based violence**

Gender-based violence (GBV) is a major obstacle to the achievement of equality, development and peace, as violence impairs women's ability to enjoy basic human rights and freedoms as enshrined in various policies and conventions, such as the 1995 Beijing Declaration. High levels of gender-based violence persist despite legislative and programme interventions. While the South African Integrated Programme of Action (IPA) addressing violence against women and children has been published, it has not been officially launched or implemented and is marred by a number of problems, including no oversight body to monitor implementation, insufficiently inclusive consultation in development, homogenisation of women and children in two distinct categories, and exclusion of certain categories.

Parliament should guide the development of a National Strategic Plan on Gender-Based Violence, which is multisectoral, co-ordinated and inclusive with a strong monitoring and evaluation component to hold all to account, and this should be fully costed. The Plan should be developed in collaboration with civil society and should be expanded to include all forms of gender-based violence.

Currently, South Africa's legislative framework concerning prostitution is one that declares it illegal. However, the law does not protect those who sell sex, often out of necessity, making them vulnerable to abuse by their clientele or the police, stigma, unfair discrimination, random arrests, the denial of medication, violence and exploitation, as well as driving prostitution and those who sell sex to the periphery of society.

A number of organisations stated in their submission to the Panel that, among other things, the Act drives prostitution and those who sell sex to the periphery of society. Here they experience stigma, unfair discrimination, violence and exploitation. The arrest of those who sell sex for acts that they have not committed (under municipal by-laws) where they are fined is abuse of the law to deliberately persecute a specific group of people (unfair discrimination and violation of the right to equality before the law). There are cases of poor health care services provided to those who sell sex from public health facilities due to stigma and

discrimination by health care workers; and criminalisation of prostitution leads to high levels of abuse by the police, including requests for free sex in exchange for not arresting, displaying of photographs of suspected prostitutes in police stations, and placing of transgender women who sell sex in male cells.

Parliament should use its powers to introduce the following legislative changes to the Criminal Law (Sexual Offences and Related Matters) Act 32 of 2007 with regard to protecting those who sell sex:

- the Act should be amended to decriminalise prostitution in order to remove the unintended consequences arising from the criminalisation of prostitution for those who sell sex; and
- other legislative provisions contained in national, provincial and municipal legislation criminalising prostitution for those who sell sex or making it an offence should also be amended.

### **Refugees, migrants and stateless people**

The Immigration Act has a unique role in nation-building and social cohesion. It is a key enabler of human rights and the determination of the status of foreign nationals, and the issuance of visas and permits is important in defining their legal status and thus in protecting their rights, which are guaranteed by the Constitution of the Republic of South Africa. However, there are provisions of the Immigration Act 13 of 2002 that have been declared unconstitutional, including the denial of the automatic right of detainees to appear in court, and others that inhibit implementation of an effective immigration system.

During several encounters between the Portfolio Committee on Home Affairs, the Select Committee on Social Services, and the Department of Home Affairs, there have been several short-term and long-term recommendations that have been made to address challenges with the Act.

Parliament should consider having regular annual mandatory dedicated parliamentary social cohesion forums with the relevant departments and stakeholders to obtain feedback from departments and input from the public on progress with the implementation of legislation relating to foreign nationals, including the Immigration Act 13 of 2002, the Refugee Act 130 of 1998, the South African Citizenship Act 88 of 1995, and the Births and Deaths Registration Act 51 of 1992.

### **Building democracy through active citizenship and governance**

Several institutions are part of South Africa's complex anti-corruption architecture. Included here are the



Auditor-General's Office, the Public Protector's Office, and the Public Service Commission, as well as other agencies such as the South African Police Service (SAPS), Directorate for Priority Crime Investigations (DPCI), Independent Police Investigative Directorate (IPID), National Prosecuting Authority (NPA), Asset Forfeiture Unit (AFU), Specialised Commercial Crime Courts, and the Special Investigating Unit (SIU). The fact that the Constitutional Court has determined the need for an independent anti-corruption body with structural and operational autonomy is an indication of concern about the independence of these bodies. This ruling needs to be acted upon as a matter of urgency.

In line with growing concerns around corruption and action taken to combat corruption, concerns have been raised about the level of independence of key institutions, particularly in the criminal justice sector, including the National Prosecuting Authority, the South African Police Service and the Hawks. These deal mainly with the appointment process of the heads of these bodies. This would be one step in establishing a minimum degree of independence for these anti-corruption institutions.

Parliament should consider opening up debate on the desirability and feasibility of a system that incorporates public participation and Parliamentary oversight for certain categories of appointments to public office to increase independence (where required) and accountability to achieve the objectives of a capable and developmental state.

### **Access to information**

Access to information is critical for citizens to hold Government accountable and to participate effectively. However, several features of the Promotion of Access to Information Act 2 of 2000 lead to unfair discrimination against certain vulnerable sectors, while providing significant and harmful obstacles to access to information by the public.

Parliament should consider having regular annual mandatory dedicated intersectoral public hearings with departments and stakeholders to obtain feedback from departments and input from the public on progress with the implementation of the Promotion of Access to Information Act and the success of the Information Regulator in resolving the serious problems in accessing information.

### **Public participation**

In South Africa, public participation is generally facilitated by means of, among other things, ward

committees in local government, public meetings, public comment following press notices and integrated development planning in a range of different laws and policies. The Constitution (1996) prioritises process values that support informed participation. Public participation in existing legislation provides an opportunity to tap into the capacity, energy and resources that vest within citizens to drive change and to meaningfully participate in processes that affect their lives. There are, however, problems in the conceptualisation of these existing frameworks for participation as well as in the implementation of these legislative provisions, where they exist. There is a need to rethink the role of active citizens as co-drivers of change. The existing framework for public participation often only enables the public to participate as invited guests in processes as opposed to partners and co-creators.

Parliament should consider identifying and reviewing all legislation that includes a public participation component, including those that relate to Parliaments interaction with citizens, and ensure that it conducts oversight of, and ensures adequate resources for the implementation of these provisions such that where provision is made for the public to be consulted this consultation is meaningful and effective.

## Nation-building

### **Reconciliation**

A central component of the reconciliation project in South Africa was the Truth and Reconciliation Commission (TRC) under the Promotion of National Unity and Reconciliation Act 34 of 1994. In the process of consideration of the final TRC Report, Parliament approved only four recommendations made by the President: the individual, once-off reparations of R30,000; educational assistance, medical benefits, and housing and other social assistance; symbols and monuments; and community rehabilitation. To date, regulations for medical benefits, housing assistance and community rehabilitation have not been finalised. In addition, concerns have been raised about the manner in which the reparations process has unfolded; the prosecution policy for apartheid-era political crimes; and the special dispensation process.

Parliament should consider having a dedicated intersectoral public hearing with the relevant departments, including the Department of Justice and the National Prosecuting Authority, the De-



partments of Basic Education and Higher Education; the Department of Social Development, the Department of Human Settlements, the Department of Health, and stakeholders to obtain feedback from departments and input from the public on progress with the implementation of the TRC recommendations, as well as discussions on prosecutions, the special dispensation process, and reparations. The Department of Justice and Constitutional Development should provide regular reports to Parliament on progress with the issues mentioned above.

### **Traditional leadership**

Current and proposed legislation on traditional leadership denies people living in areas under traditional leaders several constitutional rights, distinguishing them from those living in the rest of the country who enjoy the full benefits of post-apartheid citizenship. Such legislation also poses a threat to social cohesion by entrenching and promoting ethnic identities. By contrast, the rest of the population live in areas under democratically elected councils (and councillors) that operate under the same rules. Comments made by members of the public at public hearings indicate a clear concern about the different conditions under which people are living in areas under traditional leaders, as compared to those living elsewhere in South Africa.

Parliament should use its powers to introduce legislation that clarifies the status of both land and governance structures in order to provide certainty and avoid ongoing tension and contestation. People in rural areas are entitled to the same rights as all South Africans, including the recognition of their customary ownership of land. Parliament must ensure that no laws or policies abrogate these rights and that a law is introduced to secure customary land rights as required by Sections 25(6) and (9) of the Constitution.

### **Distrust in institutions**

Trust is an essential element of democratic legitimacy, and the declining levels of trust in leaders and institutions impact negatively on nation-building. One reason for this is that in some instances the wrong people are appointed to senior positions, which eventually results in a loss of public trust in them and the institutions they lead. The Constitution empowers the President and Premiers to appoint members of the National and Provincial Executives. Without abrogating from these constitutional powers, measures should be introduced that allow for more transparent and participatory



appointment processes. Such processes would empower the public with more information and knowledge about the new members of the executive and their relative skills, experience and merits, and would provide a forum where appointees can publicly commit themselves to applicable standards and to certain objectives, against which their subsequent conduct and performance can be measured. An empowered public will, in turn, be able to assist the legislatures to ensure that executives are more accountable to electorates.

Accountability, responsiveness and openness are foundational values in our Constitution, which also specifies transparency and informed public participation among other values and principles governing public administration (s.195).

Parliament should introduce legislation that provides for a system of public review of appointees to Cabinet, Provincial Executive Committees and Mayoral Committees.

### **Implementation of Legislation**

In Chapter 6, the Panel reflects on the implementation of policy and legislation. The Panel's work has revealed deep problems with implementation of policy and legislation. In many areas, government and Parliament have produced progressive policy and legislation, but with very poor outcomes. The causes of poor implementation are many, and the chapter discusses the most important causes of deficient implementation. Further evidence-based research is required to uncover the root causes of these failures and appropriate measures to resolve them. The Panel has made many specific recommendations, in the relevant chapters, on the implementation of specific laws and policies. In Chapter 6, the Panel makes recommendations that seek to sharpen Parliament's role in facilitating and overseeing implementation of the state's laws and policies. The most fundamental recommendations relate to the institutional reform of Parliament to make it more effective in holding government to account for its performance. The Panel has also made recommendations to guide appointments to key positions. The effective implementation of the National Development Plan is central to efforts to accelerate fundamental change, and the Panel has made recommendations to elevate the Plan into law.

### **Way Forward**

The Panel would like to congratulate the Speakers' Forum for initiating and supporting this important review of post-apartheid legislation. Through public hearings, round tables with experts



and stakeholders, and commissioned research, the Panel has been exposed to the strides that post-apartheid South Africa has made towards unshackling itself of the burden inherited from colonial and apartheid rule. The deep-seated nature of the ‘triple challenge’ of poverty, inequality and unemployment is manifest in the evidence before the Panel, that is analysed in this report with the full record available online, as is the enduring legacy of land dispossession and insecure tenure. The country has made considerable progress in healing the divisions of the past, but much work needs to be done to build a cohesive and united nation.

Chapter 7 provides guidance on the prioritisation of the Panel’s recommendations. The Panel also humbly submits that the Report should be processed by a dedicated task team set up for that purpose. In the ‘next generation’ of post-apartheid reform, the Panel foresees a state that works in an integrated fashion, with a clear break from some of the deficiencies discussed in this report, such as fragmentation (working in silos), short-termism and weak implementation. It is in this spirit that the Panel recommends that this report is processed by a special task team of Parliament.