



**HIGH LEVEL PANEL ON
THE ASSESSMENT OF KEY LEGISLATION AND
THE ACCELERATION OF FUNDAMENTAL CHANGE**



**REPORT OF THE HIGH LEVEL PANEL ON THE
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List of Acronyms

AGSA	Auditor--General of South Africa
BA	Banks Act No 94 of 1990
BBBEE	Broad-based Black Economic Empowerment
BCEA	Basic Conditions of Employment Act No 75 of 1997
CASE	Community Agency for Social Enquiry
CBO	Community-based Organisation
CEA	Customs and Excise Act No 91 of 1964
CET	Continuing Education and Training
CGE	Commission on Gender Equality
CPA	Communal Property Association
CPA	Consumer Protection Act No 68 of 2008
CRDP	Comprehensive Rural Development Programme
CSG	Child Support Grant
DAC	Department of Arts and Culture
DBE	Department of Basic Education
CHE	Council on Higher Education
COGTA	Department of Cooperative Governance and Traditional Affairs
DHA	Department of Home Affairs
DHET	Department of Higher Education and Training
DHS	Department of Human Settlements
DLA	Department of Land Affairs
DPW	Department of Public Works
DRDLR	Department of Rural Development and Land Reform
DSD	Department of Social Department
ECD	Early Childhood Development
EEA	Employment Equity Act
EPWP	Expanded Public Works Programme
ESTA	Extension of Security of Tenure Act No 62 of 1997
ETIA	Employment Tax Incentive Act No 2 of 2013
FAIS	Financial Advisors and Intermediary Services Act No 37 of 2002



FET	Further Education and Training
FLISP	Finance-linked Individual Subsidy Programme
HEA	Higher Education Act No 101 of 1997
HECQ	Higher Education Quality Committee
HLP	High Level Panel on the Assessment of Legislation and the Acceleration of Fundamental Change
HSRC	Human Sciences Research Council
IA	Immigration Act No 13 of 2002
IPILRA	Interim Protection of Informal Land Rights Act No 31 of 1996
ITA	Income Tax Act No 58 of 1962
ITB	Ingonyama Trust Board
LA	Liquor Act No 59 of 2003
LAMOSA	Land Access Movement of South Africa
LDAD	Land Distribution for Agricultural Development
LGBTIQ+	Lesbian/Gay/Bisexual/Transgender/Intersex Queer
LRA	Labour Relations Act No 66 of 1995
LRMB	Land Rights Management Board
LRMC	Land Rights Management Committees
LTA	Land Transport Authority
MLRA	Marine Living Resources Act No 18 of 1998
MPRDA	Mineral and Petroleum Resources Development Act No 28 of 2002
MSA	Municipal Structures Act No 117 of 1998
MSA	Municipal Systems Act No 32 of 2000
MSA	Medical Schemes Act No 131 of 1998
MTSF	Medium-term Strategic Framework
MWA	Mines and Works Act No 12 of 1911
NAFU	National African Farmers' Union
NAMB	National Artisan Moderation Body
NCR	National Credit Act No 34 of 2005
NDP	National Development Plan
NEF	National Empowerment Fund
NEMA	National Environmental Management Act No 107 of 1998

NGO	Non-governmental Organisation
NHA	National Health Act No 61 of 2003
NLA	Natives Land Act No 27 of 1913
NQF	National Qualifications Framework
NQFA	National Qualifications Framework Act No 67 of 2008
NSA	National Schools Act No 84 of 1996
NSFAS	National Student Financial Aid Scheme Act No 56 of 1999
NWA	National Water Act No 36 of 1998
NYP	National Youth Policy
OHSA	Occupational Health and Safety Act No 85 of 1993
OSW	Office on the Status of Women
PAJA	Promotion of Administrative Justice Act No 3 of 2000
PANSALB	Pan South African Language Board Act No 59 of 1995
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act No 4 of 2000
PLAS	Proactive Land Acquisition Strategy
PMM	Prohibition of Mixed Marriages Act No 55 of 1949
PSET	Post-school Education and Training
PTO	Permission to Occupy Certificates
SAHRC	South African Human Rights Commission
SAIVCET	South African Institute for Vocational and Continuing Education and Training
SAPS	South African Police Service
SASA	South African Schools Act No 84 of 1996
SASSA	South African Social Security Agency
SBG	School Governing Body
SDA	Skills Development Act No 97 of 1998
SER	Socioeconomic Rights
SETA	Skills Education Training Authorities
SLAG	Settlement Land Acquisition Grants
SMME	Small, Medium and Micro Enterprises
SONA	State of the Nation Address
SPLUMA	Spatial Planning and Land Use Management Act No 16 of 2013



TCB	Traditional Courts Bill of 2008, 2012 and 2017
TKLB	Traditional and Khoi-San Leadership Bill No 23 of 2015
TLGFA	Traditional Leadership and Governance Framework Act No 41 of 2003
TSF	Total System Failure
ULTRA	Upgrading of Land Tenure Rights Act No 112 of 1991
WPBL	Workplace-based Learning
WPHET	White Paper on Higher Education Transformation
WPPSET	White Paper on Post-school Education and Training

Foreword

Let me begin by congratulating the Speakers' Forum for embarking on this immense but necessary initiative to review post-apartheid legislation. For many of us who have traced the path from the liberation struggle to the halls of government, there has hardly been time to pause and reflect on the astonishing achievement of a functioning, constitutional state in what was once a bitterly divided country led by an oppressive government. We have come a long way, and it is fitting that we should take stock of the progress achieved, but also the road ahead.

Over the past 21 months, the High Level Panel on the Assessment of Legislation and the Acceleration of Fundamental Change, which it has been my honour to chair, has criss-crossed the country to hear firsthand from those who live in this land about their experience of the laws passed by the democratic state. We have received numerous submissions from individuals, non-governmental organisations, academics, industry associations and many other organisations. We have commissioned research from experts to help us think through the issues. We have held many discussions, in our working groups and in plenary as the Panel, to thrash out the questions we have been asked to grapple with. The three key themes we have been tasked with – poverty, unemployment and the inequitable distribution of wealth; land reform: restitution, redistribution and security of tenure; and social cohesion and nation-building – go to the heart of the post-apartheid project of building an inclusive society.

This report is the outcome of our efforts. It reflects our attempt to parse through the considerable record of inputs into our process, which can be found online in written, video and audio formats. We have distilled some key findings, debated the drivers behind the outcomes that are observed, and deliberated on recommendations. We offer three kinds of recommendations as summarised in the Executive Summary: priority proposals to alter, fundamentally, the trajectory of our society's development, a set of recommendations to deepen the progressive realisation of socioeconomic rights enshrined in the Constitution, and finally some urgent measures to limit the unintended consequences of legislation.

In responding to the mandate provided to the Panel, we have devised an action plan that will guide the Speakers' Forum in processing our recommendations.



Reflecting on the journey that our country has made over the past two decades is no small feat. I would like to thank all those who have contributed to this task. In particular, I would like to thank the support team to the Panel, the rapporteurs who assisted our various work streams, the facilitators who guided our sessions and the expert advisors who shared their insights with us.

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.

CHAPTER 1

INTRODUCTION AND METHODOLOGY



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 (Constitution of the Republic of South Africa Act 108 of 1996). The Constitution provides the 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. 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 socioeconomic rights that promote equal life chances.

Since 1994, the three levels of government have produced a substantial body of new laws 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. Yet, more still needs to be done to change the course of society towards inclusive development.

The Speakers' Forum, comprising the Speaker and Deputy Speaker of the National Assembly, the Chairperson and the Deputy Chairperson of the National Council of Provinces, and the Speakers and the Deputy Speakers of the nine provincial legislatures, created the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change (HLP) to assess this legislative output. This follows from a determination made by the Fourth Democratic Parliament,

in its Legacy Report, that the assessment of the impact of legislation is a key priority to be undertaken by the Fifth Democratic Parliament. After a 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 established the independent High Level Panel of eminent South Africans to assess the content and implementation of legislation passed since 1994 in relation to its effectiveness, and possible unintended consequences. The panel's mandate is to review legislation, assess implementation, identify gaps and propose action steps with a view to identifying laws that require strengthening, amending or change. 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.





The mandate of the High Level Panel

The Panel was mandated with the following:

- Assume overall responsibility for the assessment of key legislation and the acceleration of fundamental change.
- Assess the impact of existing legislation and identify legislative gaps.
- Assess the possible unintended consequences, gaps and unanticipated problems in post-apartheid legislation, as well as how effectively laws have been implemented.
- Propose appropriate remedial measures to Parliament, including amendment, repeal or additional legislation.
- Provide guidance on the selection of external experts/organisations to be commissioned.
- Conduct research and analysis together with commissioned research experts.
- Conduct public hearings and round tables.
- Produce final report on the findings together with the research experts.

The Panel organised its work into three working groups:

The triple challenge of poverty, unemployment and inequality. The creation and equitable distribution of wealth

This Working Group was tasked with producing a report on the following focus areas:

- a) Growth, poverty and inequality
 - Wage inequality
 - Wealth distribution & inequality
 - Labour regulatory environment
 - Unemployment
 - Poverty and access to basic services
- b) Unequal access to quality health care

- c) Quality education
- d) Spatial inequality
- e) Skills development

Land reform, restitution and security of tenure

This Working Group was tasked with producing a report on the following focus areas:

Land tenure reform: in communal areas, on privately owned farms (the Extension of Security of Tenure Act of 1997), in areas with a recent history of labour tenancy (the Land Reform [Labour Tenants] Act of 1996), in the former ‘coloured’ rural areas (the Transformation of Certain Rural Areas Act of 1998), and in urban and peri-urban areas (the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act of 1998, and other relevant legislation).

In relation to *communal tenure*, the review will include the Ingonyama Trust Act of 1994, the Interim Protection of Informal Land Rights Act of 1996, and the Communal Land Rights Act of 2004.

In relation to *communal areas* in particular, the review will include the links between tenure reform legislation and related legislation and policy such as the Traditional Leadership and Governance Framework Act of 2003 and its provincial equivalents, as well as mining law, and in particular the Mineral and Petroleum Resources Development Act of 2002, as amended.

Land restitution, including the Restitution of Land Rights Act of 1994, the Restitution of Land Rights Amendment Act of 2014, and the Communal Property Associations Act of 1996.

Land redistribution, including the Provision of Land and Assistance Act of 1993, as amended in 2008, the Subdivision of Agricultural Land Act of 1970, the Expropriation Bill of 2016 and proposed laws and policies regulating landownership and farm size, including the Preservation and Development of Agricultural Landholding Bill and Regulation of Land Holdings Policy Framework.

Also to be reviewed are relevant policies and programmes such as the State Land Lease and Disposal Policy of 2013, the Recapitalisation and Development Programme and their



operations and beneficiary targeting. Post-settlement support and co-ordination among government departments (e.g. between the Department of Rural Development and Land Reform and the Department of Agriculture, Forestry and Fisheries) will also be considered.

Agrarian reform and rural development. Debates concerning land use and the failure of some farming activities on restitution and redistribution land have informed key changes in land policy. A review of the literature concerning factors that inhibit the success of agriculture in South Africa, and constraints and opportunities for new farmers, will be undertaken, with particular reference to their implications for land reform policy and practice. In the absence of specific legislation to guide rural development, the review will address the Comprehensive Rural Development Programme to assess its contributions towards enabling the achievement of the land reform and related legislation referred to above.

The social, economic and political significance of the land question. This work will provide a high-level overview of the wider significance of the unresolved land question in South African society, in historical perspective. It will assess the broader implications of slow progress in land reform due to constraining laws and policies, and include a key focus on land and citizenship, belonging, and meaning, but also material aspects such as employment and livelihoods.

The legacy of spatial inequality. Studies show that deep poverty remains concentrated in the former homelands:

- Have law and policy entrenched the legacy of spatial inequality, and its ongoing impact on the lives of rural people? Laws to consider include the Traditional Leadership and Governance Framework Act of 2003, the Traditional Courts Bill and the Communal Land Rights Act of 2004 (subsequently struck down by the Constitutional Court in 2010).
- What has the impact of such laws been in relation to setting former homeland areas apart from the rest of South Africa in relation to segregated property regimes and legal systems?

What are the social, economic, political, and institutional effects of continued spatial segregation and inequality?

Social cohesion and nation-building

This Working Group will conduct its investigation to get answers to the following:

'After 22 years of democracy, despite the creation of a conducive policy and legislative environment, South Africa continues to be confronted with the challenges of social cohesion and nation-building.'

The Working Group was tasked with producing a report on the following focus areas:

Previous surveys and studies related to the perceptions of South Africans regarding issues that promote or impede the fostering of social cohesion and nation-building.

Laws, policies and regulations that inhibit social cohesion and nation-building. The aim is to identify whether legislative tools are useful in promoting social cohesion and nation-building, or whether they have been rendered toothless. In particular, the (i) presence of legislative gaps and (ii) remedial actions emanating from the legislative sector should be explored.

The main facets that need to be interrogated with regard to social cohesion and nation-building include:

- Human rights and equality
- Discrimination (racism, tribalism, xenophobia and sexism)
- Social and economic exclusion
- Redress and transformation
- Community co-operation or the lack thereof
- Crime, safety and security (the privatisation of security to benefit and protect



those of higher income)

- Growing poverty, economic inequality and unemployment
- The resurgence of racism
- The impact of traditional leaders on social cohesion
- Perceptions of corruption, basic service delivery and poor leadership
- Levels of trust between citizens and institutions
- Social solidarity and inclusion or the lack thereof
- Active and participatory citizenship
- The impact of cultural or linguistic differences
- The politics of economic livelihoods and the competition for resources

It is envisioned that the subcommittee will participate in the series of colloquiums hosted by the DAC, in a collaborative effort between the two Panels.

The Panel decided to include a stand-alone chapter on spatial inequality, which has emerged as a cross-cutting theme across the three workstreams. In addition to what is listed above, in April 2017, the Speakers' Forum requested that the Panel's mandate be expanded to include a proposed implementation plan of its recommendations over the short, medium and long term, as well as to include a reflection of the impact of legislation from a gender perspective.

The Panel's remit is quite wide, and the mandate is not to review all pieces of legislation passed since 1994. The Panel, taking guidance from its mandate by the Speakers' Forum, and through deliberation and analysis, focused on the most important policies and laws.

The Panel was constituted as follows:

- Mr Kgalema Motlanthe, Former President of the RSA

- 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

Methodology

The Panel held public hearings in all nine provinces to receive input directly from the public and received written submissions from individuals and organisations in response to calls for submission. It 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.

In structuring its analysis, the Panel proceeded by articulating the Constitutional provisions that are relevant to each theme. This was followed by an overview of the goals and objectives informing



legislation. Outcomes and trends since 1994 were considered, aided by the insights generated from diagnostic reports, commissioned papers and round tables. The ‘voice of the public’ was an important element of the Panel’s work, and the report endeavours to capture the views, experiences and concerns of ordinary people throughout the text.

In reviewing legislation, the Panel kept the following questions in mind:

- Were the right laws passed?
- Were the laws designed and drafted correctly? Any significant flaws related to substance and of process?
- Did legislation meet its objectives as outlined in the Constitution and policy documents?
- What were the unintended consequences?
- What type of legislation is missing, considering Constitutional and policy imperatives?

The Panel also considered the effectiveness of the state in implementing legislation, including considerations of funding, and institutional and political support.

Out of this analysis, the Panel made recommendations for the amendment, repeal or implementation of legislation.

Finding and recommendations

Has the legislative output of the post-apartheid state been equal to the challenges already entrenched in society in terms of its impact? 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. 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. Therefore, 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 the Panel discusses 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 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 (particularly 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, sustainable livelihoods and rural development, 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 that marginalised the black majority to the outskirts of the cities and to the Bantustans in order 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 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 makes recommendations to create 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 also makes recommendations for the enactment of laws to recognise and administer a continuum of land rights. Finally, the Panel makes recommendations to amend 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 due to 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 on 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 that 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.

A summary of recommendations can be found in the Executive Summary and in Chapter 7.

Report outline

The structure of the rest of the report is as follows: Chapters 2 to 5 of this report deal with the substantive analysis of legislation. In Chapter 2, the report examines Poverty, unemployment and the equitable distribution of wealth. This chapter also includes sections dealing with access to quality education and health care. This is followed by Land reform: restitution, redistribution and security of tenure in Chapter 3. In Chapter 4, the report deals with Social Cohesion and Nation- Building. The next chapter focuses on Spatial Inequality. Finally, in Chapter 7, the report provides an implementation plan for the recommendations made by the Panel.

CHAPTER 2

POVERTY, UNEMPLOYMENT AND THE EQUITABLE DISTRIBUTION OF WEALTH



Dr Olive Shisana



Abstract

This chapter argues that despite a progressive Constitution, which 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 takes on 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 improving government’s capacity to implement its laws and policies, including through enhanced accountability and governance measures.

Introduction

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 (for example, in dramatically increasing the number and proportion of households living in formal housing and in expanding access to electrification), 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.

These realities exist even though, since 1994, a panoply of laws and policies have been put in place, the express purpose of which has been to develop the economy and to reduce poverty and inequality. These policies and laws have sought to restructure South Africa’s distributive regime to ensure that resources flow from rich to poor, and have included:

- Policies and programmes that have sought to provide incomes and/or assets to the poor (such as the expansion of social grants, the provision Reconstruction and Development Programme (RDP) housing, the implementation of Expanded Public Works Programme (EPWP) and land reform and restitution);
- Policies and programmes facilitating the provision of free and subsidised services to the poor (such as basic education, public healthcare and subsidised tertiary education);

- Changes in the legal regime governing the labour market that have sought to strengthen worker rights to help both organised labour and more vulnerable workers pursue higher wages and more decent employment (such as the Labour Relations Act and Basic Conditions of Employment Act); and
- Interventions aimed at changing the ownership and employment profiles of private companies (through, for example, broad-based black economic empowerment, government procurement policies and employment equity policies).

This chapter draws on all the inputs received by the Panel from the public and experts. It draws heavily from papers commissioned by the Panel for the purpose of this analysis:

- Overcoming the Triple Challenge: Centre for Development and Enterprise (2017), Overcoming the Triple Challenge: Report to the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change.
- Basic education: Van der Berg S. & Gustafsson M. (2017), Quality of Basic Education: A Report to Working Group 1 of the High Level Panel on the Assessment of Key Legislation, ReSEP (Research on Socio-Economic Policy), Department of Economics, University of Stellenbosch.
- Skills Development: Reddy V., Wildschut A., Luescher T. M., Petersen I., Rust J., Kalina M. (2017), Skills Development Legislation as a Lever of Change to Reduce Poverty, Inequality and Unemployment, HSRC.
- Spatial Inequality: Turok, I., Scheba, A., & Visagie, J. (2017.). Reducing Spatial Inequalities through Better Regulation: Report to the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change. Human Sciences Research Council.
- Quality of health care: McIntyre, D & Ataguba J (2017): Access to quality health care in South Africa: Is the health sector contributing to addressing the inequality challenge?: Report to the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change. Health Economics Unit, University of Cape Town.

Constitutional mandate

Although the word 'poverty' doesn't appear in the Constitution, addressing apartheid's malign heritage of high levels of poverty and inequality is clearly one of the document's animating ideas. The Constitution is adopted,



according to the Preamble, *inter alia* to ‘improve the quality of life of all citizens and free the potential of each person’. Indeed, the first of South Africa’s ‘founding values’ described in Section 1 of the Constitution is ‘human dignity, the achievement of equality and the advancement of human rights and freedoms’ (Constitution of the Republic of South Africa Act 108 of 1996).

The Constitution, in other words, imposes a positive duty to ensure that our society becomes equal and just. Given the high levels of dignity-sapping poverty, this means we have a positive Constitutional duty to pursue policies that reduce poverty and expand prosperity and opportunity to all. This goal is elaborated in those sections of the Constitution that commit the state to the progressive realisation of a range of socioeconomic rights and to take ‘reasonable legislative and other measures, within its available resources’ to achieve this. These include:

- Access to adequate housing (Section 26);
- Access to health care services, sufficient food and water, social security, including a provision that those who are ‘unable to support themselves and their dependants’ are entitled to ‘appropriate social assistance’ (Section 27); and
- Basic and further education (Section 29).

The application of many of these rights is broadened and strengthened in the case of children (Section 28).

A number of other Constitutional provisions affect the manner in which economic activities are organised and conducted, and are relevant to the assessment of the progress South Africa has made in reducing poverty and inequality. These include:

- Section 25, which provides that ‘no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property’, and which limits the expropriation of property by the state by requiring that this be effected only through laws of general application, for public purposes or in the public interest, and on the basis of the payment of compensation, the amount of which is agreed to by both parties or approved by a court on the basis that it is equitable to both parties. These provisions apply to all forms of property, not just land, though the section makes specific provision that the state must pursue both tenure security reform as well as land restitution or redress for those dispossessed of land after 1913.

- Sections 22 and 23 set out South Africans' rights in relation to work and to the forming of unions, with Section 22 providing that 'every citizen has the right to choose their trade, occupation or profession freely', subject to the qualification that 'the practice of a trade, occupation or profession may be regulated by law'. Section 23 provides that 'everyone has the right to fair labour practices' and that workers have the right to form and/or join a trade union and to strike. It also provides that trade unions and employers can engage in enforceable collective bargaining.

Although the Constitution is premised on the equality of rights of all people and the protection of all from discrimination, it allows for the constitutionality of legislative provisions for forms of positive discrimination aimed at undoing the inequalities inherited from the past. Thus, Section 9 provides that 'everyone is equal before the law and has the right to equal protection and benefit of the law', and that 'equality includes the full and equal enjoyment of all rights and freedoms', but also provides that 'legislative and other measures' may be designed 'to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination'.

Overview of policy goals informing legislation

A very wide range of legislation has a direct or indirect impact on poverty, inequality and unemployment since these are all affected by the structure of the economy and the nature of the economic activities pursued by individuals, firms and state-owned enterprises. Thus, any legislation that influences how the economy or a sector of the economy functions has some impact on employment, poverty and inequality. This breadth of legislation that is potentially relevant militates against a comprehensive treatment of all policy considerations that might conceivably be in play in all sectors.

Having said that, the Panel surmises that the overarching policy goal of legislation affecting the economy is to ensure the fastest possible, most equitable or inclusive economic growth that generates the largest promising number of decent jobs while providing the greatest conceivable access to goods and services at the lowest possible price to consumers and transforms participation in, and ownership of, the economy in a sustainable manner.

Policy considerations

The critical issue confronting policymakers with respect to the overarching policy goals of legislation affecting the shape and rate of growth of the economy is the extent to which all of its key elements are compatible



with one another, and, if not, the nature of the trade-offs that should be made. These trade-offs take place against the context of the progressive realisation of socioeconomic rights, as mandated by the Constitution.

Key issues with which policymakers must grapple in pursuit of the vision of the Constitution are:

- The extent to which strategies designed to pursue faster transformation are compatible with the maximisation of economic growth, and the extent to which one might reasonably be sacrificed to enhance the other; or the extent to which failure to transform may bring growing inequalities and political instability which may slow economic growth;
- The extent to which policies that raise wages for unskilled workers might impact negatively on the rate of growth of employment of unskilled workers; or the extent to which narrowing the gap between highest paid and lowest paid will increase the likelihood of generating jobs for the unskilled workers;
- The extent to which desirable changes in the distribution of ownership and control of economic assets can be effected without adversely affecting the level of investment through a loss of confidence in South Africa's property rights regime; or the extent to which diversifying control of assets might grow the economy due to an increase in domestic expenditure on home ownership given high rates of people without land to build; and
- The extent to which regulatory goals should be imposed on firms, and the extent to which firms and industries should be protected from foreign competition in order to protect jobs and wages, even at the cost of higher prices for consumers or to support industrialisation to improve productivity.

It is impossible to reach unqualified and unambiguous conclusions about these issues, and there is considerable space in which reasonable people can disagree both about the evidence and its interpretation, as well as about what implications the evidence has for policy.

Debates about trade-offs exist across almost all areas of policy affecting the functioning of the economy, and that is why debate about these issues is often difficult to resolve. It is also why there is generally a much higher level of policy consensus about issues which do not require complex and difficult trade-offs. There is wide consensus, for example, that improving the performance of the education system should be a priority, since this would be beneficial, both for the pace of transformation and for the rates of economic growth and job

creation, while also having the potential of reducing the skills premium and, thereby, reducing both inequality and the cost of producing goods and services. Improving the education system is not easy, but, to the extent that this is achieved, it would help South Africa make progress across a wide range of policy priorities. It is doubtful that there are many policy interventions in which all the effects are equally desirable, however, and for that reason, policy choices are bound to remain complex and contested.

Voices of the public

There is no question that poverty and its post-apartheid persistence was one of the most important themes of the Panel's public hearings. Indeed, in one of the first submissions made at the first set of public hearings (in the Eastern Cape), the Panel was told, 'The country stinks of poverty.' People, the Panel was told more than once, go to bed hungry at night, and one common refrain was that legislation (or, sometimes, the implementation of legislation) had not changed people's lives.

Employment-related suggestions

Submissions from the public overwhelmingly ascribe high levels of poverty to the absence of employment opportunities for large numbers of people, and many of the suggestions made to the Panel reflect that assessment. The most frequently offered proposals included:

- Expanding the EPWP, which was seen by many as offering at least some prospect of employment in areas where there was often no other significant source of employment;
- Banning labour brokers, whose activities were described as parasitic and exploitative, and as increasing the vulnerability of desperate work seekers who would not be provided with the employment security that directly employed staff are entitled to;
- In some cases, the suggestion that labour brokers be banned was expanded to include the banning of all temporary employment especially in government (which, it was proposed, should take EPWP workers onto its payrolls permanently);
- Strengthening the protection of vulnerable workers (such as farm and domestic workers), whose employers, it was claimed, frequently exploit their vulnerabilities mercilessly both in relation to low pay and in relation to unfair dismissals, and who have very inadequate access to the institutions such



as the Commission for Conciliation, Mediation and Arbitration (CCMA) that are intended to provide them with protection in this regard; and

- Rolling out larger publicly funded infrastructure projects to absorb more people who would otherwise not have jobs.

In relation to the private sector's role in job creation, some submissions were received that focused on the desirability of requiring employers to draw staff from local communities. This issue arose especially frequently in relation to new mining activities, with mining firms accused of bringing outsiders into work on mines despite high levels of unemployment among local residents. Relatedly, a number of submissions were made about the need to protect local traders and retailers from competition from foreigners, some of which was deemed unfair because foreigners may seek more aggressively to avoid tax (by, for example, staying out of the formal banking system).

In relation to self-employment and business formation, submissions were made to the effect that emerging entrepreneurs were unable to access affordable finance because of an absence of collateral and a financial track-record. In this regard, the absence of title deeds for land in rural areas and for homes in urban areas against which potential borrowers could secure finance was identified as a particular challenge that government should address.

In addition to the suggestions relating to the expansion of employment, many submissions from members of the public focused on two other issues relevant to the reduction of poverty and inequality: the low pay many workers receive and the degree to which government's poverty alleviation programmes achieve their goals.

Low pay

A significant number of submissions focused on the low wages received by large numbers of workers who earn wages that are so low as to leave them and their families trapped in poverty. A number of people argued that even the proposed national minimum wage of R3 500 per month was inadequate and that higher wages for all were needed. The sector from which complaints about poverty wages were most common was agriculture, with people noting that, apart from the very low minimum wages, issues of tenure insecurity remain significant.

In addition to higher pay for low-income workers, there were repeated calls for the progressivity of the tax system to be increased so that a heavier burden fell on the rich and a lighter one on the poor.

Service delivery

Many submissions were received with respect to inadequacies of either design or implementation of aspects of South Africa's social safety net. People appearing before the panel were particularly exercised by failures in the delivery of RDP housing, affordable public transport, quality health and education services. These elements of the 'social wage' were all deemed desirable, and, indeed, they have helped reduce poverty, but the point was often made either that they were insufficiently generous or that they did not reach every eligible person. It was, for example, proposed that coverage of social grants should be extended to young adults who were not in employment.

A common complaint related to the costs imposed on households, including poor households, for the use of essential goods and services such as water and electricity. There was particular criticism of the use of prepaid meters that automatically cut households off from the network after usage caps for free basic services were exceeded and which required households to pay for services before using them (something that generally does not happen in richer neighbourhoods).

Overview of trends since 1994

This section sets out the core facts from which the Panel's analysis and recommendations flow. It shows that, while government's policy programme has ameliorated poverty to some extent, South Africa remains a society with exceptionally high levels of poverty, validating the public concerns raised at the provincial hearings. This is the direct consequence of the very high levels of unemployment that are an almost unique characteristic of the South African labour market. Unemployment is also a leading cause of very high levels of inequality, though inequality is also driven by the highly unequal distribution of asset ownership and in the distribution of wages among those who do have jobs. Although there has been some improvement in some of the key indicators since 1994, especially the partial deracialisation of the top of the income pyramid, the trends have been too weak to change fundamentally the inequalities and injustices that have their roots in apartheid, but which have been largely reproduced in the generation since apartheid's end. For a full discussion of these trends, please see the 'Triple Challenge Diagnostic Report' (Centre for Development and Enterprise, 2017).



Poverty

There are various approaches to estimating the rate of poverty. However poverty is defined, it is clear that even after one accounts for the ameliorating effects of the social grants paid to millions of households, more than half of all South Africans are poor. Economists broadly agree that poverty rose in the 1990s and then declined in the 2000s. For example, in a 2007 publication, Van der Berg et al. demonstrated a significant decline in poverty after 2001 (Van der Berg, Louw, & du Toit, 2007). Their calculations reveal that poverty levels started out at 50% of the population in 1993. In 1995 poverty peaked at 52%. From 2001 to 2006, the rate of poverty fell from 51% to 44%.

The latest figures released by Stats SA reveal that 56% of the South African population is poor. Although this number recovered, spurred by the economic activity before the 2010 World Cup, the trend reversal is evident. Additionally, the percentage of South Africans living below the food poverty line (FPL) increased from 21.4% in 2011 to 25.2% in 2015, also a reversal on some of the positive gains achieved (Statistics South Africa, 2017). This is an indication of the economic conditions in the country, including the high unemployment rate figures – the June 2017 Labour Force Survey indicates that the unemployment rate was at a 14-year high at 27.7% and 36.4% on the expanded definition (Statistics South Africa, 2017). What is concerning is that the poverty rate deteriorated during a period of recovery from the 2009 recession. The rise in poverty was more prevalent among black and coloured South Africans, while poverty levels among white South Africans saw an improvement. When examining the poverty gap by gender, black South African women are the poorest in the country. This may be an indication that some of the policies under the National Development Plan (NDP) geared towards poverty alleviation are not reaching the targeted stakeholders and/or are not effective.

Table 2.0: Poverty rate: 2006 - 2015

	2006	2009	2011	2015
Number of UBPL poor (in millions)	31.6	30.9	27.3	30.4
Percentage of the population that is UBPL poor	66.6%	62.1%	53.2%	55.5%
Number of LBPL (in millions)	24.2	23.7	18.7	21.9
Percentage of the population that is LBPL poor	51.0%	47.6%	36.4%	40.0%
Number of people living in extreme poverty (in millions)	13.4	16.7	11	13.8
Percentage of the population living in extreme poverty (below FPL)	28.4%	33.5%	21.4%	25.2%
Non-poor (in millions)	15.8	18.9	24.0	24.4m

*UBPL= upper-bound poverty line; LBPL = lower-bound poverty line; FPL = food poverty line

Definitions: The FPL is the rand value below which individuals are unable to purchase or consume enough food to supply them with the minimum per-capita-per-day energy requirement for adequate health. The LBPL and UBPL are derived using the FPL as a base, but also include a non-food component. People at the LBPL do not have command over enough resources to purchase or consume both adequate food and non-food items. UBPL, on the other hand, considers individuals that can purchase both adequate levels of food and non-food items.

Source: Statistics South Africa

Bad though they are, these figures reflect a degree of improvement relative to 1993, when a much smaller proportion of people received social grants. At that time, 33% of people fell below the food poverty line (compared with 25.2% in 2015), 45% were below the lower poverty line (compared with 40% in 2015), and 57% were below the upper poverty line (compared with 55.5% in 2015).

In 2014, Stats SA produced an assessment of the extent to which there may have been improvements in lived experience that are not well-captured in measuring income poverty. Using data from the 2001 and 2011 censuses, these showed some improvement in all of these measures, as reflected in Table 2 (Statistics South Africa, 2014).

Table 2.1: Multidimensional poverty

DIMENSION	INDICATOR	DEPRIVATION CUT-OFF	2001	2011
Health	Child mortality	If any child under the age of 5 has died in the past 12 months	<1%	<1%
Education	Years of schooling	If no household member aged 15 or older has completed 5 years of schooling	19%	11%
	School attendance	If any school-aged child (aged 7 to 15) is out of school	4%	2%
Standard of living	Fuel for lighting	If household is using paraffin/candles/nothing/other	29%	15%



DIMENSION	INDICATOR	DEPRIVATION CUT-OFF	2001	2011
	Fuel for heating	If household is using paraffin/wood/coal/dung/other/none	49%	38%
	Fuel for cooking	If household is using paraffin/wood/coal/ dung/other/none	45%	22%
	Water access	If no piped water in dwelling or on stand	38%	27%
	Sanitation type	If not a flush toilet	47%	40%
	Dwelling type	If an informal shack/traditional dwelling/caravan/tent/other	30%	22%
	Asset ownership	If household does not own more than one radio, television, telephone or refrigerator and does not own a car	40%	15%

Source: Statistics SA (2014)

These indicators are not without criticism, but they show three things. The first is that there has been some improvement in the overall level of poverty. The second is that this improvement is off a very low base, which implies the third: that there is still a very long way to go to realise the aspirations that are embodied in the Constitution.

Strategies to reduce 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. The historical spatial inequality that confined the majority of the population to the periphery and the concentration of jobs in urban areas has contributed to massive unemployment among blacks. Research by Leke *et al.* (2015) posits that it is necessary to introduce economic policy reforms, namely:

- alter the nature of South Africa’s economic growth trajectory such that it is more labour-absorbing. This would ensure that more jobs are created per unit of output. Under those circumstances, higher economic growth is accompanied by high levels of employment.

- To change the structure of economic growth, which provides enhanced access to economic opportunities amongst formal micro-enterprises and the informal economy. These economic policies are elaborated below.

Developing policies that promote labour-absorbing businesses

South Africa can unlock the potential of advanced manufacturing and job creation where the bulk of the unemployed live, i.e. Bantustans, rural areas and peripheral areas in towns and cities. It is a given that the South African manufacturing sector's share of GDP has almost halved since 1990 and at 13% of GDP in 2015 it is far below the average 20% of GDP in other major developing economies. According to Leke *et al.*, South Africa has the requisite skilled labour, technology and strong business environment required to become globally competitive in advanced manufacturing – even though labour and other input costs are higher than in many emerging markets. Growth in the primary export markets of South Africa's advanced manufacturing goods (SADC and Asia-Pacific) is also viewed as a possible future stimulus for this sector. To exploit these opportunities, it is critical for businesses in this sector to increase economies of scale by pursuing export markets, investing in capital equipment, and becoming more innovative in terms of products, manufacturing processes and materials. Special economic zones (SEZs) may be considered to house manufacturing export processing zones. Firms that operate in these areas should be restricted, inasmuch as they should (a) manufacture products that are 100% for export and (b) be new firms that do not sell any of their products in South Africa. The state should provide incentives by denying any other existing South African firm permission to relocate to these SEZs, and should also allow them to set their own wages similar to the Expanded Public Works Programme (which attracts more workers than it can hire). By introducing SEZs for manufacturing products for export, it is likely that more jobs can be created near to where the majority of the unemployed live.

To complement private sector job creation, government should maintain the Expanded Public Works Programme (EPWP). It has been found that 'working poor' households are significantly better off than those households with no one in any kind of employment at all. In South Africa, an ex-ante evaluation of EPWP policy (Antonopoulos, 2009) cited in Centre for Development and Enterprise (2017), found that the programme creates jobs and income, expands tax revenue that can be used to partially offset the cost of the initiative, promotes pro-poor growth, and contributes to gender



equality by substituting paid for unpaid work. The overall incremental change in income is 9.2% for ultra-poor households, 5.6% for poor households, and 1.3% for non-poor households. Scaling up the EPWP with skills transfer would contribute to curbing inequality.

Infrastructure development

The second major opportunity is creating jobs through infrastructure development. To support export-oriented manufacturing discussed above commercial railway infrastructure will need to be strengthened, which will generate new jobs in the rail construction, technology and maintenance value chain. To create jobs through infrastructure delivery is already a policy adopted by government.

Strengthen National Agricultural Plan

A bold national agricultural plan will help to create jobs in rural areas. Leke *et al.* estimate that by capitalising on the country's existing agriculture and agro-processing capacity, South Africa has the potential to triple its agricultural exports by 2030. Based on these projections, R160 billion can be added to the annual GDP, creating up to 490 000 jobs.

To realise this potential Leke *et al.* advocate for a plan that shifts the focus towards processed products, capturing increased market share in Europe and the Asia-Pacific region, and making farming more productive. This would require investment in technology and farming techniques to raise productivity of crops such as maize and sugar cane. Adding emerging farmers to grow the commercial agricultural sector and supply produce under international agreements, such as the underutilised African Growth Opportunity Act (AGOA) and other bilateral agreements with Middle-Eastern countries, will require end-to-end support to these farmers. Such a programme will include strengthening agricultural colleges with extension workers, supporting farmers with equipment, seeds and infrastructure for processing produce, establishing co-operatives to support agro-processing, and accessing international markets to export produce. From the side of government, Leke *et al.* argue that greater clarification of land rights is required, together with considering models of farm consolidation (where appropriate), strengthening irrigation and water management, as well as bringing additional unused land into production. Public-Private partnerships in investment in an expanded cold chain and improved logistics for rural areas are also recognised as measures to raise competitiveness.

Support Youth Entrepreneurship

The African Development Bank (AfDB) provides key policy recommendations to support youth employment (African Development Bank, 2016). One which may be useful for South Africa is fostering dynamic youth entrepreneurship. This requires government's proactive support for entrepreneurial training, and start-up capital is also needed. International good practice suggest that government interventions should target the most viable projects, extend greater financial support to a fewer high-potential entrepreneurs rather than spread resources thinly, and provide complementary packages of services instead of a single measure. This includes focused activities that will catalyse private sector investment to stimulate the employment and entrepreneurship ecosystem by:

- I. Reducing financing risks by providing guarantees to financial institutions for on-lending to SMEs and supporting student loan finance programmes to increase lending to students, and
- II. Expanding access to capital, providing lines of credit to financial institutions for on-lending to SMEs, and making direct investments in businesses that drive youth employment.

Support informal sector business

Another proposal to reduce poverty is to grow informal businesses. The need for this policy change was recognised by government itself as *'absence of a nationally co-ordinated policy as well as an integrated legal and regulated framework, coupled with a lack of policy and regulatory alignment between local government, national and provincial departments'* (DTI, 2014). Furthermore, there is *'no strategic focus by Government on informal businesses, but in certain instances there is over-regulation of the sector. In both cases the growth of business is stifled'* (DTI, 2014). There is a need to empower informal enterprises by giving and creating an enabling environment such as establishing suitable infrastructure and services (Rogan and Skinner, 2017; Rogerson, 2016; Battersby *et al.*, 2016). The impact of extending meaningful support to informal traders is to encourage these traders to sell goods at reasonable prices and thus leave more cash to purchase food and other necessities for the poor. Secondly, if these informal traders grow, they are likely to generate secondary jobs.



Support the poor to benefit from tourism

The final proposal to reduce poverty is to grow tourism. Global trends show that tourism is growing, with tourists visiting emerging economies at a higher rate than advanced economies; the gap will widen by 2030. In 2015, 60% of tourist arrivals were to emerging economies. Africa's share will grow from 3% in 2010 to 7% in 2030 and the overwhelming majority of these tourists come to South Africa (Saunders, 2017).

South Africa is an attractive destination; tourism could become a much larger source of jobs and contribute to economic growth. On average, 502 877 tourists visited South Africa per month from 1979 to 2017, peaking at 1 558 854 in January 2016 (Trading Economics, 2017). In 2015, tourism contributed R369.3 billion to GDP, and this is expected to grow to R561.4 billion by 2025. During this period the number of jobs will grow from 705 000 in 2015 to 947 500 in 2025 (Saunders, 2017).

Countries that have successfully reduced poverty through tourism have undertaken projects that have (World Tourism Association, 2006):

1. Targeted the poor to be employed in tourism enterprises;
2. Enabled the poor to supply goods and services to businesses involved in tourism or businesses that employ poor people;
3. Encouraged tourists to buy goods and services from informal traders who are usually poor;
4. Supported the poor to establish and run micro, small and medium-sized businesses;
5. Introduced tax or levy on income derived from tourism enterprises and from tourists and use the proceeds to benefit the poor; and
6. Invest in infrastructure to support tourism with the aim of benefitting the poor areas or through support to other complementary sectors.

Based on the lessons learned internationally to alleviate poverty through tourism, South Africa needs to develop a pro-poor tourism policy that should embrace these tenets. Such a strategy

should include developing tourism skills; providing seed money to start the business and establish small co-operatives; giving a subsidy, land and assistance to entrepreneurs that wish to establish a tourism enterprise; and also creating an enabling environment such as better road infrastructure, appropriate zoning for the business and easier access to building permits. This will bring new tourists who are looking for affordable destinations.

The Southern Africa Tourism Services Association (SATSA) made a submission to the Panel motivating the scrapping of the requirement for children under the age of 18 to carry an unabridged birth certificate (UBC) when traveling to South Africa. They point out that no other country requires travellers to carry certified copies of the UBCs. In addition, a host of other supporting documentation is also required that sometimes necessitates incurring legal costs and time to obtain in the case of single parents.

SAA reported that 3 974 passengers were denied boarding on South Africa-bound flights at the airport of origin for not having UBCs in 2015. Extrapolating this to all airlines using SAA's market share, this amounts to 13 246 passengers that were turned away. There is no way of estimating how many passengers cancelled their trips before going to the airport, but industry sources believe it was a significant number, as borne out by the reduction in visitors to South Africa.

AASA Airlines Association of Southern Africa (AASA) data for June, July and August 2015 showed a 44% decline in the number of children under the age of 18 travelling in and out of South Africa across all source markets, when compared to the same period in 2014. Based on Stats SA data for January to April 2015, this means that SA will lose 138 000 foreign air passengers per annum due to the regulations. However, as only 24% of foreign travellers enter/exit SA by air, when one includes all ports of entry (air, land and sea), South Africa is likely to lose 578 000 foreign tourists per annum due to the regulations. According to SA Tourism, the average spend per passenger is R13 000, which amounts to R7.51 billion revenue lost.

According to SATSA, arrivals of families into SA increased by 1.8% between 01 September 2014 and 31 May 2015, but with effect from 01 June 2015, since the birth certificate requirements became operational, they dropped by 9.8%. Reservations from the UK recorded a change of -3%, Germany -16%, US -18%, the Netherlands -3% and France and Sweden -29%. There are 1.4 million



people employed by tourism directly and indirectly in SA. In rural areas, on average, 10 people are supported by every breadwinner, and in urban areas four to five are. Conservatively, on average 5.5 people are supported by every one person employed in tourism. It then follows that one in seven people rely on the tourism industry for their livelihood. SATSA contend that Home Affairs were under the impression that 30 000 children were trafficked out of SA annually. The correct figure is now known to be 23 cases between 2012 and 2014, and these cases were all across land borders. They contend that Home Affairs have conflated one parent taking their child away without the consent of the other parent, with child trafficking, which are two separate things. Law enforcement agencies have ample mechanisms to deal with unlawful activities without resorting to UBCs, which in any event serve no purpose and have a significant negative impact on tourism and hence employment.

From the analysis presented above, including the work commissioned by the Panel supplemented by other reports and other inputs, the Panel makes the recommendations set out below.

Recommendation 2.1	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.
Recommendation 2.2	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.
Recommendation 2.3	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.

Recommendation 2.4	Parliament should ensure that the next budget appropriations include resources for supporting informal traders and upgrade their trading places such as creating low-cost kiosks, cubicles and stalls with suitable infrastructure and storage space.
Recommendation 2.5	That Parliament supports 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
Recommendation 2.6	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.
Recommendation 2.7	That Parliament conduct a fresh review of the requirement of an unabridged birth certificate for minors in consultation with all role-players in the tourist industry.

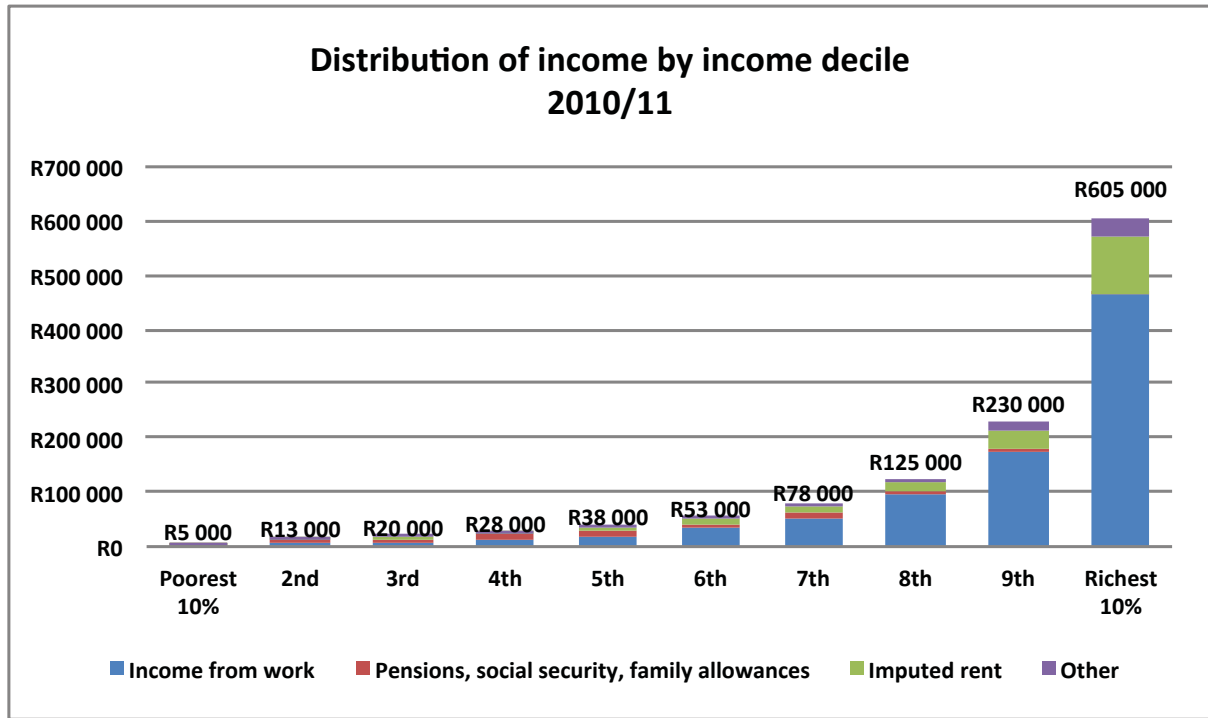
Inequality

Income inequality

Apart from high levels of poverty, South African society is also marked by very high levels of inequality, much of it racialised. One way to visualise this is to show how average annual incomes differ in each of the 10 deciles (groups of 10% of the population) that make up the population from poorest to richest, as reflected in Chart 2.1 (Bhorat, Tseng, & van der Westhuizen, 2013).



Chart 2.1: the distribution of income by decile, 2010/11

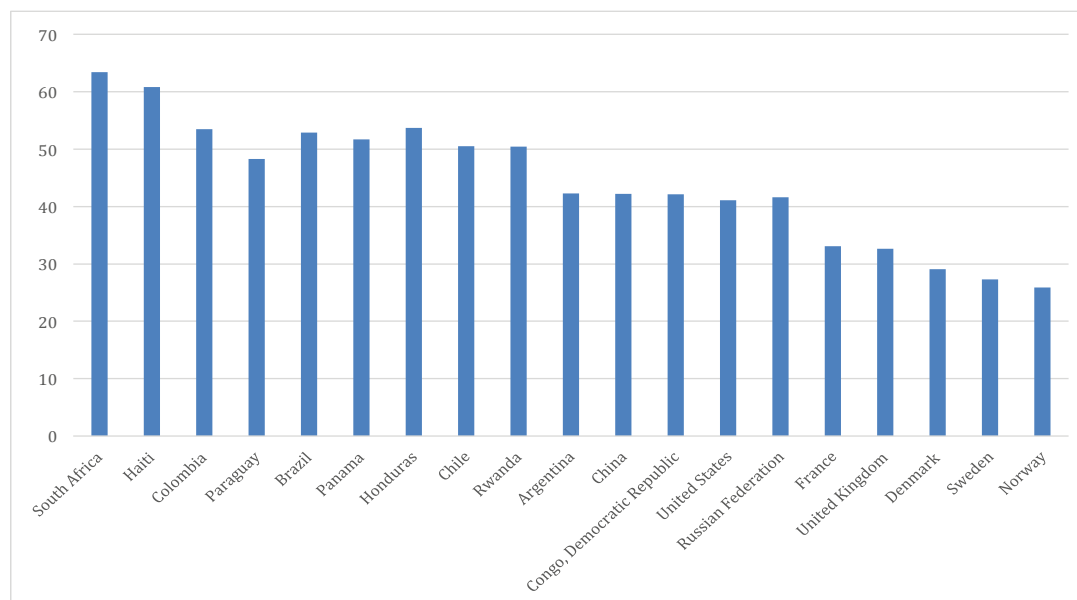


Source: Borat, et al. (2013)

As reflected in Chart 2.1, in 2010/11, the average household in the richest 10% of the population had an income of just over R605 000 compared with about R5 000 for the poorest household, a ratio of about 121:1. If one considers only income from employment, the ratio is even worse: the richest 10% of households had work-related incomes of about R460 000, while, because of high levels of unemployment, the average among the poorest 10% was under R2 000. Indeed, the average income from work for the poorest 50% of households was less than R10 000.

These exceptionally large differentials mean that South Africa is one of the most unequal societies in the world.

Chart 2.2: Gini coefficients from around the world



Source: World Bank Gini Index (2017)

It is impossible to understand inequality in South Africa without noting the impact of race on income. Table 2.2 reflects the fact that in 2010, the income of the average African person was about 14.3% that of the average white person (i.e. that the average white person had an income that was about seven times greater than the average African). The average annual incomes of Coloured and Indian South Africans were higher than that of Africans, but still considerably less than white South Africans. These ratios had all improved relative to those of 1995, though the improvement for Africans was small.

Table 2.2: Average incomes by race, 1995 and 2010 (using 2005 prices)

	Average per capital income		Annual growth	As % of average white income	
	1995	2010		1995	2010
African	R8 929	R10 893	1.3%	13.8%	14.3%
Coloured	R12 837	R21 687	3.6%	19.8%	28.5%
Indian	R29 765	R39 807	2.0%	46%	52.3%
White	R64 768	R76 177	1.1%	100%	100%

Source: Borat, *et al.* (2013)



Differences in the average annual incomes of South Africa’s race groups conceal the high level of inequality within these categories. Table 2.3 reflects the average income of individuals in each decile for all four racial categories and for the population as a whole.

Table 2.3: Income per capita by race and decile

Average per capita income in 2010 (using 2005 Rands adjusted by average inflation of 6% pa)					
Decile	All	African	Coloured	Indian	White
1 st	R832	R745	R1 932	R3 815	R5 115
2 nd	R2 183	R1 923	R4 367	R11 608	R19 398
3 rd	R3 284	R2 833	R6 781	R17 258	R36 133
4 th	R4 618	R3 825	R9 595	R23 060	R53 417
5 th	R6 521	R5 099	R12 619	R28 293	R72 003
6 th	R9 471	R6 916	R16 759	R37 484	R88 734
7 th	R14 096	R9 781	R22 977	R49 403	R104 989
8 th	R23 163	R14 429	R32 946	R64 169	R131 759
9 th	R44 814	R24 655	R52 952	R91 536	R181 494
10 th	R139 986	R75 611	R129 839	R206 902	R327 955
Average	R24 894	R14 577	R29 022	R53 271	R101 942

Source: Borat, *et al.* (2013)

As reflected in Table 4, a far higher proportion of African people live in poverty than is the case for Indian and White people, with Coloured people occupying a position in between these two groups. Thus, while the average income of Africans in the seventh decile in 2010 was less than R10 000 (see Table 2.3), this was true only of individuals in the first decile among white and Indian South Africans.

An important final point to make is that since 1994, the overall level of inequality (as measured by the Gini coefficient) has changed from 0.59 to 0.69 (The World Bank in South Africa, 2017) in 2014, suggesting that inequality has grown. There have also been changes in what drives inequality. Inequality between races has diminished to some extent, while inequality within race groups has increased. The gap between the richest 10 percent to the median has increased the most within Africans. This is reflected in Table 2.5, which shows that the rich have pulled away from the poor in every race group: in 1995, the richest 10% of South Africans were 140 times richer than the poorest 10% and 16 times richer than those in the middle of the distribution. By 2010, these figures had increased to 168:1 and 21:1 respectively.

Table 2.4: Inequality within race groups

	Ratios	1995	2010
All of SA	Richest 10% to poorest 10%	140	168
	Richest 10% to median	16	21
African	Richest 10% to poorest 10%	95	101
	Richest 10% to median	10	15
Coloured	Richest 10% to poorest 10%	24	67
	Richest 10% to median	7	10
Indian	Richest 10% to poorest 10%	20	54
	Richest 10% to median	6	7
White	Richest 10% to poorest 10%	20	64
	Richest 10% to median	5	5

Source: Borhat, *et al.* (2013)



Inequality and the technological divide

Of key concern is rising inequality presented by technological advancement. Research conducted by the World Economic Forum (WEF) reveals that the world economy is in the initial stages of a Fourth Industrial Revolution, whereby developments in genetics, artificial intelligence, robotics, nanotechnology, 3D printing and biotechnology, to name just a few, are all building on and amplifying one another (Schwab, 2017). This technological revolution will fundamentally alter the way people live, work, and relate to one another. Although the impact of the Fourth Industrial Revolution is yet to be quantified, its potential to raise global income levels and improve the quality of life for populations around the world holds great promise.

WEF notes that in the future, technological innovation will also lead to long-term gains in efficiency and productivity. Transportation and communication costs will drop, logistics and global supply chains will become more effective, and the cost of trade will diminish, all of which will open new markets and drive economic growth.

However, Brynjolfsson & McAfee (2012) have pointed out that the Fourth Industrial Revolution could yield greater inequality, particularly in its potential to disrupt labour markets. As automation substitutes for labour across the entire economy, the net displacement of workers by machines might exacerbate the gap between returns to capital and returns to labour. On the other hand, it is also possible that the displacement of workers by technology will, in aggregate, result in a net increase in safe and rewarding jobs.

As Rodrik (2016) points out, another concern that may be exacerbated by the Fourth Industrial Revolution is premature deindustrialisation, by which developing countries are turning into service economies without having gone through the experience of industrialisation. For developing countries, manufacturing is still the primary channel through which to modernise, create employment, especially by absorbing unskilled labour, and alleviate poverty. Rodrik argues that due to globalisation and technological advancements, developing countries 'imported' deindustrialisation from advanced countries, because they became exposed to the relative price trends originating from advanced economies. The decline in the relative price of manufacturing in the advanced countries put a squeeze on manufacturing everywhere, including the countries that may not have experienced much technological

progress. This account is consistent with the strong reduction in both employment and output shares in developing countries, especially those that do not specialise in manufacturing.

While some jobs are threatened by redundancy and others grow rapidly, existing jobs are also going through a change in the skill sets required to do them. The debate on these transformations is often polarised between those who foresee limitless new opportunities and those that foresee massive dislocation of jobs. In fact, the reality is highly specific to the industry, region and occupation in question as well as the ability of various stakeholders to manage change.

Technological advancement in the Fourth Industrial Revolution is expected to increase what the World Bank calls 'digital dividends', that is the economic and social benefits that digital technologies and connectivity confer on individuals, companies, countries, economies and societies. According to Bornman (2016), individual Internet use and mobile Internet access in South Africa were lower than estimated in literature. ITU World Telecommunication (International Telecommunication Union, 2017) estimates that 20.1% of South African households have access to a working computer, 50.0% of South African households have Internet access at home, and 54.0% of the South Africa population use the Internet, albeit mainly through their mobile phones. Therefore, investment in Internet inclusion is vital to stem the digital divide. The World Economic Forum Africa ranks South Africa at 49 out of 138 countries on technological readiness. To improve on technological readiness that will grow the economy, the country needs to increase the proportion of Internet users, especially through broadband access. However, a key constraint is the cost of data use due to a significant extent to failures in government regulation as evidenced, for example, in the delays to the digital migration process and the allocation of spectrum.

The World Economic Forum (2017) proposes four specific interventions: infrastructure to increase coverage by a mobile broadband signal, affordability and lowering the costs of smartphones, training in digital skills, and providing local content.

South Africa has experimented successfully with free Wi-Fi services in major urban centres such as Johannesburg and Tshwane but for most South Africans Internet access is expensive in relation to household income. A concerted drive to promote digital inclusion could have substantial economic and personal benefits.



Inequality and gender dynamics

In most developing countries, gender inequality presents itself as gaps between men and women in the form of education, earnings, occupation, access to formal employment, access to managerial positions, access to productive inputs, political representation, or bargaining power inside the household. Literature shows that these gaps are more pronounced in developing countries. Dollar and Gatti (1999) found through econometric evidence that gender equality and economic development are mutually reinforcing. Moreover, societies have to pay a price for gender inequality in terms of slower economic growth.

Blackden, Canagarajah, Klasen & Lawson (2007) provide two arguments on why gender inequality affects economic growth. First, it has a negative impact on asset accumulation and the productivity of factors of production. More specifically, gender inequality in education is thought to reduce the average amount of human capital in a society, which harms economic performance because of the exclusion of highly qualified girls and the artificial restriction of the pool of talent from which to draw for education. Second, female employment is important for their bargaining power within families. Sen (1990) and Klasen (2002) add that female employment and earnings increase women's bargaining power in the home, and not only is this to the benefit of the women concerned, but their greater bargaining power has been shown to lead to greater investments in the health and education of their children, thus promoting human capital of the next generation and therefore improving the potential for economic growth.

Similar to other developing countries, the gender gap in South Africa is persistent and may also contribute to lower economic growth. Although public institutions, both at national and provincial levels, as well as Parliament, have made strides to improve gender representation at senior management level, considerable progress is still required in the private sector. The World Economic Forum's Gender Gap reports that the percentage of women in managerial positions is 31% (World Economic Forum, 2016), while Grant Thornton's Women in Business report has the number at 28% (a marginal improvement from 2016's 23%) (Grant Thornton, 2017). According to the Businesswomen's Association of South Africa, black women are best represented at Director level and white women are more representative at the Executive Management level (Businesswomen's Association of South Africa, 2015). Additionally, women are mostly appointed in non-executive directorship positions and are still excluded from the most important key decision-making positions within organisations. Academia is not exempt – in the 26 public universities surveyed in South Africa, men

continue to outnumber women in senior positions by a ratio of 3:1. However, at the Deputy Vice Chancellor Academic, and the Dean of Students positions, women are relatively well represented.

Research has found that (on average) the gender pay gap in South Africa is between 15% and 17% – on average a woman in the same job would have to work two months more per year to own the same salary as her male counterpart. In some sectors the gender gap is as high as 34%. PricewaterhouseCoopers (2016) shows that the total guaranteed pay for women is still below the level paid to their male counterparts, where equal pay for equal work should be the rule, albeit improving.

Wealth inequality

South Africa's wealth is concentrated in the hands of a few, leading to a country being highly unequal in terms of not just income but also assets. This is largely due to the legacy of apartheid. If this unresolved apartheid situation is not urgently resolved, it is likely to create conflict between the masses of people and those who have disproportionate wealth, threatening to disrupt the social cohesion that was built as part of the end of apartheid. The situation can be averted if proactive solutions are found that do not destabilise the country.

South Africa is a highly unequal society as measured by income and wealth. However, data to measure income inequality is generally available through surveys in contrast to wealth, which requires a combination of surveys, observations, recorded data such as taxes, real estate sales, land ownership, shares, etc. 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).

There appears to be a growing number of calls for more radical forms of redistribution, arguing that, as a priority and matter of urgency, South Africa needs to bring down wealth inequality.

Land redistribution is a key element to reducing wealth inequality. This is discussed in more detail in Chapter 3. Suffice to say that 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. Unless South Africa urgently



addresses this inequality, the country is likely to be engulfed by conflict, which threatens to dismantle the peace that was negotiated during the transition from apartheid to the democratic era.

This view is in contrast to those who want to prioritise growth as a way to expand the incomes of all South Africans and ensure that government has sufficient resources to fund current redistributive policies. From this perspective, radical redistribution of wealth, through expropriation of property for instance, they argue, will undermine security and property rights, undercutting the certainty and security needed to justify investment, which is the only motor of economic growth.

The counter-argument is that inequality is itself a brake on growth and that the country can't expect to grow very quickly unless and until there is a more equal distribution of assets and incomes. A growing body of evidence suggests that inequality harms growth (Dabla-Norris, Kochhar, Ricka, Suphaphiphat and Tsounta, 2015); (OECD, 2012); (Oxfam, 2014). In unequal societies, a significant fraction of the population can't afford to invest in education and skills development, which results in a workforce without the skills to support the right kind of economic activity. Unequal societies also tend to be more unstable politically and have a greater risk of adopting bad or populist macroeconomic policies that risk slowing growth – an issue that affects not just the developing world.

Making a comment to a journalist, Thomas Piketty argues: “Many successful development experiences in Europe and also in Asia did at some point in their trajectory use land reform and other forms of direct redistribution of property much more than South Africa did. You never had this kind of big phase of redistribution of property and probably that explains why the legacy of apartheid is still very much there in terms of inequality.” (Vollgraaff, 2015).

But even if it is true that inequality lowers growth, policies aimed at changing distributional outcomes directly can be very disruptive and costly, and can also reduce growth further because of the uncertainty they bring. Much has been made of land reform at the start of the Asian boom that directly redistributed land from the rich to millions of small rural farmers (Quizon, 2013). This may very well be an important part of these countries' subsequent success. But if it is, it is not just because the assets were redistributed more equally, but because that redistribution was done in a way that was credibly once-off, and everyone knew it was never going to happen again. When that happens, redistribution does not lead to persistent uncertainty, which is a key way in which policies of this sort translate into weaker growth.

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 (Oxfam). 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. It is for this reason that suggested measures still encourage some level of inequality, but not excessive inequality. These measures are:

- Impose annual tax on dollar cent-millionaires (\$100 million) and dollar billionaires and use the funds to contribute to the achievement of socioeconomic rights articulated in the Constitution. The Davies Commission is in a position to estimate income to be generated from this tax.
- Ensure that companies pay tax where they operate as opposed to their original countries, which will be in line with the 'unitary tax' principle supported by International Monetary Fund
- Review the Air Passenger Tax regime to find ways to extend it to other categories of travellers. As of August 15, 2014, SARS taxes individuals for outbound flights, but not for inbound or domestic flights (South African Revenue Service, 2014).
- Prioritise social grants recipients who are economically active to secure employment and ensure their children receive subsidised early childhood development. As discussed earlier in this chapter ('Develop policies that promote labour absorbing businesses'), evidence shows that 'working poor' households are significantly better off than those households with no one in any kind of employment at all (Antonopoulos, 2009) cited in (Centre for Development and Enterprise, 2017). Scaling up EPWP with a focus on grant recipients who are aged between 15 and 64 years with skills transfer, would contribute to curbing inequality.
- Introduce universal health cover to reduce out-of-pocket expenses at the point of care, but rather ensure it is prepaid.

A combination of these measures 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: of the nearly 37 million people aged between 15 and 64, 16 million had jobs at the end of 2016. Of the remainder, 5.8 million were actively looking for work, 2.3 million were discouraged work-seekers (who would take a job if offered, but were not actively looking), and 12.8 million were 'not economically active' (Statistics South Africa, 2016). Of these, about 5 million were in school, 1 million were in tertiary institutions, and the remainder were homemakers, disabled or simply preferred not to work.

Chart 2.3: Unemployment in South Africa (Q4, 2016)

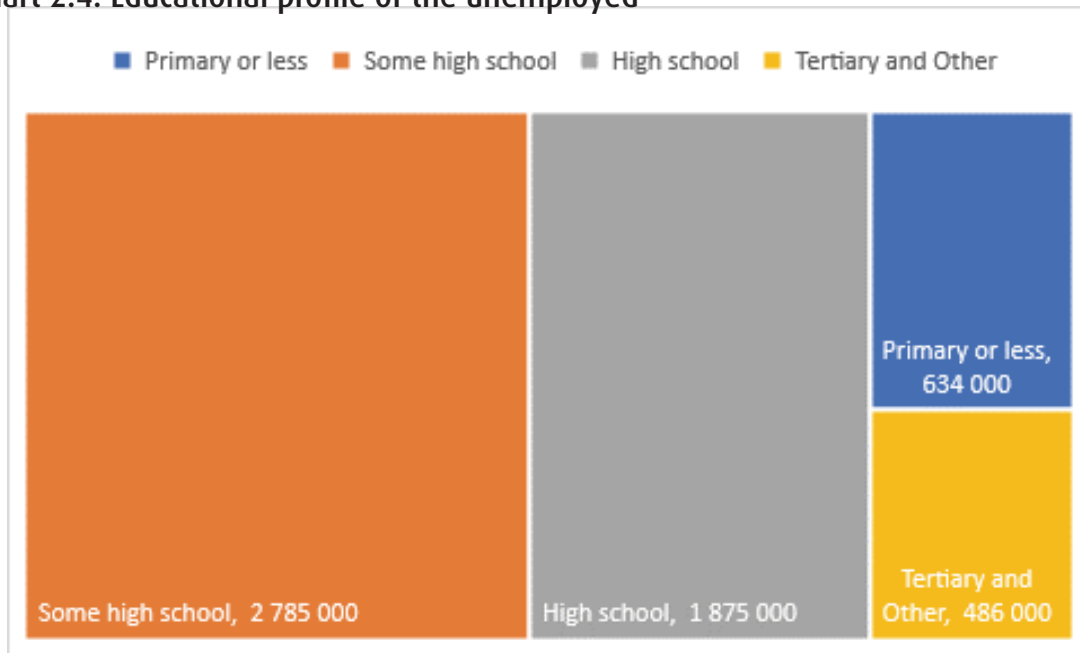


Source: Stats SA (2017)

Unemployment affects different categories of people differently. Only about 40% of adult black Africans are employed, for example, while the equivalent figures for Coloured, Indian and white South Africans are 50%, 54% and 63%. Similarly, age matters: only 13% of 15 to 24-year-olds are employed, as are 51% of 25 to 34-year-olds, but the figure for those between 35 and 54 is over 60%.

Education is also a big factor in explaining the differential risk of unemployment, with those who failed to complete matric being overrepresented among the unemployed: in 2016, 59% of all unemployed people had failed to complete high school.

Chart 2.4: Educational profile of the unemployed

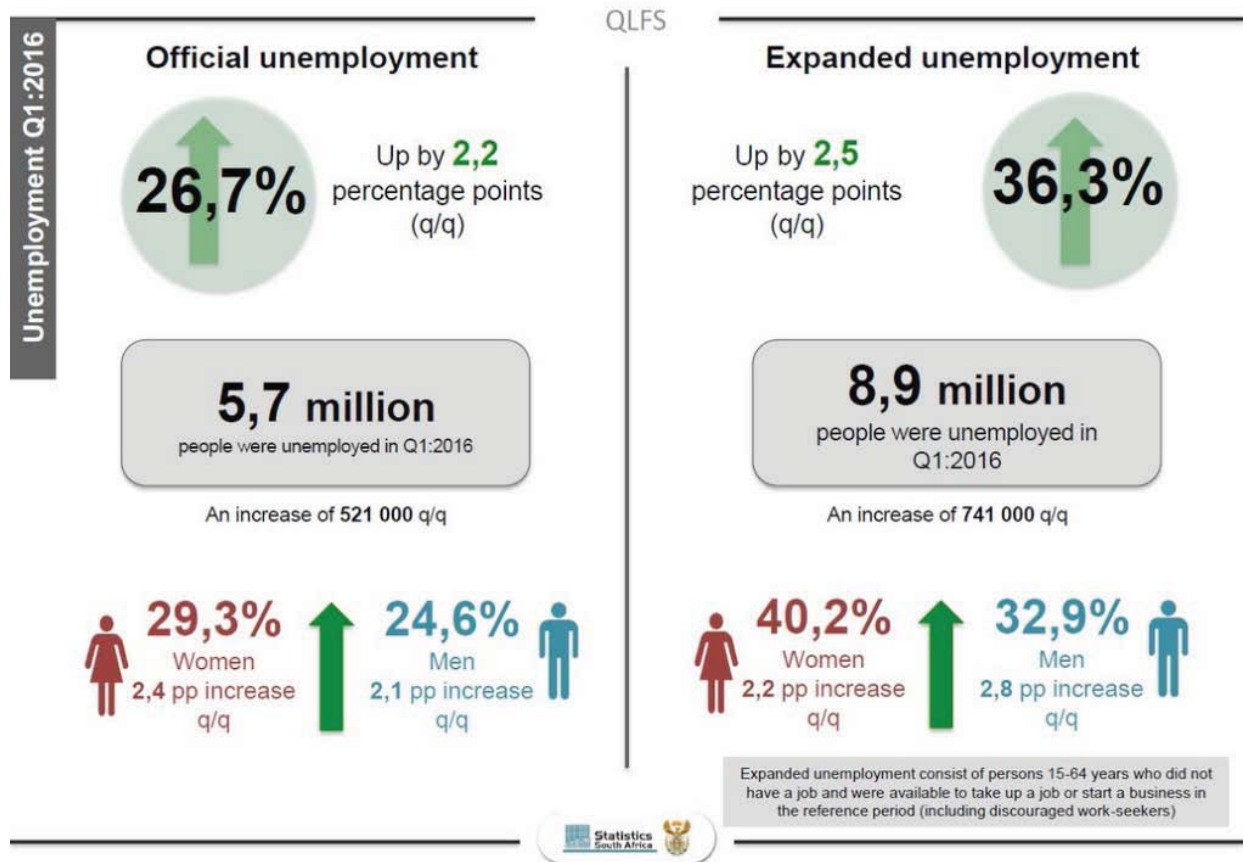


Source: Stats SA



Furthermore, the gender dimension of unemployment is also quite pronounced, as indicated in the illustration below.

Illustration 2.1



Source: Statistics South Africa (2016)

Finally, an often underappreciated fact about employment is its spatial dimension: employment rates are much lower in rural areas than they are in urban areas, and they are particularly low in the former Bantustans, where unemployment (using the expanded definition) approaches 55% compared with 36.3% in the rest of the country (Stats SA, 2017).

Why is unemployment so high?

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.

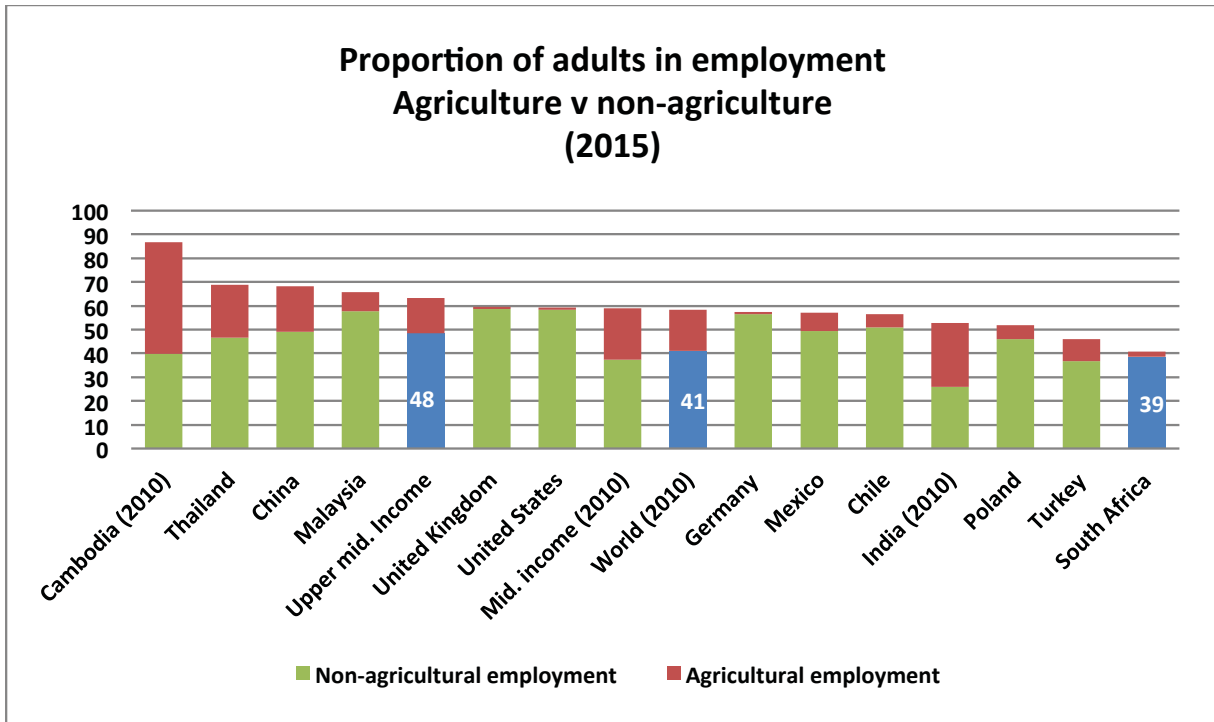
Low levels of agricultural employment

One of the most important reasons why the level of unemployment in South Africa is so high relative to that of other countries is that, by the standards of the developing world, South Africa's agricultural sector employs very few people: only 5% of employed people work in agriculture, a level similar to that of Europe and far below the much higher rates of agricultural employment in most of the developing world, where agriculture, much of it at a subsistence level, is a critical source of income for households (World Bank).

The result is that, if one looks only at the proportion of adults employed in non-agricultural activities, the figure for South Africa (at 39%) is close to the global average. And, while it is still some distance from the norms in upper middle-income countries (48%), the gap between employment rates in South Africa and employment rates in those countries is much smaller if one considers only non-agricultural activities.



Chart 2.5: Employment in non-agricultural activities, various countries (2015)



Source: World Bank database (2015)

The reasons for low levels of agricultural employment are partly climatic and geographic, and partly a result of our history of dispossession and displacement. Thus, on the one hand, much of South Africa’s land is not especially well-suited to the kind of labour-intensive, small-scale farming that employs hundreds of millions of people in much of the rest of the world, while, on the other, the dispossession of black South Africans under colonialism and apartheid deprived the majority of access to what land was suitable for agriculture. And, making matters worse, forced removals to the Bantustans under apartheid rendered the land in these areas overpopulated and overworked, leading to low levels of agricultural output and incomes.

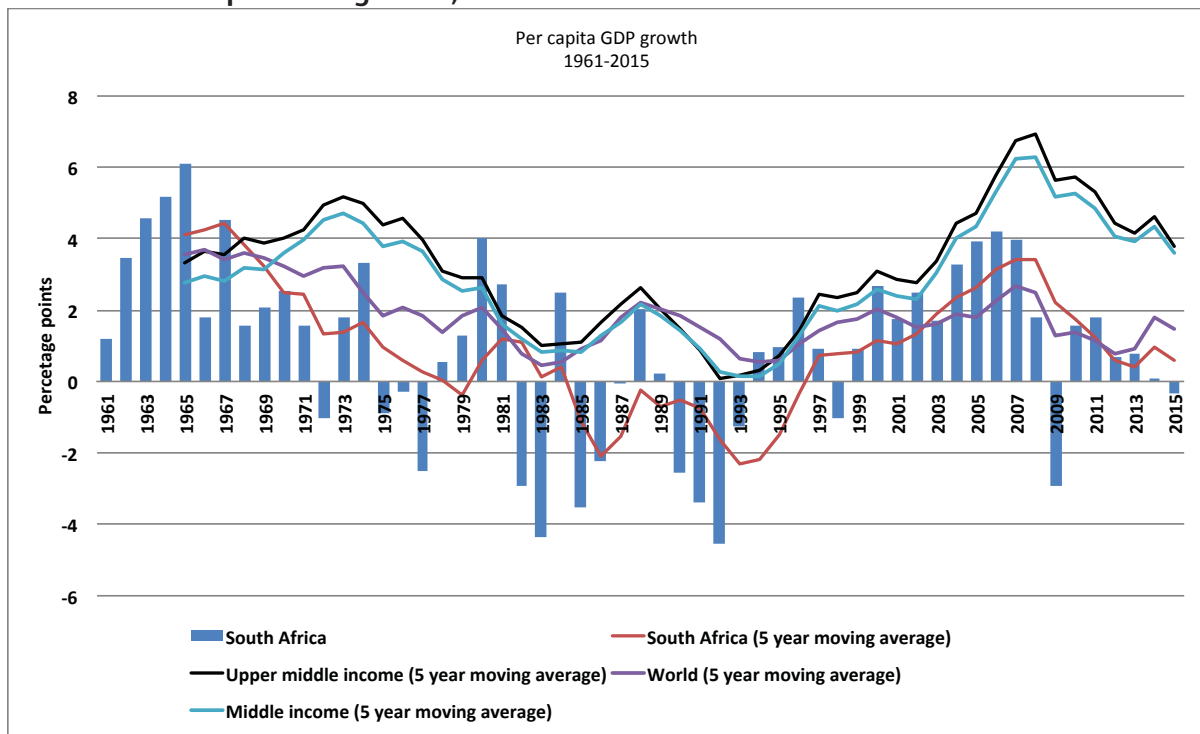
Slow economic growth

If the low level of employment in agriculture helps explain the low level of employment overall, the low rate of growth of employment in non-agricultural activities has its roots in two factors:

slow economic growth and the bias against labour-intensive economic activities that has become a hallmark of our economic trajectory.

Though economic growth since 1994 has tended to be higher than it was prior to the advent of democracy, that is largely a reflection of how slowly the apartheid economy grew as it descended into crisis in the late 1970s and early 1980s. Even when it grew most quickly in the period between 2002 and 2008, however, economic growth in South Africa was never very high and was always slower than in other developing countries. But this growth was faster than the global economy as a whole. That ceased to be the case in the last few years, during which the growth rate has slowed more quickly than that of the rest of the world.

Chart 2.6: Per capita GDP growth, 1960 – 2015



Source: World Bank database (2017)

There are many reasons for the slow pace of economic growth, among the most important of which are:

- The very slow accumulation of human capital and skills in South Africa;



- The relatively low levels of competition in the economy;
- A spatial economy in which far too large a proportion of the population is dislocated from the main currents of economic life and which also limits opportunities for emerging firms (especially in retail and other services) because most productive and valuable spaces are dominated by large, incumbent firms;
- Infrastructure backlogs in much of the country that raise the cost of economic activity;
- Growing inefficiencies in the use of scarce resources in key sectors, including the state-owned entities, leading to higher costs and reducing the stock of resources available for other activities;
- High levels of inequality, which are often associated with slower growth because they result in poor educational and health outcomes, insufficient demand for local products, and political environments that can generate unpredictable swings in policy; and
- The high cost structure of local production combined with global shifts in the distribution of comparative advantage, which have seen vast flows of capital to the emerging economies of East Asia.

Despite this lack of growth and high unemployment, the country as measured by 12 indicators in the Global Competitiveness Report 2016-17 is still globally competitive with respect to the size of the economy, demonstrated by good performance on efficiency and economic enhancers as well as on innovation. With a GDP of \$303 billion in the 2016/17 financial year, this country ranked 47 out of 138 countries. This is an improvement over the past several years, as it changed from 52nd-place out of 144 countries in 2012/13 to a low of 56th/144 in 2014/15 and rising to 47th/138 in 2016/17. However, there are areas that retard South Africa's ranking performance globally: these are poor health and primary education (rank: 123), macroeconomic environment (rank: 79) and infrastructure (rank: 64); however, its performance is relatively good for institutions (rank: 40), a situation that is beginning to deteriorate given the governance challenges such as in state-owned enterprises and the phenomenon known as 'state capture', where some private sector companies influence government to divert resources to themselves. On the efficiency enhancers, the country ranks relatively well (rank: 35), propelled largely by excellent performance in financial market development (rank: 11), goods market efficiency (rank: 30) and a relatively good markets size (at 30) (World Economic Forum, 2017).

The poor health status of the population retards economic growth. Health has a direct effect on economic growth through labour productivity as well as the economic burden of illness such as very high rates of human immunodeficiency virus (HIV), TB and fast-rising non-communicable diseases such as hypertension, diabetes and cancer. In South Africa, HIV-positive persons are 6 – 7% more likely to be unemployed. The situation is worse for those who are HIV-positive and less educated, with 10 – 11% more likely to be unemployed (Levinsohn, J., McLaren, Z.M., Shisana, O. and Zuma, K., 2013). This disadvantage reinforces existing inequalities in South Africa. Macroeconomic studies across many countries show that health positively affects economic growth; that is, the healthier the population, the greater the likelihood of the growth of the economy. Specifically, an increase in life expectancy from 50 to 70 years (a 40% increase) would raise the growth rate by 1.4 percentage points per year. Malnutrition causes a decrease in the annual GDP per capita growth worldwide by between 0.23 and 4.7%. Another good example of the impact of health on economic growth is based on an analysis of life expectancy and mortality in Mexico from 1970-1995, which indicates that health is responsible for approximately one-third of long-term economic growth (World Health Organization, 2014).

The poor quality of education leads to poor economic growth. There is strong evidence that the cognitive skills of the population – as opposed to just school attainment – ‘are powerfully related to long-run economic growth. The relationship between skills and growth proves extremely robust in empirical applications. The effect of skills is complementary to the quality of economic institutions. Growth simulations reveal that the long-run rewards to educational quality are large but also require patience’ (Hanushek, E. and L. Woessmann, 2010). Given this, South Africa’s weak education system hampers economic growth. With respect to the quality of primary education, the evidence suggests that most South African learners’ performance in international and national tests is weak. For example, in the Trends in International Mathematics and Science Study (TIMSS) 2015 Grade 5 Mathematics test, South Africa performed second weakest of all the countries that participated. Seven percent (7%) of all children who wrote the TIMSS test performed below the international benchmark, in comparison to South Africa, which was 61%. In the Progress in International Reading Literacy Study (PIRLS) 2011 reading test, 58% of South African Grade 5 children could not read for meaning, and half of those performed so weakly that they could be regarded as reading illiterate. In the 2011 Southern and Eastern Africa Consortium for Monitoring Educational Quality (SACMEQ) tests of Grade 6 children in Southern and Eastern Africa, South African children performed just below the average for all the participating countries in both reading and mathematics.



There are features of the labour market that retard economic growth in South Africa; namely labour market efficiency, particularly co-operation between labour and government, inflexible labour laws and high pay in relation to productivity (World Economic Forum, 2017).

The macro-economic environment is not conducive to growth. This is an outcome of the business, investor and institutional environment that undermines productivity. As discussed earlier in the section dealing with employment, the investment and business climate is burdened with perceptions of high levels of risk. Markets are not open and are beset with anticompetitive behaviour and high barriers to entry. Governance challenges in the private sector (as evidenced by high levels of collusion (Purfield et al. (2016)) and in the public sector (culminating in evidence of state capture) undermine the institutional foundation for economic growth.

Skill and capital biases in the economy

One of the reasons the South African economy fails to generate sufficient jobs is that there is a mismatch between the skill levels of those who are without work and the skills that business needs. This mismatch – which is the reason why a disproportionately large proportion of the unemployed is made up of people who have not completed high school, while those with tertiary qualifications face low levels of unemployment – is a reflection of the trajectory of the economy that favours skill- and capital-intensive activities and firms. This is manifest in a number of different trends, including:

- Shifts in the sectoral composition of the economy in favour of skill- and capital-intensive activities that are matched by declining levels of employment in the most labour-intensive sectors and subsectors, such as agriculture and light manufacturing;
- Changes in the structure of consumer preferences (partly as a result of higher incomes, partly as a result of increasing inequality, but also as a result of changes in the mix of goods and services available to people at all income levels), which increasingly favour skill-, capital- and (often) import-intensive goods and services; and
- The increasing dominance of large firms (which tend to be more capital-intensive) in many sectors, including those, such as retailing that in other developing countries see much greater involvement by small, often informal, firms.

The root of these changes is that firms make choices – about what to produce and how to produce it – based on their assessment of how they might maximise their profits and minimise their risks and costs. In this context, unskilled labour is sometimes in competition with skilled labour and with technology, and firms can choose to use more or less unskilled labour depending on their assessment of the relative costs and risks of each. The fact that firms appear to have become increasingly reluctant to employ unskilled labour has something to do with their assessment of the costs, risks and potential rewards of this in comparison to the costs, risks and rewards of activities that use less unskilled labour, preferring to use more skilled labour and/or more capital/technology.

There are obviously many reasons why firms may have made this assessment, including some that are wrong or illegitimate, but it is also the case that policy choices have helped to facilitate this. One way they have done so is through the provision of public subsidies that target firms in skill- and capital-intensive sectors (such as automotive), with only the Employment Tax Incentive really favouring the employment of labour rather than investment in capital equipment. And, even within less capital- and skill-intensive sectors, subsidies have also tended to favour older, larger, more capital-intensive firms that are seeking to mechanise their operations. Another factor is that a variety of policy choices have tended to have the effect of raising both the risk-adjusted cost of employing unskilled labour as well as employers' assessment of the risk that further employment cost increases may follow. These policies, largely designed and implemented to protect vulnerable, low-wage workers, have had the effect of increasing employers' reluctance to take on more unskilled labour.

In this regard, the key policies that have increased employers' assessment of the immediate and long-run risks/costs of employing unskilled labour include:

- Various forms of employment security protection created through the Basic Conditions of Employment Act and the Labour Relations Act (including the recent amendments, which circumscribed the role of 'labour brokers'); and
- Wage-setting machinery that is perceived to favour labour and which is being supplemented with the proposed National Minimum Wage.

It must be stressed that these policies improve people's lives by ensuring that employment standards and wages are higher than they might otherwise be. They also can help reduce wage inequality in the workplace. These positive effects, however, do not exclude the possibility that they also have disemployment effects, and



the long-run implication of policies of this kind is that they will tend to push employers to economise on the use of labour, especially unskilled labour (the cost of which is disproportionately affected by interventions of this kind). They will also bias the business environment against newer and smaller firms that, everything else being equal, tend to be more labour-intensive than older, larger firms.

If this country's economy is to grow and reduce inequality, it will need to focus on the following areas and improve its competitiveness. Borrowing from the World Economic Forum's Global Competitiveness Index indicators as a framework the following ensue:

Institutions

South Africa currently ranks 40th out of 138 countries and its institutions are deteriorating. The quality of a country's institutions influences the investment decisions of individuals and companies, and also how countries assimilate and distribute the costs and benefits linked to development policies. Well-functioning private companies and state-owned institutions are pivotal to economic growth, job creation and addressing inequality.

This indicator evaluates the efficiency and behaviour of both public and private stakeholders and is comprised of a number of weighted sub-indicators.

South Africa is well positioned to embrace e-governance to improve the interaction between institutions of the state and citizens. The majority of the building blocks are already in place with a well-developed information technology sector, the move towards a national biometric identity smart card and government departments that are IT-enabled. SARS e-filing is an example to effective government-to-customer e-governance services and can form the basis for expanding into a single interface allowing citizens to conduct all their interactions with government. E-governance, if rolled out across all government services, would greatly improve efficiency, reduce petty corruption and stimulate the IT sector.

Recommendation 2.8

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, including 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.

Recommendation 2.9

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.



Recommendation 2.10	<p>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.</p> <p>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, the Panel recommends in these contexts the setting of a separate wage for the vulnerable in the labour market.</p>
Recommendation 2.11	<p>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 collective bargaining agreements 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.</p> <p>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).</p>

Health and primary education

This pillar comprises two indicators each weighed at 50%; namely Health and Education, with South Africa currently ranking of 123/138. The health of the workforce strongly influences competitiveness and productivity, given that a sick workforce translates into employer costs, absenteeism, loss of efficiency and increased allocation of state resources for uninsured workers. The education of the workforce is critical to meeting the labour market demands and to competing on an international level.

The Health Indicator is comprised of a number of sub-indicators, namely business impact of malaria (30/138), malaria incidence (25/138), business impact of tuberculosis (130/138), tuberculosis incidence (137/138), business impact of HIV/AIDS (130/138), HIV prevalence (135/138), infant mortality (107/138) and life expectancy (130/138).

The topics of access to quality health and education are dealt with extensively below. The focus here is on labour market.

Labour market inefficiency

The labour market is inefficient and is therefore not contributing to economic growth that can reduce poverty, unemployment and inequality. The World Economic Forum 2016 – 2017 Global Competitiveness Index ranks South Africa on labour market efficiency as 97th out of 138 countries. There is a structural mismatch between labour demand and supply: the labour market shows a demand for highly skilled workers, but there is a surplus of low-skilled potential workers. The economy must, therefore, respond to the twin challenges of participating in a globally competitive environment, which requires a high skills base, and a local context that demands more labour-intensive, lower-end wage jobs to absorb the large numbers who are unemployed, in vulnerable jobs and the growing number of young first-time labour market entrants. The skills development challenge is not to focus only on a small number of skilled people in the workplace, but also on the unemployed, the youth, low-skilled people, the marginalised, and those in vulnerable forms of employment, including the self-employed.

An extensive systemic review of the legislative and policy system for skills development was undertaken, focusing on the analyses of three core Acts governing skills development (the National

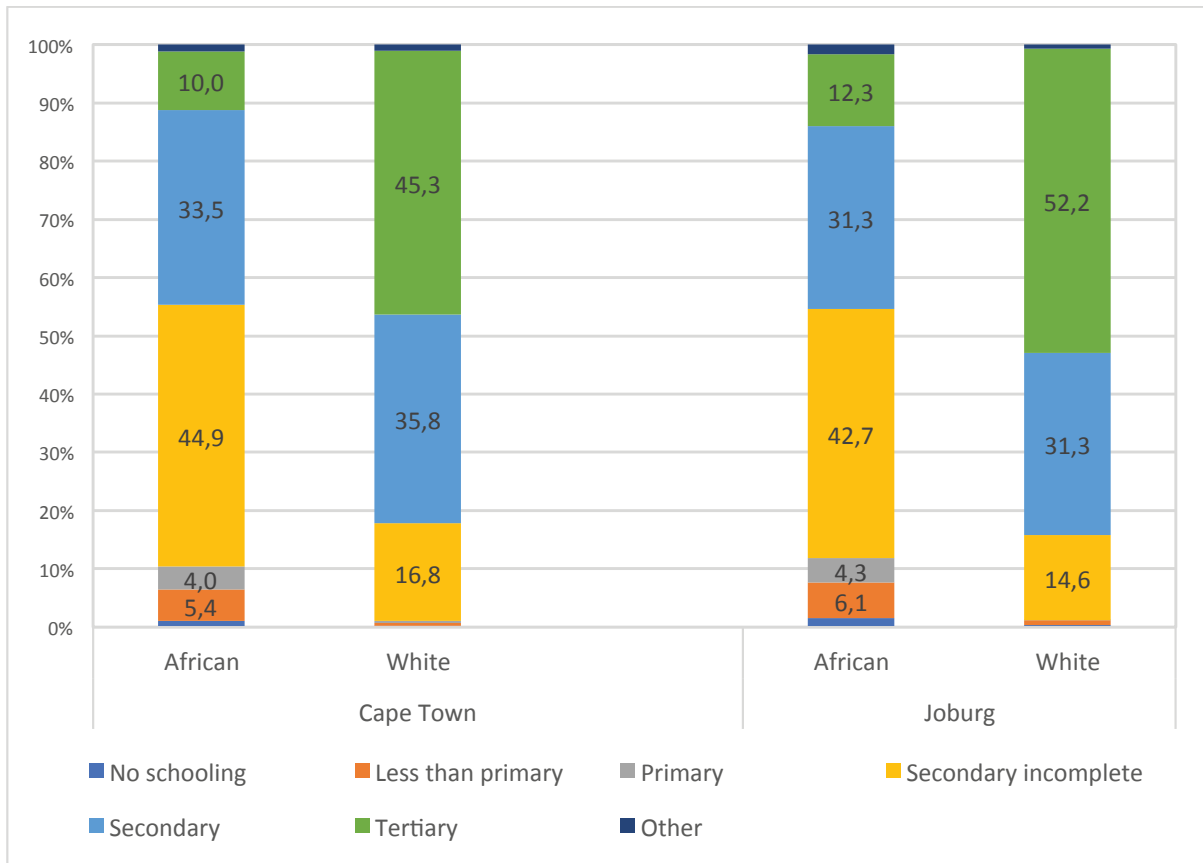


Qualifications Framework (NQF) Act No. 67 of 2008, the Skills Development (SD) Act No. 97 of 1998, and the Continuing Education and Training (CET) Act No. 16 of 2006) in order to identify emphases that enable, as well as silences and gaps that may be impeding South Africa from meeting its developmental 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. This is where the needs of the biggest proportion of both employed and unemployed South Africans lie, given the high number of job seekers with less than 12 years of schooling.

Of the employed population, 20% has a higher education qualification, 32% has completed senior secondary education, and close to half of the workforce do not have a grade 12 certificate. Close to two-thirds of the unemployed have less than a grade 12 certificate. This translates to 11.75 million members of the labour force with less than a grade 12 certificate. Skills and education levels are on average higher in the cities, although racial disparities persist. Data show that roughly half of the white workforce in Johannesburg and Cape Town has a tertiary level education compared to 1 out of 10 African workers. Approximately 45% of Africans have not completed their secondary level education. This may partly explain why labour market prospects are much more favourable for whites than for Africans (Figure 2.1). The average unemployment rate among whites in the metros is 7.2%, which is in line with the average for OECD countries of 6.2% and even better than the average of the European Union (28 countries) at 8.2% (OECD indicators, 2017). But unemployment among Africans in the metros is chronic and has spiked to record levels of 30% in recent years – and this is still more favourable than labour market outcomes among Africans in rural and other urban areas. Three out of every 10 jobs among Africans in the cities are in the informal economy. In rural areas, informal work is an even greater source of livelihoods for poorer African households.

Figure 2.1: Education level by race in two cities



Source: Turok, *et al.* (2015)

The International Labour Organisation (ILO) on its part defines casuals as ‘workers who have an explicit or implicit contract of employment which is not expected to continue for more than a short period, whose duration is to be determined by national circumstances.’ However, the practice of casualisation refers to the practice of ‘hiring and keeping workers on temporary employment rather than permanent employment, even for years, as a cost reduction measure’ (Chisala, 2006). This is a global trend, which some scholars refer to as Non-Standard Work Arrangements (NSWAs).

Although ‘labour flexibility’ is seen by some scholars (see Cheadle, 2016) as a necessary evolution in employment practices to allow for greater competitiveness for companies in a globalising world,



the practice is also open to abuse. Research conducted by the National Labour and Economic Development Institute (NALEDI, 2006) found that this practice is on the rise in sub-Saharan Africa. NALEDI's research found that there is often a racial and gender dimension to casualisation, with African women being more likely to be employed as casual workers. Where inappropriately used, this practice leads to employment insecurity, poses health and safety risks (due to long hours of work) and unfair labour practices (where casual workers are often paid much less than permanent workers, doing the same jobs in the same companies.) In terms of the ILO's emphasis on 'decent work,' it is important to find a suitable legislative solution to balance the need of business for labour flexibility with appropriate protection for workers against abuse.

One of the causes of poor labour market inefficiency as stated earlier is poor relations between the employers and employees arising from the practice of using labour brokers, some of whom are unscrupulous. Employees and work-seekers who are exploited lose workplace protection due to the operation of illegal labour brokers who are not adhering to the basic tenets of labour legislation, as contained in the Basic Conditions of Employment Act (BCEA).

Recommendation 2.12

The Panel recommends that Parliament guides the overhaul of the skills development policy in line with the principles outlined below. Skills development must respond to two divergent dynamics: participating in a globally competitive environment that requires a high skills base including more skilled artisans and a local context that creates low-wage jobs to absorb the large numbers who are unemployed or in vulnerable jobs. A greater impact on poverty, inequality and unemployment, which mostly affects persons who have not yet achieved an NQF level 4 qualification, can be made stronger by focusing on quality lower NQF level qualifications (1 – 4), both as goals in themselves through employment in as well as a pathway into high skills qualifications. Skills development must not only be focused on employability but must also result in a qualitative change in the lives of South Africans, fostering holistic human development, capabilities for sustainable livelihoods, and self-employment (and entrepreneurship).

The basic education sector is currently designed to channel learners towards a skilled (academic) career path. However, the results achieved indicate that this is an unrealistic expectation for most learners, given current outcomes in basic education. To align the basic education sector to the economy's needs the following should be prioritised:

- Improving the quality of the senior certificate to adequately prepare learners on an academic career path for entry into higher education and professional and managerial careers. This will require a radical improvement of the quality of teaching and improving access of learners to online learning resources.
- Creating a track that would channel the majority of learners to vocational educational career paths. In countries with low youth unemployment (Germany, Switzerland and the Netherlands), around 50% of learners pursue a vocational track.



There have been continuing reforms in the Technical Vocational Education and Training (TVET) sector which have resulted in a growing enrolment in TVET colleges, which more than doubled in three years, from 358000 in 2010 to 794000 in 2013 (Engineering News, 2014). However, the current design of TVET qualifications needs to be aligned with employer needs and adjusted to improve employability on completion of studies by restructuring the practical component of the qualification in line with the models used in countries with low youth unemployment. To achieve this goal the following should be prioritised:

- Reducing the classroom blocks to allow more on-the-job experience from the first year of study, i.e. one-day classroom training linked to four days' apprenticeship training in a workplace.
- Adjusting the current B-BBEE codes to create incentives for companies to provide the apprenticeship (work-based place learning) component in pursuit of the skills development expenditure targets. Systematic exposure to a potential employer over a number of years has been shown to increase the potential of employment on completion of vocational studies.
- Reviewing qualification content regularly with employer/industry bodies to ensure that the curricula meet industry requirements. There is a general perception among employers that curricula are outdated and often include subjects with little practical application.

The higher education sector needs to be incentivised to produce an adequate number of graduates to meet the economy's requirements. The approaches used internationally include establishing new government-funded institutions, encouraging the private sector to establish new institutions or a combination of both. Brazil has followed a combination of all these options and has increased access to tertiary education to 30% of the population with a third of students studying through the private sector (Redden, 2015).

To achieve this goal, the following needs to be prioritised:

- Reviewing qualifications to ensure they meet the requirements of future employers;
- Readjusting the subsidy system to prioritise scarce skill qualifications;
- Establishing higher academic institutions with a mandate on graduate output not just the current mandate on teaching and research – this will improve throughput and increase the rate of students entering tertiary education;
- Improving retention during studies. According to the Council on Higher Education (CHE), only about one in four students in contact institutions graduate in regulation time; only 35% of the total intake, and 48% of contact students, graduate within five years, and it is estimated that some 55% of the intake will never graduate (Council on Higher Education, 2013). Unlike in the UK, where universities have to keep attrition rates down to less than 13% or face financial penalties (Gaynor et al. 2006), there is no penalty system in South Africa linked to attrition.

Setting policy goals that explicitly aim to reduce poverty, inequality and unemployment in skills legislation

Policy should include in its definition of target groups specifically those that have been and continue to be marginalised from the system or are struggling to access the formal system: youth not in education, employment or training; poor, black rural and township communities, rural black women, and so forth, which can then be more expressly targeted as vulnerable groups, and targeted policy mechanisms can be designed to reach them and provide them specifically with access to skills development. In addition, the appropriation of the budget by Parliament should explicitly target these groups and ensure that adequate budgetary allocations are set.



As these are not often explicitly set out in legislation, this has led to poorly identified target groups. In addition to explicitly stating the policy intent and key target groups, legislation must include an indication of resources and the proportion of resources that will be allocated to these groups. Parliament has the competency to allocate resources, which it hardly exercises. These systemic silences limit the contribution that skills development legislation and policy can make towards addressing economic, social and developmental concerns. Poor recognition of explicit policy goals at legislative and policy level translates into poor implementation of general policy intent.

Shifting the policy gaze from regulation to provision and outcomes

It is absolutely critical for addressing the triple challenge that post-school education and training (PSET) legislation shifts from its focus on governance, advising, planning, funding, quality assurance and standard setting, towards actual provision of skills. The sprawl of regulatory institutions may have led to the slow pace of change. The overregulation and bureaucratisation of the system may be impeding rather than facilitating skills delivery.

Part of the reason for failure to implement is excessive complexity in the skills development system overall, which must be simplified, and efforts to rationalise regulatory institutions. Moreover, the complexity and lack of flexibility creates severe difficulties and disincentives for key stakeholders (such as SMMEs) to participate in skills development (e.g. WPBL provision), and in communicating the opportunities in the PSET system to the wider population, and for specific marginalised target groups being able to understand, access and succeed in PSET.

The sheer number of bodies that have some role in relation to quality, for example, has reached unsustainable proportions (they include, inter alia, the South African Qualifications Authority (SAQA), the Council on Higher Education/Higher Education Quality Committee (CHE/HEQC), Umalusi, the Quality Council for Trades and Occupation

(QCTO), 21 Sector Education and Training Authorities (SETAs), 93 professional bodies, the National Artisan Moderation Body (NAMB), the South African Institute for Vocational Training and Continuing Education and Training (SAIVCET), and so forth). Similarly, the number of bodies with planning, monitoring and/or advisory responsibility is excessive. They include, for example, the National Skills Authority (NSA), the Human Resource Development Council (HRDC), along with SAQA, CHE/HEQC, SETAs, skills development forums and so forth. There is a need to consolidate and rationalise this system and, for example, centralise the planning of human resource development at a level where it can ensure policy and implementation alignment across government departments.

Shifting the policy gaze to emphasise both higher education and continuing education and training

The higher education system has expanded to a level where it is now 'massified' and provides learning opportunities for close to 20% of the 20 – 24 year age cohort. Conversely, the vast majority of the same age cohort (80%) does not successfully participate in higher education, and the number of youth in general who are not in employment, education and training (NEET) is huge and growing. The Panel thus recommends that greater emphasis be placed on occupations, trades and WPBL especially at FET and lower HET levels, alongside general/academic and professional Higher Education.

What is critical for this recommendation to be successful is a simultaneous process to ensure that TVET institutions and the suite of occupational qualifications and WPBL provisions are attractive and have parity of esteem in society. Critical prerequisites are improved throughput/success rates and achieving closer links with workplaces (see recommendation related to WPBL). The value of technical, vocational and occupational qualifications should be communicated better at basic education level (pre-Grade 9).



Embracing supplementation from abroad as an interim solution

South Africa competes for skilled graduates in a global market and has lost substantial numbers of graduates to the international market. While South Africa has specific pull factors (enablers) that give it a competitive edge over wealthier nations – such as work experience and lifestyle, there are significant barriers to entry to foreign skills. Most countries are (1) streamlining their application processes, often putting them online, (2) employing independent recruitment organisations to source and place required skills, and (3) continually amending policies to open the doors to potential applicants. Supplementation from abroad is, therefore, a viable and needed strategy, and current restrictive policies that place limits on qualified foreign professionals do not serve the needs of the country (Segatti, 2014). There is an urgent need to lower barriers to entry and to simplify bureaucratic processes. Closely monitoring the labour market needs linked to time-limited work permits for foreign qualified professionals will stimulate the economy, in the short term, while in the long term ensuring that employment opportunities for locally qualified professionals are not hampered.

Inequality and access to credit

Poor people access credit at extremely high interest rates, which further impoverishes them. A national solution to capitalise poor people with repayable loans is urgently needed.

The promulgation of the National Credit Act (NCA), No 34 of 2005 created certainty in the unsecured lending segment. This meant that lenders in the unsecured segment had clear legislation and regulations to comply with, instead of operating under an exemption from the Usury Act that could be withdrawn at any time. The NCA has allowed for the emergence of a clearly regulated environment, where institutions with capabilities in borrowing on the strength of affordability assessments could develop their businesses. With higher loan amounts and longer repayment terms, unsecured lenders are also able to capture middle class clients.

Research by Finmark Trust highlights some unintended consequences of the NCA, including the fact that the reckless lending penalty causes the mainstream lenders to avoid the low-income market altogether.

Hawkins (cited in Ryan, 2017) posits that 55.3% of the population falling under LSM 1-3 pay a weighted average interest rate of 35% on personal loans, while the 3.6% of the population in LSM 10 get preferential rates for all financial products through private banking and are charged a weighted average interest rate of 19% on personal loans. The lenders argue that credit assessment leads them to consider poor people a risk because they have no collateral and hence cannot repay the loans. Nearly 20% of credit-active customers have some form of bad credit record (Ryan, 2017). There is therefore a need to find alternative solutions by identifying and growing unconventional funding mechanisms that would enable access to credit for the poor.

The National Credit Regulator reported that unsecured lending has increased from R54 billion in 2009 to R167 billion in 2017 (cited in Ryan, 2017). Lending organisations that use group lending approaches that create peer pressure to ensure that the loan is repaid, have been successful in helping borrowers to obtain capital to start their businesses as a means to get out of poverty. Such a model is the Small Enterprise Foundation (SEF), which offers unsecured lending and has a very small bad default record of 0.24% of the cumulative loans amounting to R5.5 billion given to 158 000 borrowers, largely women, since 1992 (Ryan, 2017).



Recommendation 2.13

The Panel urges Parliament to pass legislation that creates dedicated banks, which would allow some developmental micro-lenders, if they met certain criteria, to also become deposit-taking institutions that will lend to the poor who cannot access loans from the conventional banks. To facilitate this, Treasury would have to provide grant funding and/or credit risk insurance.

Access to quality education

Section 29 of the Constitution provides that ‘everyone has the right to a basic education, including adult basic education; and to further education, which the state, through reasonable measures, must make progressively available and accessible.’ It also provides that everyone has the right to receive an education in the official language of their choice where that is ‘reasonably practicable’, a phrase that is further elaborated. Section 29 also provides that ‘everyone has the right to establish and maintain, at their own expense, independent educational institutions’ provided that these do not discriminate, are registered with the state and maintain standards that are comparable with those of public institutions. Finally, it provides that the state can subsidise independent schools.

Administratively, the Constitution defines the provision of basic education as a concurrent competence, shared between national and provincial government. In practice, this means that educational policy, including norms and standards, are defined nationally, but provinces budget for and manage schools in their borders.

Overview of policy goals informing legislation

The key pieces of legislation governing the making of education policy and the delivery of education are:

- National Education Policy Act (1996),
- South African Schools Act (1996), and
- Employment of Educators Act (1998).

In the following summary, we focus on key aspects of the legislation, which might be reformed in light of the diagnostic we offer below.

National Education Policy Act of 1996 (NEPA)

This Act elaborates the responsibilities of the national and provincial levels, in line with the Constitution, creating a set of principles for admissions, curriculum development, etc. Various regulations framing the curriculum of basic education have been promulgated on the basis of NEPA. These include:

- Regulation 1718 of 1998: Assessment policy in the General Education and Training band, grades R to 9 and ABET.
- Notice 710 of 2002: National policy regarding General Education and Training programmes: Approval of the Revised National Curriculum Statement grades R to 9 (schools).
- Notice 306 of 2008: Foundations for Learning campaign: 2008-2011.
- Notice 722 of 2011: Approval of the National Curriculum Statement Grades R to 12 as national education policy.
- Notice 1115 of 2012: Draft amendment policy pertaining to the national curriculum statement grade R to 12 as set out in the policy document, National policy pertaining to the programme and promotion requirements of the National Curriculum Statement Grades R to 12.
- Notice 323 of 2016: Policy on the South African standard for principals.

Section 8 provides for the national minister to ensure the appropriate monitoring and evaluation of 'education provision, delivery and performance throughout the Republic' by the national department in order to assess progress with the achievement of the country's goals. NEPA provides some guidance on how the process of monitoring and evaluation ought to be structured.

South African Schools Act of 1996 (SASA)

This Act establishes the responsibilities and rights of schools, in particular, the school governing



body and the school principal. It also describes the duty of parents to send children to school from the year the child turns seven to the year the child turns fifteen, the duty of the provincial Member of the Executive Council (MEC) to provide schools for communities, and the duty of the national Minister to promulgate equitable school funding norms. SASA also sets out the rights of the school and parents with respect to charging school fees and rules relating to the management of the 'school fund'. The Act emphasises that post-apartheid schooling should be schooling free from discrimination and corporal punishment.

Amendments to SASA in 2007 are important for the goal of improving learning outcomes in schools. Principals are required to produce an 'annual report', which must include information on academic performance relative to nationally promulgated minimum standards. They should also produce an annual 'academic performance improvement plan', which the provincial education department can approve or return to the school with recommended changes. These amendments also affect the balance of authority between the provincial department and the school governing board, with the latter's view prevailing if there is disagreement between them.

The following regulations have been promulgated in terms of SASA:

- Notice 869 of 2006: Amended national norms and standards for school funding.
- Notice 723 of 2011: Determination of minimum outcomes and standards and a national process and procedures for the assessment of learner achievement as stipulated in the National Curriculum Statement Grades R to 12.
- Notice 1116 of 2012: Determination of minimum outcomes and standards and a national process and procedures for the assessment of learner achievement as stipulated in the National Curriculum Statement Grades R to 12.
- Notice 1495 of 2016: Approval of amendment to the regulations pertaining to the National Curriculum Statement Grades R to 12.

Employment of Educators Act of 1998 (EEA)

The EEA establishes the national minister's right and duty to determine national salary scales, and

the provincial MEC's duty to declare a set of educator posts, or a 'post establishment', per school, and to allow for posts to be filled with suitably qualified educators. The provincial education department is the employer of publicly paid educators, though school governing bodies should make recommendations to the department regarding whom to appoint. Where educator posts move between schools due to the growth or shrinkage of schools, school governing bodies have to select new appointees from a list that includes only 'excess' educators from other schools.

Draft legislation proposed in 2014 focuses on reducing the powers of the school governing body, and strengthening those of the employer (the provincial department) when it comes to the appointment of school principals, deputy principals and schools-based heads of department. This is intended to introduce more professional criteria into the process whereby school managers are appointed.

The following are promulgated in terms of the EEA:

- Notice 1451 of 2002: Amendment of regulations for the distribution of educator posts to schools in a provincial department of education.

Finally, key policies relating to the employment of educators which are not directly linked to the EEA include the resolutions of the Education Labour Relations Council (ELRC) which deal with matters like the rights of educators, school governing bodies and the employer when it comes to the moving of educators across schools.

Other acts

Other Acts that affect the basic education sector include the Children's Act (2005), which includes responsibilities of schools to protect children, and the National Qualifications Framework Act (2008), which establishes the basic framework within which the school curriculum operates.

Policy considerations

Providing access to quality education is a Constitutional imperative because of the key role of education in providing a basis for individuals' dignity, personal growth and fulfilment. Education is more



than just a source of individual self-actualisation, however: it is a fundamental building block for a society's economic success, and expanding access to quality education has also long been seen an essential prerequisite for reducing poverty, inequality and unemployment. This is partly because increasing the quantity and variety of skills available is key to economic growth, which is needed if South Africa is to deal with its many social and economic challenges.

Notwithstanding the consensus about the critical importance of basic education to the achievement of South Africa's goals of increased prosperity and reduced inequality, educational outcomes in South Africa are poor by global standards, and what good education is available, is concentrated in schools that serve children from relatively well-off households. The effect is that the education system is not producing the skills needed to alleviate the skills crisis and create the conditions needed for faster economic growth while also failing to reduce entrenched inequalities in human capital.

Improving the quality of education provided to South Africans is the fundamental goal of education policy. It is, however, important to recognise that improving educational outcomes is a complex task and one that is constrained and affected by a range of factors that are beyond the classroom. Poverty levels, for example, the educational level of children's parents/guardians, the availability of space and lighting in which to do homework, the stability of the neighbourhood/community in which a school is embedded, are among a wide variety of socioeconomic factors that impact on children's capacity to learn.

That said, what happens in the schools is clearly of critical importance to the educational efficacy of the system of basic education, with key issues including:

- The preparedness of learners to receive education (including the impact of past access to pre-school education/ECD activities);
- The nature of curriculum;
- The nature of the school's infrastructure (the size of classrooms, the availability of ablution facilities, libraries, laboratories);

- The availability of complementary learning materials (especially text books); and
- The number, quality and dedication of teachers.

Some of these elements are more amenable to improvement through policy than others, but all are needed to produce good quality education. To do so, however, they must be used effectively by schools, the management of which is critical to the efficacy with which these resources are used to produce education. It is difficult to state with any precision exactly what determines how effectively these inputs are used, however, with hard-to-define aspects of school/institutional culture (affecting both teaching staff and the learners themselves) clearly playing an important role. Policymakers have sought to improve educational outcomes using the tools available to them, and, as we shall see, their efforts have achieved some limited success. Much more needs to be done, however.

Overview of trends since 1994

The central fact about the South African system of basic education is the low average quality of education that is delivered. There is considerable evidence of this:

- A 2011 study of reading literacy found that nearly 60% of learners in grade five could not read for meaning, and that half of these children – i.e. nearly 30% of all grade fives – could not read at a level equivalent to basic literacy.
- A standardised test of maths and science – Trends in Maths and Science Study (TIMMS) – repeated every few years showed that South Africa’s Grade Five learners in 2015 were the second worst performing in all countries tested. For example, a low threshold of success in TIMMS above which over 90% of children in most countries were able to score, was beyond the ability of more than 60% of South African learners.
- Results from a reading and literacy test that compared Grade 5 learners in South Africa to Grade 4 learners in the UK found that South African students were far behind: only 8% of English students could not reach the low international benchmark of 400, while this applied to 78% of South Africans. Among students in England, 70% attained at least 500 points



(the global average), whereas only 9% of South African students could do so.

- In 2011, during tests of Grade 6 children in Southern and Eastern Africa, South African children performed just below the average for all the participating countries (most of which are much poorer and much less urbanised) in both reading and mathematics. The results indicate that South African Grade 6 schoolchildren are on average about a year's learning behind Kenya, and two years' behind Tanzania.

These dire statistics need to be tempered, however, by awareness of the fact that there is growing evidence that educational outcomes are improving at a relatively healthy pace. This evidence is recent and needs to be confirmed over time, but evidence to this effect is growing. Thus, an analysis conducted by the DBE in 2016 suggests that the achievement gap between rural and township schools, on the one hand, and advantaged schools, on the other hand, narrowed between 2008 and 2016. This, of course, might mean a decline in educational standards across the system, but that seems unlikely if one considers two other pieces of evidence:

- The TIMSS results reported earlier showed South African learners to be among the worst performers in the world in 2015. What they also show, however, is that there has been relatively rapid improvement in average performance since 2002. The pace of improvement compares favourably with the pace achieved by Brazil, long regarded as an educational success story.
- Similar improvements in achievement have been identified in the reading scores of South African learners in standardised tests used in Southern and East Africa, results that appear to indicate rapid improvement between 2006 and 2013, even while the final level of achievement was low in comparison to our neighbours.

Inequality in education

Although public funding of schools on a per-learner basis is now based on a formula that seeks to direct more resources at schools in poor areas than at schools in rich areas (which do, however, charge school fees to supplement their funding), huge infrastructural gaps remain between schools

in rich areas (and which previously served white children only) and schools in poor areas (and which previously served black children). Despite the building of a large amount of new infrastructure across the country, some schools, especially those in rural areas and former Bantustans, still lack classrooms, ablution facilities and other basic amenities. It is very difficult, however, to ascribe deep and persistent inequalities in the quality of education delivered in public schools serving rich and poor solely to differences in resourcing and infrastructure, with numerous studies showing that the outcome gaps are too large to be explained solely in this way, with a representative study concluding that ‘The evidence suggests, these differences result in part from historically-rooted characteristics of schools that are difficult to measure explicitly, such as the ability and motivation of the teaching staff and the managerial skills of principals. Second, they probably reflect unmeasured characteristics of children’s parents or other carers, most notably the importance they assign to children’s education’ (Timæus, Simelane & Letsoalo, 2012).

How large are the inequalities in educational quality?

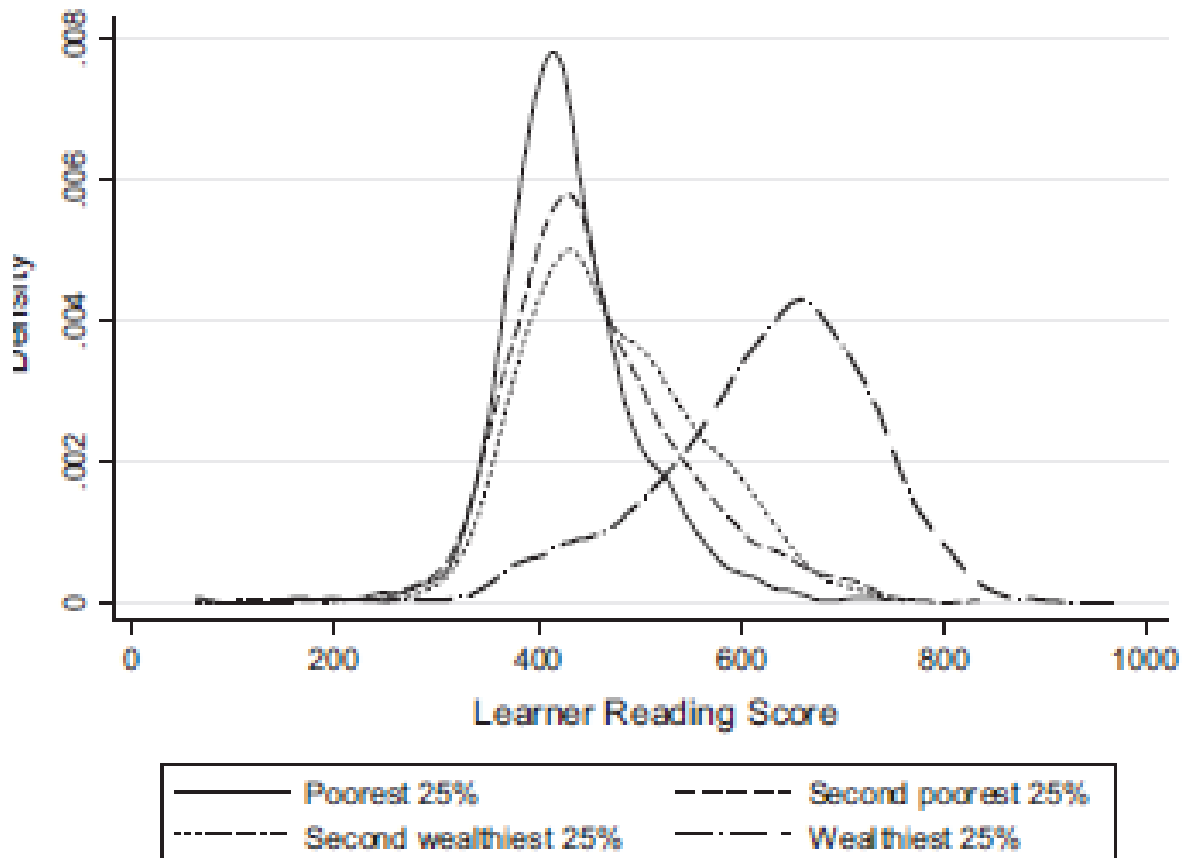
Low as the average quality of education delivered by the schools is, that average masks considerable inequality. Thus, while 61% of all grade five learners failed to achieve a score of 400 (the low international benchmark) in TIMMS, the figures varied enormously between non-fee paying public schools (where more than 80% of learners failed to achieve this mark), fee-paying public schools (where about 40% failed) and independent schools (where about 20% failed).

Unsurprisingly, these differences in educational outcome map differences in income, and, because of the close correlation of the two, differences in race, with white learners tending to achieve much higher results than black learners, especially African and Coloured learners.

There are high levels of inequality in test performance between children with differing socioeconomic status, from different language groups, and from different race groups. The figure below shows the distribution of reading test scores from 2011, with results differentiated based on the socioeconomic status of the community within which the school was located. It is quite clear that the results were much higher for children in communities in the top 25% of household incomes than for learners in households in the bottom 75%.



Figure 2.2: Performance in SACMEQ reading test by school wealth quartile, 2011



Source: Spaul (2013)

These data all suggest that educational outcomes are exceptionally unequal in South Africa, and there is evidence that the extent of inequality is greater than in other countries. At the same time, there is also evidence that high as inequality is, it may be moderating somewhat.

Have levels of inequality declined?

Recent research seems to suggest that, deep as the inequalities in educational outcomes are, they are less severe than they were in the late 1990s and early 2000s. Gustafsson (2016), for example,

found that the number of African learners attaining levels of mathematics performance which would allow entry into engineering at university increased by 65% between 2008 and 2015, and, critically, that these improved outcomes could not be explained solely by an increase in the number of African learners in formerly white schools, but that the footprint of mathematics excellence had expanded to a wider variety of schools, in particular township and rural schools. Similarly, separate data show that, while more than half of all high-achieving maths matriculants in 2002 were white, by 2016 the figure was less than one in three.

Another indication of a narrowing – though still wide – achievement gap can be seen by looking at the reduction in the gap between the chances of a white learner’s achieving a high mark in mathematics and the chances that a black learner would do so, and comparing the extent of this gap over time. If, for example, we look at a mathematics mark that was achieved only by the top 20% of white learners writing mathematics, and compare the probability that a white learner chosen at random would achieve that mark, we see that in 2016, the average white student was about 7 times more likely to achieve this result than the average African student. This is a very high level of inequality, but the comparable figure for 2002 was even higher: the average white learner was about 23 times more likely to achieve a high mark in mathematics in 2002 than was the average African learner.

Explaining improved performance and the decline in inequality

In work commissioned by the Panel for this report, Prof Servaas van den Berg and Dr Martin Gustafsson of the University of Stellenbosch sought to identify the key drivers of the (somewhat) improved educational outcomes and the declining level of inequality achieved by the school system. They point to a number of factors, not all of them directly under the control of the DBE. These include:

- Improved parental support: In 2003, only 41% of learners in South Africa’s schools lived in a household where at least one adult had herself passed matric; by 2015, this figure was 56%.
- Better access to school textbooks: In 2002, only 30% of Grade 9 teachers reported using a textbook in teaching mathematics; by 2011, this figure was 70%. In addition, the use of study guides and workbooks has been incorporated into the process of teaching and learning.



- Standardised testing: The introduction of Annual National Assessments (ANAs) helped send a signal through the school system about the importance of teaching basic mathematical and language skills, while also introducing a degree of transparency about the comparative effectiveness of different schools.
- More suitable curriculum documents: New curriculum documents (that set out what and how to teach) are far more detailed and helpful than earlier documents were, providing teachers with much better guidance and assistance.

Voices of the public

The issue of education and schooling attracted an enormous amount of attention at the Panel's public hearings. There was universal consensus about the importance of education, about the link between poor education and the high level of unemployment, and about the relationship between educational inequality and income inequality (with the latter seen as both a cause and an effect of the former, creating a vicious intergenerational cycle in which income inequality is reproduced and entrenched through the unequal quality of education available to people in different income groups). 'Inequality,' the Panel heard more than once, 'starts in the school system.' Another person went further: 'Inequality,' she said, 'starts in the crèche.'

The poor quality of rural schools, the Panel also heard, meant that few if any attendees ever go on to university, with the result that 'they are only educated to be a slave to someone else.' It was noted by some, however, that the chances of success at school were diminished by factors that were not in the control of the schools themselves. 'Our children come from wrecked homes,' said one participant, 'and that affects them at school.'

Beyond these general statements of the critical importance of education and the need, therefore, for policymakers to find a way to ensure that high-quality basic education was provided to all learners, submissions covered a wide range of more specific concerns.

Infrastructure and resources

Unsurprisingly, the absence of adequate school infrastructure emerged as a concern in a number of public hearings, with submissions noting that some schools are overcrowded; some are constructed

of unsuitable materials (or operate under trees) making schooling difficult at best and impossible in adverse weather conditions; some lack important complementary infrastructure (ablution facilities, etc.); and many lack laboratories and libraries.

In relation to the allocation of resources, the Panel received a submission from Equal Education, which sought to propose amendments to the formula used to allocate resources to schools. These suggestions included:

- Adjustments should be made to the formulae used to calculate the equitable share portion of provincial budgets to take account of the fact that poor provinces must allocate a greater share of their resources to poverty reduction, leaving less for schooling, and that many of these provinces also face higher costs in delivering education because a larger proportion of learners are in rural areas;
- The quintile-based approach to funding schooling is too blunt an instrument and leads to perverse outcomes (e.g. that schools that happen to be in rich areas, but which cater to poor learners may be relatively underfunded, while schools in poor areas that have been upgraded may be wrongly deemed to be in a higher quintile than they should be); and
- The formula used to allocate staff equitably between schools fails to account for differences in the quality of individual teachers, fails to distinguish between rich schools (where fees can be used to supplement teaching staff) and poor schools (where this is not possible), and discriminates against schools that have narrow subject offerings (which generally serve poor areas).

Conditions vary enormously between urban and rural areas, within urban areas, and between schools of similar kinds, but the notion that infrastructure remains inadequate in too many places was widely repeated. A special plea was made not to forget farm schools, which one participant said were ‘at mercy of the farmer’, while many participants noted that too few schools were accessible for learners with disabilities.

Teachers and principals

A number of concerns relating to teachers and principals were heard in public hearings across the



country. Most of these related to issues of quality, and, in particular, the conviction that there were significant differences in the quality of teachers in schools that serve the rich relative to teachers in schools that serve the poor. In this regard, it was claimed that private schools pay higher salaries, allowing them to attract better, more experienced teachers.

A separate but related point that was often made was that schools in richer areas were able to attract teachers of subjects in which there were few specialist/experienced teachers, allowing those schools to offer a wider, more diverse and enriching mix of subjects. Particular mention was made in some hearings about the need to expand high-quality ECD programmes into poor communities, though a submission made in the Western Cape hearings pointed out that unless more funding were secured, ECD in poor areas would collapse if service providers had to pay the proposed national minimum wage. ‘Our parents do not pay fees, so we rely on the government to pay for teachers.’

In relation to principals, concerns were occasionally expressed about the extent of ‘corruption’ in the process of their appointment. While few details were provided, this was presumably a reference to widely voiced concerns that teacher unions manipulate the process of appointment of principals in order (a) to reap financial reward, (b) to secure benefits for their members, and (c) to put in place principals who will use their authority to manage/discipline teachers less vigorously. The factual basis of these concerns was confirmed in the so-called ‘Volmink Report’ released by the DBE in May 2016 (Volmink *et al.* (2016).

The cost of education

A number of submissions were made in relation to the cost of schooling, which, despite the large number of no-fee schools is regarded as a constraint on attendance and, more importantly, success at school. This is because school fees are only one of the potential costs that households face in ensuring learners attend school, with others including costs of uniforms, study materials and transportation. One submission from a community-based organisation in Gauteng noted that it had been established with the express purpose of using past matriculants to help local learners study more effectively, but that it was unable to secure any funding for its activities. Having said that, one participant bemoaned the fact that households are prepared to spend far more on funerals than on education.

Relatedly, some people noted that the success of the #FeesMustFall movement was important for learners, since the fact that the costs of post-school education were likely to be unaffordable to members of poor households discouraged learners from working as hard as they might if they felt more confident that they would be able to afford to go to university.

Discipline and security

An issue that emerged at all public hearings was that of safety, security and discipline. In the Western Cape, a number of submissions were made about the dire effect of gangsterism on teaching and learning in some of the province's schools, while a meaningful number of schools in Gauteng submitted written requests for security upgrades, security guards and the like. In many places, the presence of drug-dealing and drug use on school grounds was noted with despair.

A related but distinct issue was that of learner discipline, with a number of submissions being made to the effect that corporal punishment should be reintroduced. Other submissions pointed to a concern that learners were not receiving sufficient instruction in how to respect their elders and the community more generally. One person asked, 'How do we protect teachers from dangerous children?'

Curriculum

A proposal was made that all schools teach the same curriculum so that no learners have more opportunities than others, as well as the plea for the expansion of teaching in some specific subjects such as crafts and agriculture. There were also repeated calls for the expansion of teaching of vocational subjects and the widening of access to vocational training.

Given the complexity of the issues, one way to approach the assessment of legislative issues is to ask what impact they have had on the ten education-related priorities in the National Development Plan. These include:

1. Better-aligned rights and duties for school principals.
2. An effective school principal appointment process.
3. More reliable national assessments of learning.
4. Learning results reported to parents.



5. Financial incentives attached to standardised assessments.
6. New methods for teaching basic reading skills.
7. Broadband access for all schools.
8. Stronger focus on career guidance at the senior phase.
9. All children to participate in an additional year below Grade R.
10. Twelve years of compulsory schooling by 2030.

Getting the principal's authority right

The NDP advocates a more concerted move towards the ideal of capable school principals with expanded managerial authority. In this regard, the 2007 amendments to the South African Schools Act requiring school principals to compile plans and reports focusing on academic improvement were clearly intended to make the principal a more central driver of qualitative change. In the absence of effective system-wide tools and policies to guide principals, these amendments are unlikely to achieve the desired changes. Provincial governments have also not always complied with the prescribed funding norms, reducing principals' ability to allocate resources in response to local needs.

A key matter for principals is their ability to manage teachers in the school. While it has been argued by some that what is required is the rebalancing of the relative power of principals and the parents' bodies in appointing teachers, difficulties may simply reflect poor compliance with existing rules, and, in particular, the failure of departmental officials to support effective disciplinary processes aimed at upholding teacher professionalism.

A policy on the 'standards for school principals', published in 2016, is a move in the right direction when it comes to having the right policies relating to principals. However, this policy seems to skirt around the more difficult challenges the system faces, including the role of the principal in fighting corruption, how the performance of principals should be gauged, in part to determine the degree of management freedoms a principal should enjoy, and how the administration should 'listen' to the concerns of principals through, for instance, professional bodies.

Improving the process of appointing principals

It is widely known that the process of appointing school principals is plagued by undue influences, including undue union influence. The NDP sees a part of the solution as lying in the introduction of a ‘competency assessment for school principals’. The training of officials involved in the appointment processes and in the application of existing labour laws is also seen as a solution.

A proposed 2014 amendment to the Employment of Educators Act aims to remove undue influences from the principal appointment process by allowing the provincial department to nominate a few candidates, and then force the school governing body to select from the department’s candidates, which would reverse the current situation.

There is nothing in law yet on the proposed competency assessments for school principals, and specific legal provisions may not be necessary, but legislators could insist on a better policy framework for school principals.

More reliable national assessments of learning

Although the implementation of the ANAs was placed on hold in 2015, having a system of this kind in place is still necessary because testing all learners in one primary grade annually to produce performance statistics is needed if stakeholders are to know if the system is improving. In 2016, the DBE proposed an approach to achieving this critically important reform and it needs to be supported with legislation if necessary.

Transparency about school performance

Providing comprehensive reports to parents about the performance not just of individual learners but also of the school as a whole is a key step to improving school performance over time. Detailed proposals for ‘school report cards’ have recently been developed.

As with the ANAs, there is considerable antipathy to this among educators who believe that this will create unhelpful competition between schools. But some sense of performance differences across schools to drive decision-making is needed. It is necessary, however, to ensure that unfair



comparisons across schools where the socioeconomic circumstances of learners are not taken into account should be proscribed. Without such a measure, fair judgements of which school principals are more and less effective are impossible to make.

Financial incentives attached to standardised assessments

The NDP proposes paying financial incentives to schools which display exceptional improvements in their national assessment results, but international assessments of this approach offer mixed and ambiguous results. Just having better information on which schools are performing well creates good pressure in the right areas, even without financial incentives. Teachers need to feel that exceptional effort and talent is rewarded, for instance through promotion opportunities.

While no policy work has occurred on attaching financial incentives to ANA results, there has been work done on the design of financial incentives linked to improvements in Grade 12 examination results, though implementation would require changes to existing funding norms.

New methods for teaching basic reading skills

Given the poor performance of South African learners, there is a need for greatly improved teaching methods in the foundation phase (grade R to 3). Some improvements to the curriculum have already been made, but there is more work to be done. The National Education Evaluation and Development Unit (NEEDU) has argued that a few simple additions to the rules could add great value, for instance in the form of norms on how many pages of writing learners should complete at specific points in the initial grades, and norms on the minimum number of words a minute a child should reach when reading out loud. The Department of Education published such a strategy in 2008, though this has been criticised for not being specific enough with respect to what teachers must actually do in the classroom. Having policy is not enough, however. NEEDU's report observed that many provinces have reading strategies which are poorly disseminated and barely known in schools.

Broadband access for all schools

For the NDP, 'the most crucial enabler of ICT [in schools] is high-speed broadband'. Progress has

been made towards more widespread access to broadband. There is no evidence that access to broadband will, by itself, improve educational outcomes, and it is clear that careful planning and a holistic approach are needed. A White Paper on e-education was published in 2004, but it is considered too thin on detail relating to lessons from around the world, the contribution towards better learning and teaching, costs, and the technology trade-offs, and a new strategy is needed.

Providing better guidance to learners through certification at Grade 9

The NDP proposed that better career guidance in the senior phase (Grades 7 to 9) would be key to reducing youth unemployment. While Life Orientation provides some guidance to learners, strengthened academic assessment at the Grade 9 level, and perhaps even certification might help ensure that learners were better informed about their relative strengths and weaknesses, enabling them to make better decisions about subject to study in Grades 10 to 12 or at TVET college.

In this regard, it is worth pointing out that, while TVET colleges are supposed to take learners after Grade 9, in practice they take learners who have completed grade 12 because of the absence of certification after grade 9. Designing and implementing a Grade 9 qualification was a high priority in Education White Paper 1 of 1995, and this was repeated in a Ministerial Committee review in 2014 which recommended introducing a Grade 9 certificate.

All children to participate in an additional year below Grade R

The NDP proposed that all children participate in a year of education before Grade R – i.e. during the year, they should ideally turn five. Government has sought to implement this through ECD institutions under the principal guidance of the Department of Social Development, with the Department of Basic Education being a key second department. This has been relatively successful if measured by enrolments: by 2014 around 75% of four-year-olds were attending an institution.

The Department of Social Development's 2015 policy together with the 2013 curriculum for birth to age four, has many strengths, but reforms are needed to ensure that costs per child are affordable and sustainable for both households and government.



Twelve years of compulsory schooling by 2030

The NDP envisages that by 2030 all youths should complete twelve years of education, a goal that is in line with considerations of how fast the education system can grow and how quickly quality can improve to ensure learners remain enrolled through Grade 12.

Much has been done to achieve this in recent years, with changes in the rules relating to grade repetition resulting in a large increase in the number of Grade 12 learners in public schools in 2015 and 2016. By 2016 provisional estimates are that perhaps as many as around 80% of South Africans were reaching Grade 12 in a school, and about 55% were obtaining the National Senior Certificate. Concerns have, however, been raised about the effect of permitting large numbers of academically weak learners into Grade 12 on results in general, and on resource-driven issues such as class size. This has led to new rule changes to slow the growth in Grade 12 enrolment.

Legislative gaps

Although this 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.

Recommendation 2.14

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 (McIlwraith, 2013) 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 (Economist, 2016). 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 curriculum 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 the SA 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 eventually will complete matric and thus enjoy high returns to 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

Constitutional mandate

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 further stipulates 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).

Another perspective on the right to health care is to frame it as a constitutional right for



every citizen to choose the health care provider and plan that is appropriate to their needs and wallets. This is in accordance with Section 18 – Freedom of Association - which states that ‘everyone has the right to freedom of association’ and Section 25. Under Section 25 (1), , ‘no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property’ (for this section, ‘property is not limited to land’ – Section 25 (4) (b)).

Overview of policy goals informing legislation

The principal legislation governing the health sector is set out below.

National Health Act (61 of 2003) as amended:

- Clarifies the role of national, provincial and local government in the delivery of health services, establishes the district health system, and establishes mechanisms for coordinating these efforts;
- Defines various categories of health facilities and the types of services provided;
- Provides that primary health services be provided without charge to pregnant mothers and children under six years of age;
- Sets out the rights and duties of healthcare workers and users of these services; and

Establishes various entities to govern/regulate the health profession and to provide research for the system such as the Office of Health Standards Compliance.

Medical Schemes Act (131 of 1998) as amended:

- Establishes that medical schemes are the only financial product that can provide medical expense cover and ensures they are appropriately regulated;
- Establishes basic parameters of the medical scheme industry, including open enrolment, community rating, prescribed minimum benefits, risk equalisation, and permits the appointment of preferred suppliers;
- Determines how schemes are to be governed; and

- Establishes the Council for Medical Schemes, provides for it to regulate the industry, and tasks it to look after the interests of members.

The Council for Medical Schemes Levies Act (58 of 2000), as amended, provides for the establishment and funding of the CMS through levies.

Medical, Dental and Supplementary Health Services Amendment Act (89 of 1997) establishes the Health Professionals Council, requires new graduates to serve a year of community service and provides for the Council to manage continuing professional development.

Allied Health Professions Act (63 of 1982) establishes the Allied Health Professions Council to regulate allied and complementary medical practitioners.

The Nursing Amendment Act (19 of 1997) and Nursing Act (33 of 2005) establish the Nursing Council, with members appointed by the minister after calling for nominations, and determines its powers to regulate the profession and its members.

The Pharmacy Act (88 of 1997) as amended provides for the establishment of the Pharmacy Council and establishes the rules for licensing pharmacies and requires new graduates to do a year of community service.

The Traditional Health Practitioners Act (35 of 2004) establishes the Traditional Health Practitioners Council, with members appointed by the minister.

The National Health Laboratory Act (37 of 2000) consolidated all public health laboratories (except those operated by the police and military), as well as those operated by provincial departments.

The Medicines and Related Substances Control Act (90 of 1997) seeks to manage the cost of medicines by allowing international tendering and the parallel importation of medicines, generic substitutions, regulating marketing activity by pharmaceutical firms, and establishing a medicines pricing committee, and provides for the establishment of the SA Health Products Regulatory Authority.

The Tobacco Products Control Act (12 of 1999) allows for the regulation of advertising of tobacco products and smoking in public places.



The Mental Health Care Act (17 of 2002) creates a bill of rights for mental health patients and establishes mechanisms for regulating the provision of mental health care services.

The Choice on Termination of Pregnancy Act (92 of 1996) governs the provision of abortion services.

The Occupational Diseases in Mines and Works Act (60 of 2002) requires mine-owners to compensate workers who contract certain industry-related diseases.

Policy considerations

There is wide agreement that the constitutional requirement that there be universal access to health services is appropriate. There are, however, important differences in how various participants in public debate understand and interpret the constitutional requirement of universal access. The important differences are in the way that participants believe that the model should be designed to achieve Universal Health Care (UHC).

The World Health Organization (WHO) posits that the goal of UHC is “improving equity in the use of needed health services, improving service quality and improving financial protection. All countries share these goals to varying degrees. Therefore, making progress towards UHC is relevant to every country in the world (Kutzin, 2013).”

The WHO clarifies what it means by UHC. It posits that “the unit of analysis for goals and objectives must be the population and health system as a whole. What matters is not how a particular financing scheme affects its individual members, but rather, how it influences progress towards UHC at the population level. Concern only with specific schemes is incompatible with a universal coverage approach and may even undermine UHC, particularly in terms of equity (Kutzin, 2013).” Health care is therefore an individual right to the highest standard of quality health care. It has been argued by some that South Africa already has UHC because a comprehensive package of services is offered to users of the public health system without exposing them to undue financial risk, while those who can afford it can purchase services from private providers while insuring themselves against catastrophic costs. This is incompatible with the WHO concept of universal health cover as articulated above.

The WHO recommends that all citizens have access to affordable health care, not free health care, in the WHO's version: "UHC does not mean free coverage for all possible health interventions regardless of cost as no country can provide all services free of charge on a sustainable basis (WHO, 2016)." It also does not prescribe that the model to achieve this is a single fund model as proposed in the White Paper.

There are two key subjects of debate. The first is whether the very high level of inequality in the quality of services provided to those who cannot afford private health care compared to those who can (see below) vitiates from the universality of coverage. In this regard, the debate revolves around the term "universal", which some interpret narrowly as universal access to services with low financial risk, and others interpret more broadly to mean universal access of everyone to services of the same quality and on the same terms. It is also important to note that the Constitutional obligation to provide reasonable access to health care for all citizens is an obligation of the State. This constrains the potential policy interventions and means that inequity arising from private expenditures cannot, *per se*, be regarded as limiting or undermining the universality of services proved by the State. However, the WHO argues otherwise, that "Universal means universal.... what matters is how the scheme influences UHC goals at the level of the entire population. A concern only with specific schemes is not a universal coverage approach (Kutzin, 2013)." The WHO goes further to clarify this matter of universality by stating that "Health financing for universal coverage implies that reforms in collection, pooling, purchasing and benefit design are aimed specifically at improving one or several of those objectives and goals (listed above), as measured at the population or system level (Kutzin, 2013)."

The second is how, irrespective of how universal coverage is defined, it can be achieved and what policy and legislative framework best achieves it. The issues of affordability and practicality underscore debates of the various models under discussion to implement national health insurance. It is obvious that no policy or legislation can be debated or promulgated without some consideration as to fundamental principles of implementation – particularly affordability and feasibility.



Overview of trends since 1994

Mortality, morbidity: facts and trends

The health status of South Africans is rapidly improving, exceeding the targets set for 2014 by 2012. Life expectancy at birth has increased and exceeded the 2014 targets by 2012. Similar observations were made for life expectancy for males, and for females the increase was much higher than that of males. Overall adult mortality has decreased much faster than the 2014 target, surpassing it by 2012. With respect to under-five mortality, the decrease was also much higher than expected at 10%. The same was experienced with infant and neonatal mortality. These dramatic changes are the result of the government's programmatic efforts that led to widespread availability of free antiretroviral therapy, free prevention of HIV transmission from mother-to-child programmes and free immunisation against pneumococcal pneumonia and rotaviral diarrhoea in infants. Maternal mortality is not discernible, largely because of small numbers of cases used to provide reliable estimates (Table 2.5).

Despite the recent improvement in the mortality trends, the rates are still unacceptably high for a middle-income country. Premature deaths and high absenteeism due to poor health status contribute to low productivity at work and therefore slow economic growth. Life expectancy in South Africa is far lower than that of other BRICS countries, and infant mortality and under-five mortality rates in South Africa are much higher than those of Russia, China and Brazil and yet lower than those of India (Table 2.5).

Table 2.5: Key mortality indicators, 2009 - 2012

Life Expectancy and Adult Mortality (Output 1)					
Indicator	Target 2014	2009	2010	2011	2012
Life expectancy at birth Total	59.1 (increase of 2 years)	57.1	58.5	60.5	61.3
Life expectancy at birth Male	56.6 (increase of 2 years)	54.6	56	57.7	58.5
Life expectancy at birth Female	61.7 (increase of 2 years)	59.7	61.2	63.3	64
Adult mortality (45q15) Total	43% (10% reduction)	46%	43%	40%	38%
Adult mortality (45q15) Male	48% (10% reduction)	51%	48%	46%	44%
Adult mortality (45q15) Female	37% (10% reduction)	40%	38%	35%	32%
Maternal and child mortality (Output 2)					
Indicator	Target 2014	2009	2010	2011	2012
Under 5 Mortality Rate (U5MR) per 1 000 live births	50 (10% reduction)	56	52	40	41
Infant mortality rate (IMR) per 1 000 live births	35 (10% reduction)	39	35	28	27
Neo-natal mortality rate (less than 28 days) per 1 000 live births	12 (10% reduction)	14	14	13	12
Indicator	Target 2014	2009	2010	2011	2012
Maternal mortality ratio (MMR) per 1 000 live births	252 (reverse increasing trend and achieve 10% reduction)	280	304	269	-

Numbers for 2009 – 2011 differ slightly from previous report because estimates of births and the population exposed to risk were updated to take into account the 2011 census

Source: MRC (2013)



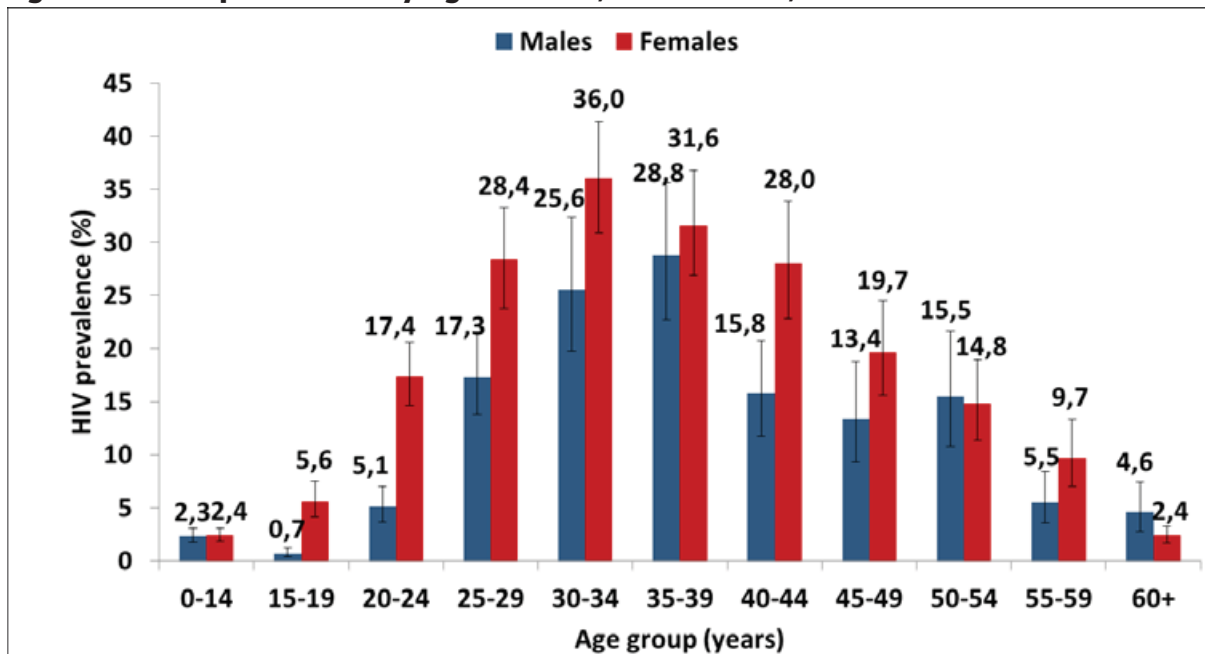
Table 2.6: Differences in health outcomes, life expectancy, infant mortality and under-five child mortality, 2011

	Life expectancy at birth		Infant mortality rate per 1000 live births	Under-five mortality rate per 1000 live births
	Male	Female		
Brazil	71	78	14	16
Russia	63	75	10	12
India	64	67	47	61
China	74	77	13	15
South Africa	57	60	35	47

Source: WHO (2013), World Health Statistics (2013)

The major contributors to premature deaths are HIV and TB, diseases that are more common among young people than older people. Young women bear the brunt of the epidemic (Figure 2.3) largely because of their biological makeup, gender-based violence, unequal power relations between males and females, and poor socioeconomic status that increase the risk of contracting HIV.

Figure 2.3: HIV prevalence by age and sex, South Africa, 2012



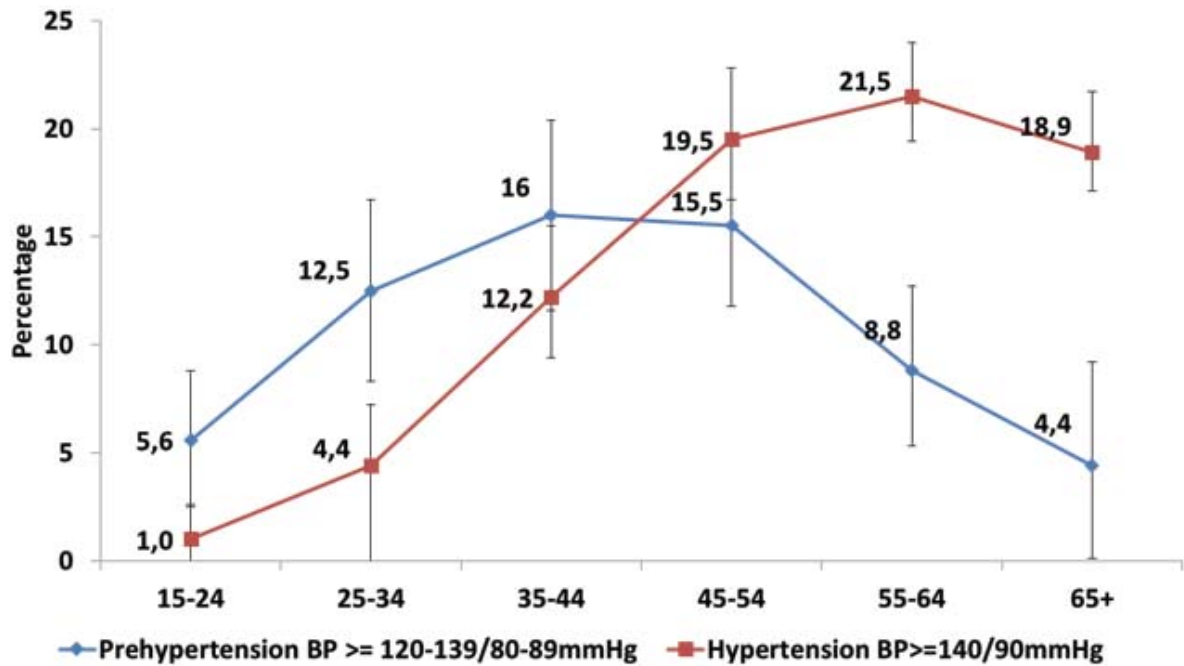
Source: Shisana, *et al.* 2014

The high HIV burden is coupled with very high rates of TB, with an estimated 450 000 active cases of TB in 2013. This implies that during that year 1% of the South African population developed TB. South Africa has the third highest rate of TB in the world, after India and China, and it has increased by more than 400% over the past 15 years (World Health Organization, 2013), largely because of the high rate of HIV infection.

These two communicable diseases occur in a country with a rapidly growing rate of non-communicable diseases resulting largely from lifestyle changes that include obesity, smoking, alcohol consumption, unhealthy diet and lack of exercise. The two graphs presented below are indicative of the high rate of hypertension, starting at before age 35, and the high rate of pre-diabetes.



Figure 2.4: Prevalence of measured prehypertension and hypertension by age, SA 2012

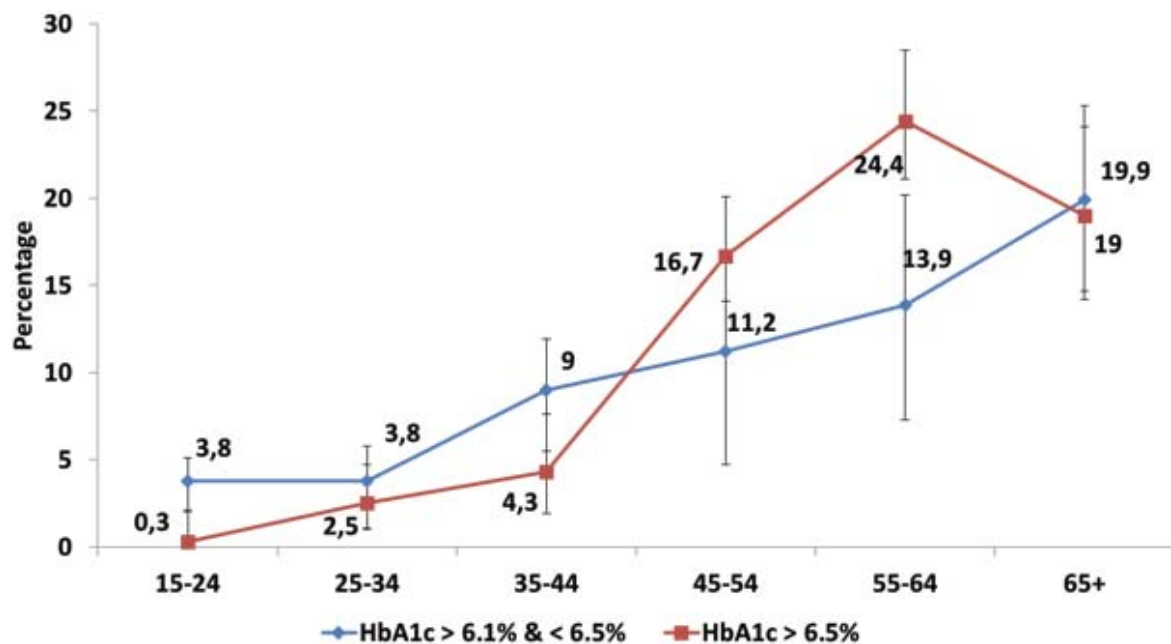


Shisana, *et al.*, 2013

Poor health outcomes are not exclusively a reflection of the health system alone: a vast range of genetic, socioeconomic and behavioural factors influence a population’s health status, and many of the factors that drive poor health outcomes are present in South Africa. These include issues such as poor housing and access to clean water and sanitation, high levels of indoor pollution associated with fires used for cooking and heating, poor diets and high levels of consumption of alcohol, tobacco and narcotics.

These social determinants of health create high levels of need for healthcare services, imposing heavy burdens on the country’s health professionals.

Figure 2.5: Prevalence of impaired glucose homeostasis and diabetes by age, SA 2012

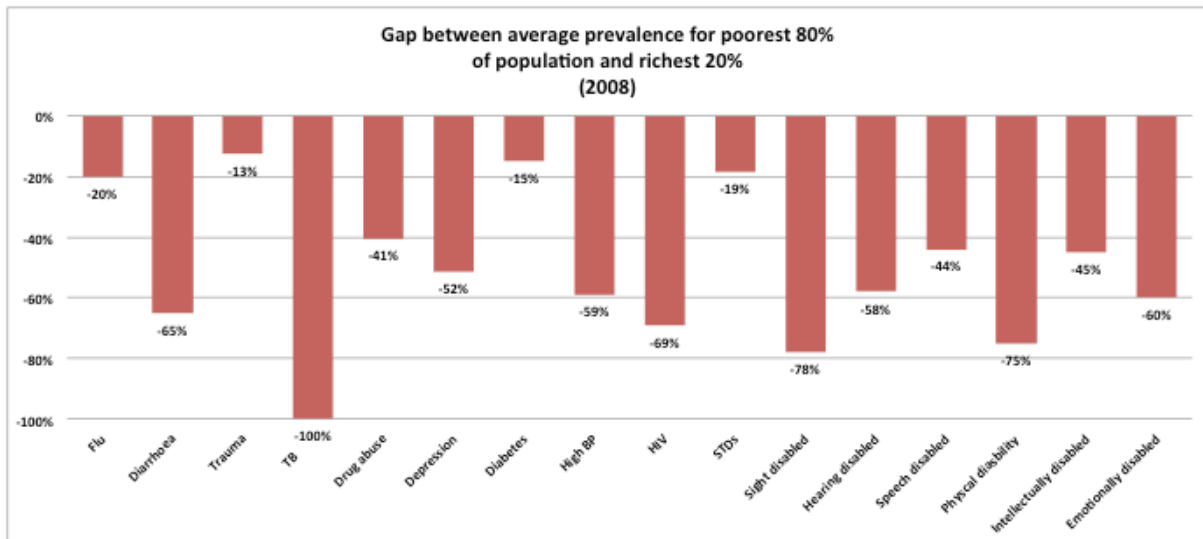


Source: Sishana et. al. (2013)

South Africa's relatively poor outcomes for the country as a whole mask vast inequalities in health outcomes for different communities, with the rich living much longer, much healthier lives than the poor. Moreover, because of the country's socioeconomic profile, these divergences in outcome are also differences between races. One way to reflect this is to note the very significant gap in the likelihood that someone in the richest 20% of the population will suffer a particular illness and the likelihood that someone in the poorest 80% would suffer it. Data on this for 2008 are presented in Figure 1, which shows, for example, that the likelihood of someone in the richest 20% of the population having HIV is 69% lower than that of someone in the poorest 80% of the population (Ataguba and McIntyre, 2011). The gaps in per capita risk for other diseases and disabilities are also very large – diarrhoea (65%), physical disability (75%) high blood pressure (59%), and TB (100%).



Figure 2.6: Illness/disability – the richest 20% compared with the rest



Source: Adapted from Ataguba, Akazili and McIntyre (2011)

South Africa is marked, then, by a high level of morbidity and mortality, as well as large inequalities in health outcomes between rich and poor. While this has been broadly true of the whole period since 1994 (and before), a major difficulty in understanding how these patterns have evolved since the transition to democracy is that health outcomes in the post-apartheid era have been strongly shaped by the HIV epidemic and government's belated response to it. Mortality rates from a wide range of illnesses declined over the period, in some cases quite strongly, though the pattern of HIV and TB deaths reflects a rapid increase in deaths per 100 000 before a subsequent fall.

Access to healthcare services

Data reflecting the extent to which access to health care services has changed over time are hard to find, so it is unclear whether levels of inequality in access to health care services (which is usually measured indirectly by quantifying utilisation of health care services) have worsened or improved

19 It should be noted that the substantially reduced risk of illness/disability between those in the bottom 80% of the income distribution and those in the top 20%, probably understates the gap between rich and poor because of substantial income inequality within the richest quintile of the population: the annual income of people at the 80th percentile of income earners in 2010 was about R30 000, while those at the top of the distribution earned many multiples of that. It is likely that there is a wide distribution in mortality and morbidity within the top 20% of income earners, with those in the top 10%, 5% and 1% facing even lower incidence and prevalence rates than the average for the quintile as a whole.

since 1994. It is clear, however, that utilisation of health care services is very unequal. It is accepted, however, that:

- The majority of healthcare utilisation occurs in the public sector, which accounts for between 70% and 80% of all outpatient and inpatient services provided each year.
- Approximately 16% of the population is covered by medical aid, with extensive coverage of households with monthly incomes above R10 000, but much lower levels of coverage for households with incomes below this.
- It is not possible to get accurate figures on the number of doctors and specialists in private practice at any given time. However, it is clear that only a minority of registered specialists are employed in the public sector: of 15 008 specialists registered with the Health Professions Council in 2015, only 4 986 were working in the public sector. The figures for dentists were 6 035 of which 1 137 were in the public service, while 68 105 of the 136 854 registered nurses were working in the public sector.
- People in the highest income quintiles use the public health sector much less, and the private sector much more than do people in lower income quintiles. Membership of a medical aid is the key determinant of how much individuals use the private health sector, though non-members use the private sector, too, generally to consult general practitioners or visit a pharmacy. Medical scheme members tend to use health services more frequently than do non-members: in 2008, about 139 out of every 1 000 members of medical schemes became a hospital inpatient, compared with 89 non-members per 1 000 in the population as a whole. (The WHO estimates that the norm should be around 100 inpatient discharges per 1 000 people in the population.)
- Within the public sector, the physical location of clinics, community health centres and district hospitals means that the population tends to be poorer than the national averages, so their utilisation is higher among poor households than rich ones. Reflecting the building of new primary health care facilities after 1994, by 2008, 70% of health care utilisation among the poorest three quintiles was in primary health care centres, up from 40% in 1993. Central hospitals, on the other hand, tend to be in the main centres whose pop-



ulations' incomes tend to be higher. Their utilisation, therefore, is greater among higher income groups.

- Because it is generally more efficient to group specialists in central hospitals, the fact that public central hospitals are located in the main centres means that the distribution of specialists in the public sector is very uneven, with between 1.5 and 8 specialists per 100 000 people compared with 21 per 100 000 in Gauteng and 33 per 100 000 in the Western Cape.

Given the much higher rates of utilisation of public healthcare services, capacity constraints in the public healthcare sector are a critical factor in explaining inequalities in access to, utilisation of, and the quality of the services provided by the public sector. In this regard, the loss of experienced professions in the 1990s as a result of the voluntary severance packages that were offered continues to be felt, though initiatives such as the introduction of community service have helped increase capacity despite implementation challenges.

Affordability of healthcare services

The affordability of healthcare services is a key factor in assessing the extent to which a society can be said to have universal access to healthcare. Affordability depends on three factors: household income, the cost of services, and by whom those costs are paid. Poor people rely on public healthcare primarily because they cannot afford either the ongoing costs of medical insurance or the out-of-pocket costs of using private practitioners and their access to healthcare services (and utilisation thereof) depends on what services are available. The roll-out of free basic services for young children and pregnant women, for example, met a previously unmet need and resulted in an increase healthcare services utilisation among the poor. High transport costs and user fees (even when means tested) tend to reduce utilisation rates for poor people, but overall, the availability of free services means that South Africa has a relatively low rate of impoverishment caused by out-of-pocket medical payments.

Although a substantial proportion of all out-of-pocket payments are made by people who are not members of medical schemes (either in the form of user fees or, more commonly, when they choose to use private health care services providers), the bulk of out-of-pocket fees are incurred by

medical scheme members. The minimum value of the out-of-pocket expenses incurred by medical scheme members was R27 billion, or 18% of all health care expenditure in 2015, a figure that excludes any out-of-pocket expenses that medical aid members did not submit to their schemes because they knew that the services were not covered (Council for Medical Schemes, 2016). The cost of medical aid schemes has increased over time at a rate that is somewhat faster than inflation, which, in an economy where real wage growth has been slow, means that medical aid costs account for an increasing share of household income. The causes of this are controversial, but may include: demographic trends including an ageing population and young people refusing to join medical schemes, increasing the prevalence of lifestyle-related non-communicable diseases among members of the medical schemes requiring increased visits and significant levels of anti-selection against medical schemes due to the current regulatory environment which encourages adverse selection. Other factors are over-servicing (or the provision of inappropriate services) by health care professionals, monopolistic practices in parts of the industry (currently subject to an enquiry by the Competition Commission), the cost associated with increases in prescribed minimum benefits due to health care needs, high reserve requirements on medical schemes, global health inflation associated with new products and services, an ageing (and, therefore, heavier-using) membership, and the scarcity of supply of specialist services.





Voices of the public

Across the country, dissatisfaction with the accessibility and quality of public health services was a consistent theme in the Panel's public hearings, with people noting concerns about clinics' physical location (often located far from the communities they served), clinics' operating hours, the shortage of staff at clinics, and the indifference with which some health care professionals provided services.

As one person at the Northern Cape's hearings said:

'If you go to our hospitals, you'll see that people are dying because the nurses are not passionate like Nightingale. They are working for money, not passion. You should treat black patients well. Why are there no medicines at clinics? Why do people manage these clinics badly? Government must take care of this: we voted for leadership, we wanted to be treated equally, but we are still living in Egypt.'

Nonelela Phindela stated in her submission to the public hearing in the Western Cape: 'We need hospitals in Strand. We do not have hospitals. I advise that more hospitals be built because people who would have lived, died because the one hospital we have caters for many people.'

Selina Ngwenya put it to the Gauteng public hearings: 'At Rethabiseng we do not have clinics. We sit outside and get wet when it is raining. There are only two nurses; we do not get help. You get there in the morning, but they send you back without helping you.'

Fikile Magubane of the Alfred Nzo Municipality told the KwaZulu-Natal public hearings: 'I am the Chairperson of the clinics and we have a problem with the nurses and the venue. The number of people has grown, and they don't fit in the current venue. We have spoken to the hospital management, but nothing has been done so far.'

Nomgcibelo Nkosi from Mpumalanga said: 'As the Zanele Breyton community, we would like to request that the Buhlebempilo clinic operates for 24 hours. We would also like to request that there be more staff working at the clinic so that people won't have to wait forever before they are attended to. If not, they must use CHWs to do duties such as checking blood pressure. We plead with you to let the Constitution benefit people from the villages as well, not just those from the cities only.'

Sarah Phinda Masanyane from Mpumalanga said: '24-hour clinics shouldn't be in the cities or townships only;

we also need them in the villages. The medication should be proper; so should the air-conditioning where medication is kept.’ Veronica Mangane, also from Mpumalanga, added: ‘Rural areas still have a problem with regard to clinics. You find that a clinic has small rooms and yet that clinic is serving a number of communities. [For] example, the Manzini Clinic is serving four communities, but the theatre is so small, and the walls have cracks. We are requesting government to make a provision for home-based care service providers so that they may get a stipend every month because they are of great help to the Department of Health.’

The Mbombela Community-Based Organisations (CBOs) pointed out at the Mpumalanga public hearings that the organisations that take care of the members of the community who suffer from various ailments that reduce quality of life in the home, working together with the health people (DOH) and social services (SDS), complain about the way in which CBOs are treated. ‘Our assistance in the community is part of much-needed help in the lives of the patients. CBOs are a significant component of the continuum of care as stated in the DOH National Strategic Plan. ... Money is sent after five months, which makes us [unable] ... to take care of our needs.... Some organisations are allocated, and others are not. And yet the services we render to the community are reported on every month. Communication is not satisfactory; it shows that CBOs are looked down upon. The opportunity for raising an idea is not enough. The manner in which CBOs are dealt with is not transparent. CBOs are not treated equally. It has been years since those trained for HBC are waiting for their certificates that prove their skills. Skills development is not clear. The organisations are requesting for solutions to their problems so that CBO workers are given quality assistance.’ Philemon Qweleza from North West Province made the following submission at the public hearings: ‘The clinic only opens at 7.30. Therefore the ... patients arrive there early and spend the whole day in a queue without getting any help. At 4pm it is closing time, whether you received help or not.’

W Mabue made the following submission at the North West public hearings: ‘Our clinic does not operate 24 hours, and some days it is not operational. Due to this, our people die. Sometimes it would be closed for the whole month. We also request that the clinic be operational at all times so that people on ARVs [will not] find it difficult to get their medication when the clinic is closed.’

This was an issue repeated elsewhere, with some people suggesting that a key challenge in South Africa is that the fact that the elite – economic and political – does not use (sic) the same health facilities as ordinary people, which means they are indifferent to the problems in the public system. ‘We vote for people who do not send their children to these institutions,’ noted one person at the Eastern Cape hearings. Despite the frequently voiced



criticism of some aspects of service delivery, people often noted that there are aspects of the system of which they approved, in particular, the provision of free health care services to children and pregnant women.

Some submissions, particularly from COSATU, were made at public hearings to the effect that government needed to implement NHI as a matter of urgency, with those calling for this insisting that this was necessary to ensure that there were adequate resources available for the delivery of services to the poor. On the other hand, written submissions from FirstRand, Econex, the South African Institute of Race Relations and MediClinic, and comments in the public workshops from professionals in the private health care industry highlighted the significant risks and funding challenges inherent in the implementation of an NHI model set out in the White Paper. They argued that a defined set of regulatory interventions that could be implemented immediately could have a significant impact on efficient delivery and cost of providing services both for medical scheme members and for those unable to afford medical scheme membership. These include among others the mandatory membership by the employed of medical aids to introduce more of the youth and healthy into the risk pool to thereby subsidise the old, sick and poor, a revision of the PMB regulations and revised solvency requirements of medical aids. They believe that consideration should be given to alternative models of NHI that co-opt the private sector into becoming part of the solution rather than sidelining them, for example, by restricting them to covering complementary services only, and envisage price regulation for private sector providers, which will be very destructive to private hospital investment and will likely cause a large-scale exit from service delivery by private providers. These suggested changes are encapsulated in the proposal for a Hybrid model presented in Annexure H1.

All the platforms on which the Panel engaged (public hearings, written submissions, and workshops) unambiguously agreed on the need and support for the implementation of the NHI as a matter of urgency. Differences of opinion have been expressed on the implementation modalities. As mentioned above, one alternative model to implement the NHI was presented to the Panel (the Hybrid Model published online for reference).

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

- i. *Right to access health care:* NHI will ensure access to health care 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 health care system for all; those with the greatest health needs will be provided with timely access to health services.
- iv. *Health care as a public good*: Health care 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*: Health care 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 health care programmes for the entire population.
- vii. *Effectiveness*: The health care 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*. Health care 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.

Analysis of legislation passed

The submissions received by the Panel address many different issues, but all proceed from the starting point that there remain serious challenges to the provision of quality health care services to the majority of poor people in South Africa. There were, however, considerable differences in opinion about the causes of these challenges and how best to try to resolve them. In relation to some issues, the solutions posited to particular problems addressed in individual submissions were not compatible with solutions proposed in other submissions that dealt with different kinds of challenges. Thus, for example, submissions made by medical schemes that sought changes to the legislation that, they said, would help lower the cost of medical insurance, are incompatible with submissions calling for the implementation of NHI, which would fundamentally redraw the role of private medical insurance. It is, therefore, not possible to bring coherence to varied submissions made. Instead, this section seeks to document the submissions made about issues that appear to be of par-



ticular significance. There were also submissions made to the effect that many of the challenges faced in the sector had less to do with legislation than with implementation. This was the view, for example, of the South African Medical Association, which noted that the provision of health care services is a ‘highly fragmented, heavily curative, inefficient and discriminatory system against the poor and sick’, but attributed this largely to poor implementation rather than to deficiencies in the law. Evidence shows otherwise. The fragmentation is a function of the National Health Act that did not go far enough to integrate the services in the public and private sector as envisaged in the 2007 White Paper on the transformation of the health care system.

Legislative issues affecting the supply of healthcare services

In the course of the Panel’s work, some concerns about aspects of the legislation governing the provision of health care services, and, in particular, inadequate provision of these services to all or some communities were raised.

- South Africa’s Constitution and, following it, the National Health Act provide that provincial governments have considerable autonomy from national government both in the budgeting for the provision of public health care services and in the management of the institutions that provide those services. Some feel that this has led to inadequate resourcing and/or managerial control over the provision of these services, leading to deficiencies in service provision. On the other hand, it was also argued that with the creation of a single purchaser NHI Fund, whose role is to contract directly with all health care providers, there will be no significant role for most employees in the National and Provincial Departments of Health. These will therefore have to be dramatically downsized. If this does not occur, there will be duplication of costs in running these Departments, as well as the NHI Fund, which will need massive personnel resources to carry out its functions. The result could be that the cost of this model will become even more unaffordable. However, a counter-argument to that criticism is that the policy as espoused in the White Paper aims to reduce duplication of service provision by creating a division of responsibilities between provinces and districts. The provinces will be responsible for non-personal health services whereas the districts will be responsible for personal health services.
- Private health care providers have criticised provisions in the law that prohibit the direct employment of doctors by private hospitals, suggesting that this limits providers’ capacity to innovate delivery models and reduce costs.

- Some written submissions criticise legal prohibitions on the provision of medical training by private institutions, noting that this limits the supply of doctors.

Legislative issues relating to the cost and affordability of health care services

The cost of health care services is a key determinant of the affordability of health care services, whether these are supplied by the public or the private sector, and evidence was presented that the Medicines and Related Substances Control Act (1997) helped to limit the rate of increase of medicines in both the public and the private sector by mandating generic substitution by pharmacists and the establishment of the Medicine Pricing Committee and the subsequent introduction of more transparent pricing, including a 'single exit price' rule that requires that manufacturers sell medicine at the same price to all. One unintended effect, identified by the South African Medical Association, was that the exemption from anti-patenting rules for Schedule 0 and 1 drugs has led to some patients substituting Schedule 2 drugs for these.

Submissions made by medical aid schemes identified a number of factors which they believed raised the cost of medical insurance, the two most significant of which were firstly the list of prescribed minimum benefits and the requirement that each medical aid retain 25% of annual expenditure in reserves, and secondly, consistent annual increases in utilisation of healthcare services by scheme members, including disease burden associated with increased rates of chronic diseases (for the reasons cited above).

The setting of prescribed minimum benefits, a provision of the Medical Schemes Act, is intended to ensure that members of all medical schemes have adequate cover for a range of common illnesses and services. Inevitably, the wider the list, the greater the utilisation of insurance will be, leading to higher levels of expenditure and, therefore, increased cost. It is not, however, clear that reducing the list of prescribed benefits is really a cost-saving measure because it simply means shifting the risk and costs away from the insured pool back to the individual. This might lead to cheaper insurance products, but would not necessarily lead to lower costs overall. Separately, the South African Medical Association noted that the list of PMBs had not been changed as the burden of disease shifted, though it is unclear whether conditions needed to be added to or removed from the list. Discovery Medical Scheme, however, estimates that there may be as many as 5 million people who would purchase insurance that covered only catastrophic medical costs.



In relation to the reserve requirements imposed on medical schemes by the Medical Schemes Act, insurance companies have submitted that, by depriving companies of the opportunity to earn optimal returns on these funds and, therefore, reducing firms' incomes, these requirements raise the cost of insurance. They propose that a risk-based model, rather than prescribed reserve holdings, would result in the more efficient utilisation of capital, leading to higher investment income and lower costs to consumers. Discovery Medical Scheme estimates that this might reduce costs by as much as 30%.

Recommendation 2.15

The solvency requirements of medical schemes should be re-evaluated to establish whether risks can be more efficiently managed, capital utilised and fees to the consumer reduced.

Inequitable access to healthcare

Access refers to people's ability to obtain and appropriately use quality health services. It is the compatibility or 'degree of fit' between health services and those who need to use these services. There are several aspects or dimensions of access; while different terms are sometimes used, these dimensions can be categorised as: availability (physical access), affordability (financial access) and acceptability (cultural access) of health services. Having access to health care is a right. Section 27(1) of the South African Constitution mandates that everyone has the right to have access to health care services, including reproductive health care. However, access is inequitable, varying by rural or urban dwelling, public or private sector service, socioeconomic status and membership of a medical scheme. The rich use the relatively well-resourced private sector, while the poor use the underresourced public sector; better and accessible services are concentrated largely in the urban areas.

Within the public sector, the following pattern of utilisation of different kinds of facilities prevails:

Those living in rural areas, those who are not medical scheme members and the lowest socioeconomic groups mainly use public clinics or community health centres for healthcare.

The distribution of use of clinics, community health centres and district hospital outpatient departments is what is termed 'pro-poor', i.e. the lowest socioeconomic groups use these services more than higher socioeconomic groups.

The use of outpatient services at higher level public hospitals, particularly central hospitals, is what is termed 'pro-rich' in that higher socioeconomic groups use these services more than lower socioeconomic groups. It should be noted that the highest socioeconomic quintile tends to use public sector services the least, largely due to the majority of medical scheme members being in this group. Nevertheless, the second highest and middle socioeconomic quintiles have the highest use of non-district public hospitals, which results in the pro-rich overall distribution of service use in these hospitals.

In terms of use of inpatient services, there is a similar pattern with district hospitals being pro-poor but higher-level hospitals, particularly central hospitals, being pro-rich.

There has been a substantial increase in the use of primary health care facilities (clinics and community health centres) between 1993 and 2008; while in 1993, only about 40% of the utilisation of public sector health services by the three lowest socioeconomic quintiles (60% of the population) occurred in a primary health care facility, this had increased to over 70% by 2008 (McIntyre and Ataguba (2016)). A recent study has found substantial inequalities in the use of critical maternal health services such as antenatal care and skilled birth attendance. It is of considerable concern that inequalities in use of these services have increased between 2008 and 2012 (Wabiri et al., 2016) cited in (McIntyre and Ataguba (2016)).

Given its multidimensional nature, health service access is difficult to measure in an integrated and comprehensive way. It is for this reason that the focus in health system assessments is often placed on evaluating utilisation of health services and because access enables use of health services. A key constraint to detailed evaluation of efficiency, equity and quality in the South African health system, and trends in these aspects of the health system over time, is the lack of publicly available comprehensive, accurate data on both the public and private health sectors.



Recommendation 2.16

Parliament should express its support for the introduction of a system of universal health care coverage underpinned by the principles articulated in this chapter, which are 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.

To monitor use of the health care system, both in the public and 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 datasets, the facility-based District Health Information System, the BAS public financial management system, PERSAL human resource system and a range of household survey datasets, 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.

Recommendation 2.16

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

Recommendation 2.17

The Panel recommends that Parliament introduces legislation to allow for community health workers to be formally employed within the public health system and be based at all primary healthcare levels.

Recommendation 2.18

To ensure that data is publicly available for the purpose of serving patients and planning, monitoring and evaluating services, the Panel recommends that Parliament should introduce legislation that would create integrated and comprehensive data on resources and services in the public and private health sector that is routinely updated and is publicly available. Confidential data that involves identifiers will not be publicly available.

Poor quality of healthcare

Health care is defined as clinically effective, safe and patient-centred. The South African health care system is plagued by quality challenges with specific reference to perceptual and technical



quality problems, affecting health outcomes in both the public and private sector, although to a different extent. An underfunded public health system is plagued by overcrowding, which tends to affect the quality of services provided in terms of availability of human, financial, equipment and facility resources and medicines. The shortage or abundance of the resources tends to lead to underservicing or overservicing, contributing to inappropriate care.

Key findings

There is a strong link between quality and access, particularly the availability and acceptability dimensions. A key problem in the South African context is that there is almost no data to assess quality in a comprehensive way; instead, there is only anecdotal evidence and media coverage of the worst consequences of poor quality care. Even though some surveys present information on patient satisfaction with health care, such data is generally not regarded as a good indicator of technical quality of care, or sometimes even interpersonal quality of care. Very high levels of patient satisfaction are often reported, which could be due to gratitude, limited previous alternative experiences against which to assess care received and low expectations of the health service, i.e. patients could express satisfaction with what is technically low quality care. Conversely, perceptions are influenced by factors such as negative media reports, with those who have never been admitted to a public hospital reporting higher levels of negative perceptions about quality of care in public hospitals than those who had been admitted to a public hospital in the previous year, and those without first-hand experience of public facilities listing media reports as the primary source of information on public facility quality of care. Nevertheless, there are concerns about interpersonal service quality, such as respectful treatment and staff morale issues, and structural quality of care as highlighted in terms of drug stock-outs and other service availability challenges.

In relation to technical or clinical quality of care, there is limited available data. One indicator available for public sector facilities is the TB treatment success rates. The improvement in treatment success rates has been achieved within the context of the emergence of MDRTB and XDRTB (multi-drug and extensively drug resistant TB respectively). Even indicators such as treatment success rates are difficult to interpret from the perspective of clinical quality of care, given that this outcome reflects not only aspects of service delivery but also patient factors such as treatment adherence.

Improving quality of care in public sector facilities is seen as an absolute priority by the national Department of Health. Two key initiatives introduced by the Department to promote quality of care improvements are the introduction of the Office of Health Standards Compliance (OHSC), through the 2013 National Health Amendment Act, and the Ideal Clinic initiative. As part of the OHSC development, a set of national core standards were developed, against which all health facilities in South Africa are to be assessed. Although there is no publicly available information, it appears that the initial rounds of ‘mock inspections’ found that a relatively high proportion of the public facilities that were inspected were non-compliant with the core standards. The National Department of Health introduced Facility Improvement Teams (FITs) to support selected facilities in NHI pilot districts in an attempt to move facilities closer to compliance with the national core standards. Subsequently, the Ideal Clinic initiative was launched, which provides detailed benchmarks for what is regarded as a well-functioning clinic. While enormous efforts have been devoted to these initiatives, various criticisms and concerns have been raised. In particular both the core standards of the OHSC and the Ideal Clinic initiative’s indicators focus almost exclusively on structural measures of quality of care, such as the availability of physical, administrative and other infrastructure in facilities. The second area of concern is that some health facility managers and frontline health workers experience the OHSC inspections as demotivating and not necessarily engendering quality improvement in that the inspections do not provide an educational opportunity to gain insights into how to improve quality. The potential for public sector facilities to improve and sustain quality of care is limited within the context of the very limited decision-making authority of facility managers.

There is no publicly available information on the quality of care within the private health sector. Many years ago, Discovery Health posted information on its website on key outcomes measures (such as mortality rates and hospital-acquired infections) of individual private hospitals that were used by their members and, thus, on which they had data. However, this data was quickly removed after vociferous opposition from private hospital groups. More recently, Discovery Health began making available to its members the results of its patient experience survey. One of the greatest concerns from a quality perspective in the private health sector relates to potential overprovision of diagnostic and therapeutic interventions; this is not only inefficient but can be harmful when interventions are undertaken that are unlikely to be beneficial. Although, once again, there is extremely



limited data, it has been noted that there are very high levels of diagnostic equipment capitalisation in private hospitals, with MRI and CT scanners per million population that exceed levels in most high-income countries, only being higher in a few countries such as Japan, the United States and Iceland. There are also high levels of private hospital inpatient admissions in South Africa, being more than double those in countries such as the United States; private hospital inpatient admissions in South Africa have increased substantially over time in contrast to declining levels of inpatient admissions in high-income countries. The issue of potential overprovision of health care interventions in the private health sector is an issue that is being investigated by the Competition Commission's Health Market Inquiry.

Equitable access to quality health care

A wide range of issues is raised in the preceding sections that highlight inequalities in access to quality health services in South Africa. Some of the most important findings include:

- There are substantial differences in utilisation of health services across socioeconomic groups and geographic areas. Although the greatest burden of ill health in the full range of disease categories is on the lowest socioeconomic groups, utilisation of health services is lowest among the poorest. Utilisation of specialist referral services is particularly inequitable. Utilisation of health services is not in line with the need for healthcare; access inequalities contribute to this utilisation pattern.
- There are substantial inequalities in the availability of health services across socioeconomic groups and geographic areas, whether one is looking at the distribution of facilities, human resources, the routine availability of essential medicines or other service availability indicators. The lowest socioeconomic groups and poorest provinces have the worst access in the availability dimension.
- Affordability problems are in some ways less of a challenge, particularly given the removal of user fees at public sector primary healthcare facilities, but as discussed earlier, there are challenges related to transport costs, out-of-pocket payments and the affordability of medical scheme contributions.
- There is a range of acceptability challenges, particularly in public health sector facilities, and particularly in terms of staff morale and attitudes.

- There is very little available information to assess technical quality of healthcare in both the public and private health sectors. While the establishment of the OHSC provides the basis for routine assessment of quality of health services in public and private health facilities, there remains a lack of mechanisms for improving and sustaining quality of services. There have been various legislative and policy efforts since 1994 to address some of these challenges, but progress has been slow in some areas. While some of these challenges point to very specific recommendations, many analysts point to the need to introduce fundamental institutional transformation to achieve extensive and sustained improvements in access to quality healthcare.

Recommendation 2.19

Some of the reforms that have received considerable support among a wide range of stakeholders are:

- 1 There needs to be a focus on building the institutional and management infrastructure and skill levels of the public health sector specifically. One way to do this will be through decentralising management authority to individual public sector hospitals and health district or sub-district level for primary health care services, along with appropriate governance mechanisms. The results of pilot studies must be monitored to inform decisions in future.
- 2 Centralised allocation of healthcare resources. An assessment needs to be done of the merits of such a policy.
- 3 Establishing public agencies outside of the Department of Health for strategic purchasing, quality assurance and other functions. A focus on building more healthcare infrastructure such as hospitals and clinics.
- 4 Allowing and encouraging the private sector to train and employ doctors and nurses within strict guidelines to alleviate the acute shortages. Currently many recently qualified doctors are unable to get posts in public hospitals and given the shortage of doctors employing them in the private sector will help alleviate the doctor shortage.



Mandatory or voluntary membership of medical schemes

The current status regarding membership of medical schemes is summarised as follows:

1. Any person, regardless of employment status, can join open medical schemes and they are required to accept them.
2. An employed person, whose employer does not have a designated medical scheme for employees, can join an open scheme of his or her choice.
3. An employed person can become a member of a scheme as part of his/her contract. This may be a specific scheme that the employer and employee body have agreed to exclusively use and often the employer subsidises the premiums and does the payroll administration.
4. It is common practice in the industry for the employment agreement for employees to offer a panel of schemes to choose from.
5. In the employer/employee agreement, employees are entitled to negotiate whether cover should be mandatory or voluntary. Some agreements allow for voluntary membership while others are mandatory. Some have also gone from voluntary to mandatory to address anti-selective behaviour. A prominent example is GEMS, who mandate this move clearly on their website.

Below are two recommendations articulated with respect to membership of medical schemes, in terms of whether such membership should be voluntary or mandatory.

Recommendation A: Medical schemes should be mandatory for the employed

This recommendation is based on the alternative model of universal health cover, described as a 'hybrid model' as articulated in the Annexure and on the Panel's website. The recommendation is to make membership of regulated private medical schemes mandatory for the employed, above certain income levels (as a phased approach). Motivations for this recommendation are as follows:

This option results in cheaper premiums for the employed poor as it is expected to reduce the cost of cover by as much as 23%. This will also make it cheaper to provide for the balance of the population as the government can allocate the additional resources to the poor.

It will lead to a transition to UHC, which is far less risky as the cost of any overruns in the employed population, due to the expected continuation of high utilisation levels and better access to facilities, will not be borne by the state.

A regulated private medical scheme mechanism is likely to reduce levels of inequality as risk and income

equalisation mechanisms can be applied. A single fund approach with the wealthy purchasing care directly and via private health insurance operating as a completely separate pool will create much greater levels of inequality. This can be evident in other markets with high levels of income disparity.

The wealthy are likely to make more claims due to factors such as access and expectations. The hybrid model is structured on the basis that they pay for this additional cost rather than drawing from the central pool. Higher utilisation levels mean that there is a risk that the wealthy will squeeze out the poor in terms of benefits.

Voluntary cover means that employees may opt out to improve their disposable income. These employees are then exposed to the risk of catastrophic out-of-pocket (OOP) payments and financial ruin in the event of sickness or accident. This is a particular concern for lower income earners and not in the interest of the employee or the employer.

Voluntary cover may lead to a cost spiral effect as the cost of private cover escalates with the young and healthy opting out and more employed people will find themselves unable to afford cover. Mandatory cover ensures that the young, healthy and wealthy subsidise the elderly, unhealthy and lower income earners. This is consistent with UHC principles.

There is no safety net in the interim period offered for these employees who are not able to afford cover until the NHI fund is implemented for everybody. The wisdom of a voluntary membership requirement that will severely prejudice the private schemes, without an alternative cover mechanism, has to be questioned.

Members that are currently comfortable with the services offered by their schemes will not only have significant cost reduction but also have the security of being able to stay with their schemes rather than being forced to join an untested and yet to be established single fund controlled by a huge government department. This should address resistance to cross-subsidies as well as continuing to provide an element of choice of cover.

In summary, the employed are compelled to pay for themselves and subsidise the poor while the proposed NHI Fund can focus on the poor. This is consistent with the proposed implementation framework that focuses on vulnerable groups (women, children, the elderly and disabled). This will speed up the achievement of UHC for all. The speed of expanding cover can be accelerated by also enabling medical schemes to simultaneously expand access affordably.



Recommendation B: Membership of medical schemes should be voluntary

This recommendation counters the argument for mandatory membership of medical schemes by the employed by providing evidence summarised by the World Health Organization, which is derived from countries that have implemented universal health cover to illustrate the impact on inequality.

There were submissions made that suggested companies should compel their staff to join medical schemes, often specifying the name of the medical scheme. Evidence generated from research in countries that have implemented the approach that required employees to join medical schemes and the resultant growing inequality are presented below and summarised in the article by the World Health Organization (Kutzin, 2013).

There is adequate evidence to suggest that mandatory insurance for the employed leads to inequality between the employed and the unemployed and also within the employed population. Historically, countries choosing to pursue mandatory health insurance schemes, whereby individuals are required to make insurance contributions in order to use health services which would be paid for by the insurance scheme, have initially focused on making scheme membership mandatory for formal sector employees. This was generally gradually extended to ensure coverage through the same mechanism over many decades. An important feature to note about countries that have adopted such an approach and achieved universal coverage (e.g. Germany and other West European countries, South Korea, etc.) is that they were high-income countries and embarked on this strategy when there were already relatively high employment levels and employment growth rates, which is not the case for South Africa.

Middle-income countries, particularly in Latin America (LA), which opted to focus initially on mandatory health insurance membership for those in formal employment have in most cases not been successful in extending coverage outside the formal employment sector through these schemes, and are characterised by fragmented health systems with wide disparities in access to quality health services between those in formal employment and those not. A notable exception is Costa Rica, which, although beginning by making membership of their CCSS scheme mandatory for urban formal sector workers, had the stated intention from the outset of covering everyone through the CCSS and committed to paying for contributions of the poor from tax funds. Other countries in LA have struggled to expand coverage, in the context of relatively low formal employment levels and growth rates, but importantly also because of vociferous resistance from formal sector workers protecting their superior health service benefits and opposed to cross-subsidising comparable service benefits for

those outside the formal employment sector. There has been a similar experience in low-income countries, such as Tanzania, which introduced mandatory insurance for civil servants through an NHIF. In 2008, it considered trying to 'harmonise' the district level community health funds (CHF) for those in the informal sector and integrate them with the NHIF to create a single scheme covering the whole population. This again was vociferously opposed by civil servants, who did not want their NHIF contributions to cross-subsidise benefits for non-civil servants.

Thailand had also started its journey to universal coverage by introducing a mandatory health insurance scheme for civil servants (CSMBS) and for private formal sector employees (SHI). There have been repeated attempts to 'harmonise' or integrate these two schemes with the UC scheme, but this has not been possible due to opposition from formal sector workers, particularly civil servants. The UCS and SHI have similar service benefits and methods of paying providers; while the CSMBS also has a similar range of service benefits to the two other schemes, the main difference is that the CSMBS pays providers on a fee-for-service basis. Not only has this contributed to the average spending per CSMBS beneficiary being four times greater than UCS per capita spending, but it has introduced disparities in service access, with providers giving preferential access to CSMBS members.

The clear lesson for South Africa (and indeed other low- and middle-income countries with relatively low formal employment levels and growth rates) from international experience is that membership of health insurance for formal sector employees should not be made mandatory, unless South Africans as a whole are satisfied with ongoing disparities in access to quality health care, and specifically more privileged access for formal sector workers. It is also important to note in this regard that a key element of the current emphasis on UHC is that the emphasis should be on creating a universal entitlement to financial protection and access to quality health services rather than an entitlement linked to employment status.

Furthermore, changing the basic conditions of employees will require negotiations between employers and labour in the bargaining chamber. Without this it will create labour disputes or even disputes between employees and non-employees, as already evident considering the recent statement by COSATU that vehemently opposed being forced to contribute to medical aid, which they consider to be 'against the principles of NHI', asserting that "they seek to prop-up the profit-driven medical scheme industry through 'mandatory membership and cover for all individuals in formal employment'" (COSATU, 2017). COSATU argues for an urgent need to 'amend Medical Scheme Act to be in line with NHI implementation' (COSATU, 2017).



Recommendation 2.20

The Panel recommends that Parliament sets up an independent task team of all relevant players in the public and private sectors to evaluate whether there should be legislation passed regarding voluntary or mandatory membership of medical schemes, for the implementation of the NHI to ensure that high-quality, affordable health care is delivered to all South Africans, regardless of race, income level or geography.

Maldistribution of human resources for health between the public and private healthcare facilities

Accurate data on the number of health care professionals working within the private health sector is 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. Even without precise figures on private sector health workers, the above information indicates that there is a large pool of health professionals in the private sector who could be drawn on to promote equitable access to quality health care. The greatest challenge in realising this potential is the distribution of private health professionals, many of whom are based in urban areas, particularly metropolitan areas.

There are also major differences in the distribution of community pharmacies within provinces; most of them are in urban areas and less so in rural areas. The density of these pharmacies was eight times higher in the least deprived districts than in the most deprived ones. The disparities in the distribution of these pharmacies make it difficult to draw on private sector health professional resources to improve access in areas that are most underserved currently.

Recommendation 2.21

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 that 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.

Conclusion

The panel recognises that progressive policies and legislation that are in line with the constitutional requirement to achieve the progressive realisation of socioeconomic rights were developed, approved and promulgated. It furthermore recognises the progress that the post-apartheid government has made with respect to the expansion of services in areas that are critical to improve people's quality of lives, which include housing, health, education, food, water, social security and social grants. However, due to massive implementation challenges, the quality of the services and their impact have muted the successes of increased access. The public hearings conducted, and submissions made, as well as evidence generated from research and statistical data, convinced the Panel that the policies and legislation promulgated have not significantly reduced the challenges of poverty, unemployment, income inequality and wealth inequality. Instead, of late the trend seems to be a reversal of the gains made. Poverty has increased, affecting more than half of the population; unemployment has reached levels last seen 14 years ago and inequality has reached levels that threaten to undo the progress made to ensure a socially cohesive society.

The Panel concludes that these three challenges are best addressed collectively because they are intertwined; the solution to one is likely to have an impact on the others. Poverty in South Africa is a manifestation of unemployment, which is largely responsible for the massive income inequality. Poverty, unemployment and inequality all occur in an environment of low economic growth, poor quality of education and poor health status of the population. Unemployment has been found in this report to be linked to a number of determinants, including a poor skills base, lack of investment by



the private sector, overregulation of the small and medium enterprises (where most jobs are likely to occur), poor agricultural planning and lack of a clear plan to support the informal sector to grow and absorb the unemployed. The Panel has made various recommendations to address each one of these determinants and therefore urges Parliament to implement the recommendations made. Some of them are discussed below.

The Panel borrowed the Global Competitiveness Index as a framework to analyse South Africa's economy and made several conclusions. South Africa's economy, although it is growing more slowly than the rest of the world, is still competitive, as demonstrated by its ranking of 47th place out of 138 countries in 2016-17. Its sheer size, efficiency and innovation give it an advantage over other countries. What reduces its competitiveness is performance on health, primary education, macro-economic policy environment, and slow growth of infrastructure investment. The institutional base is currently being eroded, for example; several companies associated with state capture have come under the spotlight, such as Eskom, Trillian, KPMG, SAP and McKinsey.

Reducing poverty will require the economy to grow through job creation; growing the manufacturing sector largely for export to the Southern African Development Community and the Asia-Pacific region; extending the Expanded Public Works Programme; infrastructure development such as railway lines; strengthening agriculture with end-to-end-support; and providing start-up capital for more viable projects developed by the youth. Furthermore, it will be critical to strategically grow tourism rather than limit it through the requirement of the unabridged birth certificate, which causes the country to lose massive revenues; instead South Africa should establish a pro-poor tourism strategy that expands throughout the country.

For poverty to be reduced, it is critical that unemployment is reduced by ensuring increases in the number of skilled people. The Panel presented a diagnostic assessment that indicated that there is a mismatch between the skills available in the labour market and the existing vacant positions. This is largely because the education system is not producing enough skilled persons whom employers can readily use without additional training to be 'fit for purpose'.

With respect to education, there are no short cuts to improving the quality of education because the problems are multifaceted. They include early childhood development, home factors, school determinants, cur-

riculum, the quality of educators and education policies. The country will need to earnestly address these factors simultaneously at an invigorated pace with a view to improving outcomes.

The Panel is highlighting a few of the factors that impede South Africa's ability to improve the quality of education learners receive. For education quality to improve, it was clear to the Panel that early childhood development is key. There are too many children, particularly those coming from rural areas, who are unable to access early childhood development programmes (ECD), partly because the facilities are underresourced and hence not permitted to provide the service. Failure to develop cognitively at these early ages has major repercussions for later educational achievement. It is no wonder that nearly 60% of grade 5 learners could not read for meaning. The Panel has recommended change in policy with respect to flexibility in entry level requirements for service providers in underresourced areas, increasing funding and resourcing of ECD programmes, as well as changing the location of the administration of this programme from the Department of Social Development to the Department of Basic Education, whose competence is educational training.

Another major educational challenge relates to inadequacy of the curriculum taught at schools. The decision to introduce mathematics literacy instead of mathematics is doing a major disservice to learners and to the country. The Panel cited studies that showed that South African Grade 6 school-children are on average about a year behind Kenya in reading and mathematics, and two years behind Tanzania. South Africa is the second worst performer in Trends in Mathematics and Science Study tests. Despite some progress being made within the last decade in education performance in South Africa, this should constitute a crisis of confidence in the education system and should require urgent steps to rectify the situation by removing mathematics literacy and improving the teaching of mathematics in schools. The Panel has recommended that Parliament should insist on the introduction of new measures to strengthen early grade teaching, ensure quality assurance by bringing in international experts and reduce class sizes to allow for innovative approaches to teaching. These measures should be treated with the urgency they deserve.

The focus on matric qualification to the exclusion of any other exit point from secondary school deprives children who are not academically inclined of their chances of gaining skills and employment in life. Since universities absorb only about 20% of the 20-24 age cohort, the remaining 80% are likely to find it difficult to progress economically. Youth are severely affected, with only 13% being employed, largely because employers look for those who have successfully completed grade 12, bearing in mind that 59% of the



unemployed failed to complete matric. The Panel recommended that Parliament legislates the binary post-Grade 9 (post-NQF Level 1) provision of (future compulsory) further education in terms of a general/academic pathway and an occupational pathway. This will help learners who are more vocationally inclined to enter into attractive occupational paths within the NQF system of levels 2-4 and also focus on work-based place learning programmes.

Despite the massive investment in higher education, student throughput remains low. Based on the commissioned research reports only 25% of students complete their degree within the allotted time, meaning that the contribution of tertiary education to skills acquisition is lower than it would have been had the overwhelming majority completed their studies within the prescribed length of the programme. Universities should be incentivised to support students to complete their education within the allotted time to permit others to access university education.

A major part of the problem identified with post-secondary education is an overemphasis on quality assurance to the detriment of educational provision. More than 125 bodies have some role in education quality, which is unsustainable. They are bound to trip over one another, and confuse the service providers and the students. The Panel recommended that Post-Secondary Education and Training legislation should shift from its focus on governance, advising, planning, funding, quality assurance and standard setting, towards actual provision of skills required by employers. This could be accomplished by rationalising quality assurance bodies.

Regarding inequality, South Africa has now become more unequal than when the 1994 democratic dispensation was ushered in. The Gini Coefficient has grown from 0.59 in 1994 to 0.69 in 2014. Overall inequality is still racialised and gendered, with white males at the top of the totem pole and black women at the bottom. Inequality within the black population is also growing. The income of whites is 7 times higher than that of blacks. This level of inequality is likely to be exacerbated with the ushering of the fourth industrial revolution that may increase the digital divide. Given the poor educational outcomes and inadequate competence in mathematics and sciences, inequality in South Africa is likely to worsen if changes are not made as a matter of urgency.

The inequality between males and females continues in areas of employment and earnings. Men are more likely to be employed than women; and when women are employed they are likely to

occupy low-level positions relative to their male counterparts, even with the same level of education. Furthermore, women earn 15-17% less than their men counterparts. This has a negative impact on the economy of the home and the country. It deprives the family of a major resource of income from women, who generally, compared to men, use their resources to support their children, to ensure that they have access to food, health and education, particularly in a country where only 24% of black women of marriageable age are married. For those who are single parents, they need to earn enough to support their families. Furthermore, the country is deprived of the services of highly qualified women in a country that has skills shortages relative to the vacant positions available. Clearly, despite the constitutional requirement of equality for all by gender and race and the passage of several pieces of legislation, the situation is not improving to a satisfactory level.

Wealth inequality remains unacceptably high. Despite the lack of data to accurately measure the extent of wealth inequality, due to methodological challenges, evidence based on data submitted to the South African Revenue Service reveals that 10% of South Africans own 90-95% of all assets. While there is a case for some level of wealth inequality to give incentives for productivity, this very high level of inequality threatens to undo the good that was negotiated to bring about the new democratic dispensation. Wealth inequality can be reduced through social and economic policy, which is in the hands of the Executive and the Legislature. The Panel has adapted Oxfam's strategies to end wealth inequality and recommended serious measures that include wealth tax measures focusing on the Centa US\$ millionaires and the US\$ billionaires, taxing companies where they operate, and reviewing passenger air travel taxes to focus on inbound and domestic flights. The Panel recommended two other social measures that would reduce wealth inequality, which are prioritising social grant recipients to be employed in the EPWP jobs, while their children are supported to enter into ECD programmes. It will give these women a chance to progressively enter the world of work and increase their earnings over time. The second one is to bring more money into the pockets of all citizens by introducing National Health Insurance, which will leave more money for spending on assets.

One of the challenges South Africa is facing is the poor quality of the health system. This is despite recognising the progress that has been achieved to reduce mortality due to AIDS, consequent improvement in life expectancy, prevention of mother-to-child transmission of HIV due to massive



provision of antiretroviral drugs to treat those living with HIV. South Africa still ranks highest in the number of people living with HIV (more than 7 million in 2017) and ranks third in terms of the highest burden of tuberculosis (more than 450 000 active cases of TB) in the world. The country has a growing non-communicable diseases problem, with hypertension and diabetes reaching epidemic proportions. Cancer is also on the rise.

Massive inequity exists between the public and private health sectors, where less than 20% of the private sector has access to approximately half of the country's GDP spend on health. The bulk of the expenditure is due to hospital costs and medical aid costs as well as a high concentration of specialists in the private sector. The cost of health care is escalating at unacceptable levels because of the existence of a two-tiered health care system that is not integrated to benefit the whole population. All these inequalities continue unabated despite the constitutional requirement to ensure progressive realisation of the socioeconomic rights, which include health. This creates serious implementation challenges. The fiscal federalism in the allocation of health funding that has crept in since the establishment of the new democratic government has exacerbated the creation of a comprehensive and integrated health system as envisaged in the White Paper on the Transformation of the Health Care System. The attempt to establish National Health Insurance is a means to address the financial allocation of resources across all levels of government, correcting management problems, reducing disparities in access to quality health care and focusing on health outcomes. It is for this reason that the Panel has recommended that Parliament should express its support for the introduction of a system of universal health care underpinned by the principles of 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.

CHAPTER 3

LAND REFORM - RESTITUTION, REDISTRIBUTION AND SECURITY OF TENURE



Dr Aninka Claassens



Abstract

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.

Introduction

The Panel’s terms of reference provide for the three components of land reform: redistribution, tenure reform and restitution. Each of these is governed by a specific subsection of Section 25 of the Constitution.

- 25(5) Provides for equitable access to land – this drives redistribution of both rural and urban land for those whose families were dispossessed prior to 1913;
- 25(6) Provides for tenure security – legal protection for those whose tenure is insecure because of past discrimination – or comparable redress (which adds a redistributive component to tenure reform); and
- 25(7) Provides for restitution – for those who can show how they lost land through racially discriminatory laws and practices such as forced removals after 1913.

While redistribution and restitution are discrete programmes, tenure reform has various subcomponents, in relation to different categories of people with insecure tenure. These include people living under customary tenure, in the former homelands or so-called Coloured Reserves, farm dwellers and labour

tenants living in formerly white farmland areas, and urban people with insecure rights on the fringes of the towns and cities. Tenure reform overlaps with both redistribution and restitution in that it governs the form of land rights and tenure security that beneficiaries of these programmes will have.

The Panel's mandate was to examine the extent to which current laws and policies uphold and fulfil rights to equitable access, tenure security and restitution, and to identify possible proactive interventions to address any shortcomings identified. The Panel's approach was to start by investigating the nature of the problems on the ground, so as to be able to recommend solutions that address these problems directly.

The public hearings confirmed that serious problems exist, and people are angry.

The evidence examined by the Panel, including public submissions, commissioned research papers, expert round tables, and public hearings indicated that land reform is beset by severe problems. The issue of land dominated most of the public hearings, particularly those in rural provinces. People at the hearings expressed their sense of having been betrayed by government officials and politicians. They expressed deep distrust of the motives of officials and politicians, accusing them of diverting farms and other resources to themselves, at the expense of the rights of the poor and dispossessed.

The problems identified can be divided into two broad categories, although there is an important overlap between the two categories.

Failures of delivery in redistribution and restitution

The first category is the failure of delivery in relation to the land restitution and redistribution programmes. Redistribution refers to reallocation to black people of land that was previously reserved for white people by the Land Acts of 1913 and 1936. The basis of redistribution is the Constitution's requirement that people should have equitable access to land to address past dispossession. Restitution, on the other hand, is limited to people who can prove that they were dispossessed of land after 1913 through racially discriminatory laws and practices. It deals mainly with the legacy of forced removals.

Many people and groups who submitted restitution claims prior to 1998 have still not received land, despite signed settlement agreements in some instances. On a more positive note, there is evidence



that over 75 000 urban restitution claims have been settled, and that the claimants have used their cash settlements productively. There is also evidence of some successful commonage schemes. But many people who applied for redistribution complain of long delays, constantly changing qualification requirements and 'strategic partners' being imposed on them as a condition of getting land.

Both restitution and redistribution beneficiaries complained of (and often named) officials whom they allege are unhelpful, rude and dismissive of their concerns. They also pointed to increasing corruption, with both restitution and redistribution land going to unknown people, rather than those whose names are on claim forms and applications. The problem of corruption has been confirmed by recent Special Investigating Unit investigations and proclamations, and the suspension of senior officials in the Department of Rural Development and Land Reform.

Of particular concern is that officials consolidate claimants into large dysfunctional groups of people, who in many instances have no shared identity, and in some instances serious internal disputes with one another. These groups are then expected to manage large farms without adequate support from government. This makes successful agricultural production virtually impossible.

Denial of land rights and dispossession

The second category relates to tenure security. At the hearings people complained that they are currently more vulnerable to dispossession than they were before 1994. The problem is especially acute in areas where mining is taking place in former homeland areas, and in areas administered by the Ingonyama Trust in KwaZulu-Natal. People complain that traditional leaders and officials deny their land rights (including long-standing customary rights) and assert that traditional leaders have the sole authority to sign agreements with investors in respect of communal land. This is based on inaccurate interpretations of post-apartheid laws such as the Traditional Leadership and Governance Framework Act (TLGFA) of 2003 and the Minerals and Petroleum Resources Development Act (MPRDA) of 2002.

They gave examples of mining deals that enrich a select few while excluding the ordinary people whose land rights are at stake. They said these deals are possible only because officials collude with elites in ignoring various oversight and accountability provisions set out in law. Of particular concern is that the protections set out in the Interim Protection of Informal Land Rights Act (IPILRA) of 1996 are not enforced. But this is not the

full extent of the problem. Certain other legislation plays into the dynamics of rural areas and adds to the unfolding tensions. This includes the TLGFA, the MPRDA and the Ingonyama Trust Act of 1994.

The desperate plight of farmworkers was raised in all the public hearings. Evictions have continued despite laws that were meant to curtail them. Moreover, laws and provisions that require the Minister of Rural Development and Land Reform to provide independent land rights to farmworkers (in on-farm and off-farm settlements) and labour tenants are not complied with.

Overlap between delivery failures and tenure security issues

A key issue raised at the public hearings is that the relatively few people who do manage to get land through redistribution and restitution do not get secure rights to the land they acquire. Current policy is that people should not get ownership of redistributed land. Instead the land remains the property of the state and beneficiaries get leases or 'conditional use rights'. Research indicates that in practice, in many cases, they get no recorded rights to the land whatsoever. This makes it very difficult, if not impossible, for them to develop the land or protect their right to it.

Because of the manner in which the different aspects of land reform relate to one another as set out above, the discussion below treats the topics in the following sequence: Redistribution, Restitution and Security of Tenure (despite the different chronology of the relevant provisions as they appear in the Constitution). We propose a new Land Framework Act in the Redistribution section, which speaks to how the various parts of land reform need to articulate with one another. In the section on Restitution we propose amendments to both the Restitution of Land Rights Act and the Communal Property Associations Act. There are two sub-themes under Security of Tenure related to different forms of insecurity, and the laws that were designed to address these. The first relates to tenure security in communal areas, and the laws discussed are the Interim Protection of Informal Land Rights Act (IPILRA) of 1996 and the Ingonyama Trust Act of 1994. The second relates to tenure security on farms, and the laws discussed here are the Extension of Security of Tenure Act (No 62 of 1997), commonly referred to as ESTA, and the Land Reform (Labour Tenants Act) (No 3 of 1996). Urban tenure issues and the MPRDA and TLGFA are discussed in the cross-cutting chapter on Spatial Inequality.



Redistribution and equitable access to land

Constitutional mandate

Section 25(5) of the Constitution states that:

‘The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.’

While Section 25(1) prohibits arbitrary or discriminatory deprivation of land, there is a safeguard clause to prevent any provision from impeding reform to redress past discrimination:

‘No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of Section 36(1).’ This refers to the limitations clause in Section 25(8).

The meaning of Section 25(5) has not in the past 20 years been interpreted judicially; in other words, while other provisions, such as the right to restitution and to secure tenure, have been extensively challenged and adjudicated in the courts, what constitutes adequate measures to ‘enable citizens to gain access to land on an equitable basis’ has not. There is no existing jurisprudence related to this right.

Section 25(2) of the Constitution allows for property to be expropriated ‘in the public interest’ and Section 25(3) requires that ‘*just and equitable*’ compensation be determined ‘having regard to all relevant circumstances, including:

- (1) The current use of the property;
- (2) The history of the acquisition and use of the property;
- (3) The market value of the property;
- (4) The extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
- (5) The purpose of the expropriation.’

A new Expropriation Act was passed by both houses in 2016, but referred back by the President for further consultation. Unlike the Expropriation Act of 1975, this Bill allows for expropriation ‘in the public interest’ and with ‘just and equitable’ compensation, as provided for in Section 25.

The difficulty that all stakeholders face – claimants, landowners and the state – is the absence of clear guidelines to determine ‘just and equitable’ compensation in any particular case. There have been calls for the Constitution to be amended because of the belief that compensation is on the basis of a willing buyer and willing seller. However, the willing buyer, willing seller formulation is not included in the Constitution. A submission by Justice Albie Sachs states that: “Factors which could considerably reduce the amount of compensation could well include whether the property was given free of charge by government or acquired at a knock-down price, whether the state has invested in or subsidised the land or improvements, and/or whether the property is in use or simply being held as a speculative investment”. He concludes as follows: “Far from being a barrier to radical land redistribution, the Constitution in fact requires and facilitates extensive and progressive programmes of land reform. It provides for constitutional and judicial control to ensure equitable access and prevent abuse. It contains no willing seller, willing buyer principle, the application of which could make expropriation unaffordable”. This interpretation is the same as that of former Deputy Chief Justice of the Constitutional Court Dikgang Moseneke, who stated in his submission to the High Level Panel “Everyone, whose property is expropriated, must be for a purpose the Constitution authorises and against payment of equitable compensation. The willingness of the buyer and/or of the seller may facilitate a smooth transaction, but does not seem to be a constitutional requirement.”

Overview of policy goals informing legislation

Following centuries of colonial rule and decades of apartheid rule, democratic South Africa set out to redistribute rights in land as a means to remedy past racial injustices and lay the basis for more equitable development.

‘Land is the most basic need for rural dwellers. Apartheid policies pushed millions of black South Africans into overcrowded and impoverished reserves, homelands and townships. In addition, capital-intensive agricultural policies led to the large-scale eviction of farm dwellers from their land and homes... Only a tiny minority of black people can afford land on the free market’ (ANC, 1994).



In pursuit of social justice, land reform would seek to undo more than racial discrimination: it would be pro-poor and would promote gender equality and, by changing production and investment patterns, start to transform dualism in agriculture by blurring the lines between the commercial and communal areas of the country. In 1994, the election manifesto of the African National Congress declared that:

‘A national land reform programme is the central and driving force of a programme of rural development... This programme must be demand-driven and must aim to supply residential and productive land to the poorest section of the rural population and aspirant farmers. As part of a comprehensive rural development policy, it must raise rural incomes and productivity, and must encourage the use of land for agricultural, other productive or residential purposes’ (ANC, 1994).

The 1997 White Paper on South African Land Policy set out the rationale for land reform, and outlined how it would seek to achieve its ambitious goals: addressing the injustices of dispossession in the past; creating a more equitable distribution of landownership; reducing poverty and contributing to economic growth; providing security of tenure for all and establishing a sound system of land management. Its vision was of ‘a land reform which results in a rural landscape consisting of small, medium and large farms; one which promotes both equity and efficiency through a combined agrarian and industrial strategy in which land reform is a spark to the engine of growth’ (DLA 1997: 7).

Overview of trends since 1994: Insights from diagnostic papers, commissioned reports and roundtables

The trajectory of land redistribution over the past twenty years reflects changing policy agendas and ideological positions. Not only has land redistribution fallen far short of official government targets and public expectations, its focus, criteria and modus operandi have also undergone several significant shifts.

In 1994, the Reconstruction and Development Programme (RDP) proclaimed a goal of transferring ownership of agricultural land in the white commercial farming areas to poor black South Africans (ANC, 1994). The RDP target was to transfer 30% of this land within the first five years of the programme. In terms of the White Paper on South African Land Policy (DLA 1997), households with

incomes below R1 500 a month were eligible to access a modest Settlement/Land Acquisition Grant (SLAG) with which to buy land and settle on it. By 1999, less than one per cent of commercial farmland had been made available to black South Africans; ten years after the advent of democracy, just three per cent had been transferred through all aspects of the land reform programme combined, and by 2013 about 6.5% had been transferred (MALA, 2004; SANews.gov.za, 2013).³

In 2001, a revised policy, Land Redistribution for Agricultural Development (LRAD), was adopted, which removed the pro-poor bias of land redistribution and introduced the new aim of establishing a class of black commercial farmers. In 2006, the Proactive Land Acquisition Strategy (PLAS), initially complementing and later, from 2011 on, replacing LRAD, saw the state buying land and leasing it out to beneficiaries, with the aim of eventually transferring it to them in private ownership – though plans towards this second transfer now appear to have been abandoned. This model was confirmed in a State Land Lease and Disposal Policy, adopted in July 2013, which establishes state land purchase with long-term leases as the model of redistribution. While there has been continued reliance on market-based purchase, significant changes have shifted the character of the programme, diverting attention away from securing tenure for the poor for multiple livelihood purposes.

PLAS has become the only route through which the state is currently redistributing land, but through leasing rather than transferring it to beneficiaries. Eligibility is broad and unclear, yet new insistence on ‘production discipline’ suggests that those with the resources to continue commercial farming operations will be prioritised, and that the state will evict its beneficiary tenants unable to do so. Initially described as an alternative to the ‘willing buyer, willing seller’ approach, PLAS has widened the discretionary powers of officials. While discursively framed as part of a radicalisation of the reform process, the redistribution process appears to be narrowing and is showing signs of elite capture (Hall and Kepe 2017).

The character of land redistribution policy has altered over time: the land tenure arrangement has changed; the class agenda has changed; and the intended land uses have changed. Apart from the state now being the ‘willing buyer’, the method of acquisition has not changed, and remains one of market-based purchase (see Table 1 below).



Table 3.1: Summary of land redistribution policy shifts and continuities over time

	Acquisition	Tenure	Class agenda	Land use
SLAG (1995-2000)	Market-based purchase	Transfer of title	Means-tested (i.e. pro-poor)	Multiple livelihoods
LRAD (2000-2010)	Market-based purchase	Transfer of title	Not means-tested (unclear)	Agriculture only
PLAS (2006-now)	Market-based purchase	No transfer of title	Not means-tested (unclear)	Agriculture only

Source: Kepe and Hall 2016.

Underlying these changes, however, are key continuities not only with the struggling programme of the 1990s, but also a set of much older ideas. Notions of ‘proper farming’ that were used by the apartheid government have been invoked yet again in the democratic era, shaping and often constraining opportunities, for poor people in particular, to secure rights to land, and precluding fundamental social change in the countryside.

In the past, the creation of ‘self-governing’ bantustans saw successive attempts to control and ‘modernise’ black agriculture, from the Tomlinson Commission in the 1950s, through betterment planning, through parastatal development corporations, to farmer support programmes in the 1980s. Such an agenda was premised on ideas about minimum farm sizes, income targeting, full-time farming – and these historically produced and ideologically underpinned notions continue to have currency in land reform policies today. These ideas should be interrogated, because their effect is to justify prioritising a narrow sector of black commercial farmers instead of creating a more inclusive redistribution process.

Scale of land redistribution

Since the inception of the land redistribution programme, an annual average of 214,415 ha, amounting to a total of 5.46% of commercial agricultural land, has been redistributed (Table 2).

These figures combine three main forms of redistribution: transfer of ownership to beneficiaries (under SLAG and LRAD); transfer to a state institution (Commonage and PLAS); and transfer of shareholding in businesses (Equity Schemes under SLAG, LRAD and 50/50 policy). They are a combination of state-subsidised purchase, state purchase, and shareholding. Not all land has been ‘redistributed’ in that, where equity schemes are established on commercial farms, hectares are listed as ‘redistributed’ even where workers hold shares in a farm rather than own the land.

Table 3.2: Summary data on land redistribution in relation to South Africa’s land area

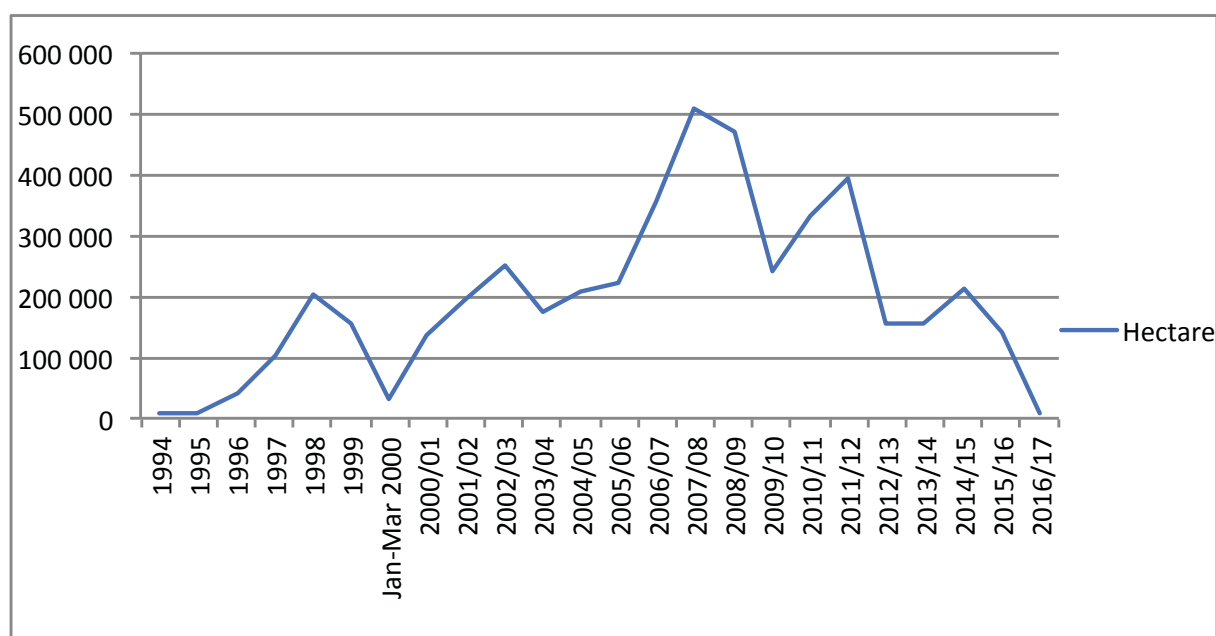
Land area of South Africa	Land area of former home-lands	Land area of former ‘white RSA’	Commercial agric land	30% of commercial agric land	Total land redistributed to date	Land redistribution as % of commercial agricultural land
122 320 100 ha	17 112 800 ha	105 267 300 ha	86 186 026 ha	25 855 808 ha	4 701 542 ha	5.46%

Source: Kepe and Hall, 2016

Pace of land redistribution

There has been a downward trend in the pace of redistribution, measured by hectares, since 2008, as shown in Figure 1 below. The pace of redistribution has fluctuated with the changing of ministers but also in response to changes in budget allocation. The high point of redistribution was in 2007/08, and 2015/16 was at the lowest level since 2000/01.

Figure 3.1: Amount of land transferred through land redistribution, in hectares per year





Spatial spread

The provincial breakdown of land redistribution shows the general trend of the Northern Cape being the province in which most land is redistributed, and also shows increases in delivery in KwaZulu-Natal and the Eastern Cape in the past decade. Delivery of hectares by different project type shows strong provincial variations: in the early years of the SLAG projects (1994-2000 exclusively, and partially thereafter), more land was redistributed in the Western Cape and KwaZulu-Natal and Mpumalanga. There has been no spatial targeting directed from the national level. District and provincial offices have made the decisions about where resources should be prioritised.

A further result of the market-based approach is the dispersed pattern of redistribution, in which individual properties are acquired one-by-one, requiring separate planning in each case. This precludes economies of scale in planning for whole areas where land could be redistributed, as well as the provision of infrastructure appropriate to new land users and uses. This may be characterised as a ‘mosaic’ pattern of redistribution, which proceeds in an *ad hoc* manner. In contrast, acquiring and allocating land at scale will require moving to acquire whole blocks of properties in areas of high demand, in a ‘partition’ model. A combination of these may be needed, but partition approaches, or block purchases, could be particularly important in areas surrounding rural towns and near communal areas.

Gender distribution of land

All policies relating to land redistribution emphasise gender equity as a goal, and prioritise women to gain access to land. What exactly this prioritisation consists of is unclear. Nationally, women constitute only 23% of land redistribution beneficiaries. We do not have detailed breakdowns of women beneficiaries, or women-headed households, under the various land redistribution programmes. However, statistics on women as a percentage of land redistribution beneficiaries by province shows that it is less than 30% in all provinces except the Western Cape (36%) and Limpopo (83%). In short, the national data shows that women are a minority of beneficiaries in all provinces bar one and make up less than one quarter of beneficiaries.

Beneficiary selection

How ‘beneficiaries’ are selected has changed substantially over time. This is due in part to the change from an application-based subsidy programme for land purchase by beneficiaries (under SLAG and LRAD and

associated programmes) to the state purchase and allocation on leasehold model of PLAS. In all periods, how various target groups are to be addressed and weighted has not been clarified. Decision-making about who actually gets land through redistribution is opaque.

The White Paper of 1997 states:

*The purpose of the Land Redistribution Programme is to provide the poor with land for residential and productive purposes in order to improve their livelihoods... Land redistribution is intended to assist the urban and rural poor, farmworkers, labour tenants, as well as emergent farmers.*⁵

Among these broad groups of ‘the poor’ certain priority criteria were established: ‘The most critical and desperate needs will command government’s most urgent attention. Priority will be given to the marginalised and to the needs of women in particular’ (DLA 1997).⁶

Under LRAD, policy specified certain categories of people as priority groups to be targeted, namely the four ‘marginalised groups’ of women, farmworkers, the disabled and the youth (35 years and below); these were a proxy for the ‘poor’, introduced after the removal of the income-based criterion that limited eligibility on the basis of a means test. Whether or not the poor in fact did predominate among beneficiaries is far from clear; available data do not show whether or not this was the case. More fundamentally, the focus on ‘marginalised groups’ was in tension with the ‘own contribution’ required by LRAD, which, according to policy, was intended to demonstrate (and lead to) a degree of commitment by beneficiaries to dedicate themselves to farming, which, in turn, was supposed to lead to project success. These arguments, however, are more moral than empirical; they also imply that the better off are more committed, since this is recognised in the form of own contributions of capital, assets and loans.

The requirement to submit business plans, under LRAD (and also currently for recapitalisation grants) also generates exclusions. The use of income targets in some provinces requires applicants to demonstrate their anticipated profit in the first year of operation – effectively making the majority of poorer applicants ineligible (Jacobs et al., 2003). Not only may the criteria being applied in approvals processes result in applications being rejected, but there is some evidence that consultants and planners encouraged LRAD applicants to take out loans as one way of making the figures work on paper, thereby promoting indebtedness which became a major problem facing LRAD beneficiaries.



Under PLAS, eligibility is broad: black South Africans not employed by the state – and including households with limited or no access to land; expanding commercial smallholder farmers; well established black commercial farmers; and financially capable aspirant black commercial farmers. Two vulnerable constituencies – residents of the bantustans, and farmworkers and labour tenants – are not explicitly privileged in the land reform process currently, but compete for public funds (in selection processes obscured from public scrutiny) with those able to bring capital and skills from other sectors.

With the advent of PLAS, where there is no means test and now also no leveraged grant, there is no way to say the degree to which the purported target beneficiaries are in fact being targeted, and which of these target groups are being prioritised. At a national level, for instance, we cannot determine the degree to which land redistribution is now a programme for ‘the rural poor, farmworkers and women in particular’ or is a programme for ‘emerging commercial farmers’ and also for urban-based business people, a category not mentioned in policy but evident among beneficiaries.

Evidence of the impacts of redistribution on beneficiaries’ livelihoods

The multiple meanings of land to people, and thus the diverse importance and potential impact of land redistribution in South Africa are widely acknowledged (Kepe, Hall and Cousins, 2008) but one of the key goals of land reform in the country is the improvement of the livelihoods of the rural and urban poor. What impact has land reform made on the livelihoods of land reform beneficiaries? Outcomes, or indicators, of success in land reform should include improved food security, more income, increased well-being, reduced vulnerability and improved sustainability.

Quality of Life (QOL) surveys conducted by the DLA have provided limited insight into the land uses, production patterns and livelihoods of land reform beneficiaries. Two QOL surveys have been published in 1998 and 2000, and one was carried out (but not released) in 2003. These have shown that those in the programme are better off than the rural population as a whole, but are they better off because they are land reform beneficiaries or did they manage to become land reform beneficiaries because they are better off? These questions cannot be answered using QOL data.

An audit of land redistribution (LRAD) projects in the North West province in 2005 suggests that project failure can be ascribed largely not to operational problems but to inappropriate planning and contextual factors

(Machete and Kirsten 2005). Its key findings were that, of all the land reform projects in that province:

- One-third were locked in intractable conflict and, as a result, the majority of their members had lost interest in the project and had de facto exited;
- Fifty-five per cent of projects had no implements for production and 27% had inadequate implements; and
- More than a quarter of projects had not produced anything since taking ownership of their land.

The findings of the study draw into question the quality and appropriateness of the type of business plans that form the basis for project approval, since these are widely ignored and, even where they are implemented, correlate negatively with project success.

The emphasis in both the QOL and the North West studies (among others) on marketing of produce, and profits, obscures the *non-monetised* benefits that may have accrued to project members. This raises the possibility that the contribution of land reform to livelihoods may have been underestimated in some of these studies – including where projects may be producing benefits for members, but have ostensibly ‘failed’ in the sense that they have not realised the objectives of business plans.

Discussion of the underuse of land and non-operational projects have tended to focus on failures of the project members themselves (such as conflict, lack of skills and poor management) and the inadequate character of support from government institutions, most notably the Department of Agriculture (such as lack of support, training and extension advice). However, few studies question the business plans as such.

Questions also need to be raised about the quality of the relationship between beneficiaries and mentors/strategic partners, particularly control over land, capital and production. In particular, what voice do the beneficiaries have in these situations, and if the relationship is unequal, what processes are in place to deal with that?

Post-transfer support and coordination

Post-transfer support (also known as post-settlement support) for land reform beneficiaries ranks high as a key challenge. Beneficiaries in both land redistribution and restitution projects face multiple challenges such as poor infrastructure on farms, inadequate access to agricultural inputs, group tensions and lack of support



from official agencies (e.g. for agricultural extension, business management, legal advice). Some scholars extend the definition/understanding of land reform to include post-transfer support as a necessary element of land reform (Manenzhe, 2007).

Two departments, the Department of Rural Development and Land Reform and the Department of Agriculture, Forestry and Fisheries, are responsible for delivering post-settlement support, establishing a framework for inter-departmental co-operation, developing a database, and monitoring implementation. However, major challenges have arisen relating to poor co-ordination, role confusion, staff and budget shortages and inefficiencies.

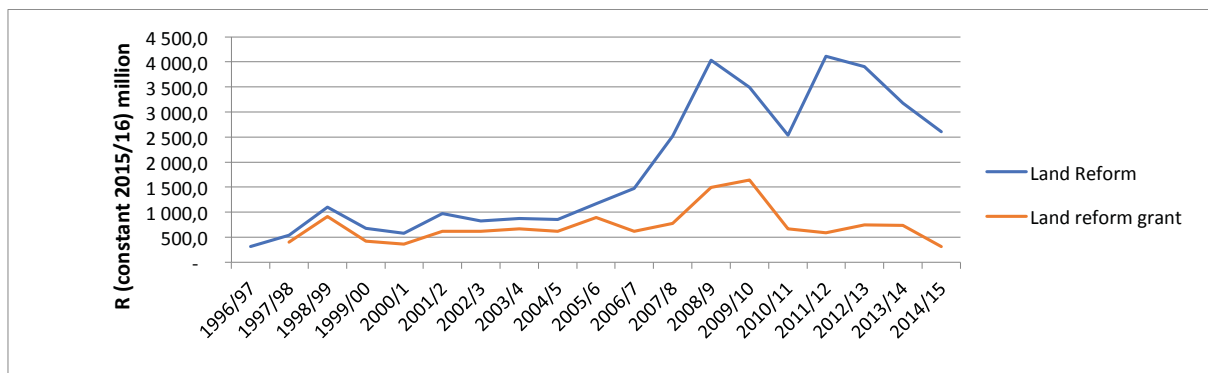
Relevant provincial departments are also key institutions in the implementation of the land reform post-settlement support programmes. Given that local governments are closest to the people, these too should be responsible in part for the delivery of post-settlement support through the statutory requirement that they implement Integrated Development Plans (Masoka, 2014). It appears that this is rarely the case.

Budgetary issues

The budget for land redistribution is contained within the budget vote for Rural Development and Land Reform and appears as a line item entitled 'Land Reform' alongside 'Restitution' and 'Rural Development'. Here our focus is on the 'Land Reform' budget line only. Expressed as a percentage of National Expenditure, the Land Reform budget has generally been between 0.15% and 0.4%, reaching a peak of 0.44% of the national expenditure in 2008/09 and then declining to 0.2% in the current financial year.

The land reform budget includes current costs, including operational costs of the offices of the Department and its staff. Capital costs include land reform grants (previously SLAG, LRAD, commonage and other products, and now also Recap) and an Agricultural Landholding Account (for state purchase of land for redistribution). Since land grants were abandoned in 2011, the Agricultural Landholding Account is the only budget line for acquiring land for redistribution. Overall, land reform grants have constituted a declining share of the Land Reform budget, as Figure 2 shows below.

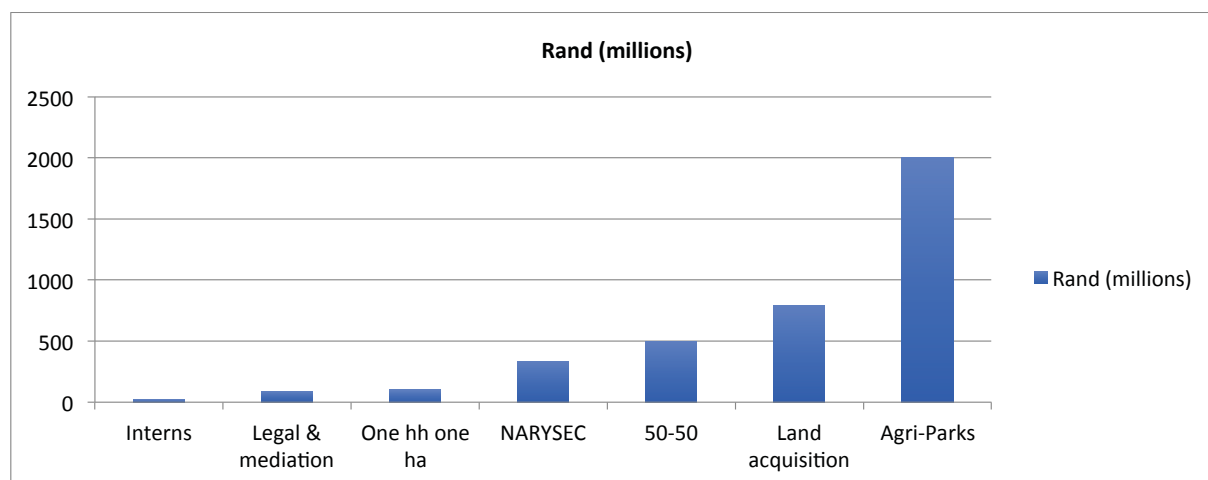
Figure 3.2: Land reform grants compared with land reform expenditure for 1996/97 – 2014/15 (in million Rands)



Source: Kepe and Hall, 2016

By 2016, expenditure on land reform grants had returned to the levels of 20 years ago. However, land acquisition is no longer included under 'Land Reform Grants', given the creation of the Agricultural Landholding Account through which the state purchases land for redistribution on leasehold.

Figure 3.3: Reallocation of land reform budget, 2016/17



Source: Kepe and Hall 2016, from MRDLR 2016

On 6 May 2016, the Minister announced a plan in Parliament for speeding up land reform, and outlined a reallocation of the Land Reform budget across different policy areas. Key among these



is Agri-parks, the initiative by the Department to establish agro-processing infrastructure in hubs connected to black farmers – which is nonetheless being funded out of the land reform budget. Two new and not yet formalised policies were also allocated funds – ‘50/50’ and ‘One Household, One Hectare’. Overall, just R750m was earmarked for land acquisition.

Insights from the roundtable on land redistribution of 1 November 2016

Several insights on the poor governance of the land redistribution programme emerged in this round table. An expert from the University of Pretoria stated that different government departments had mounted numerous initiatives for agricultural support, such as the Comprehensive Agricultural Support Programme (CASP), Micro Agricultural Financial Institutions of South Africa (MAFISA) and the Recapitalisation and Development Programme (RECAP). CASP seeks to enhance provision of support services to promote and facilitate agricultural development, while MAFISA aims to empower micro and small-scale entrepreneurs and farmers to improve their livelihoods and develop their businesses. RECAP aims to provide technical and financial support to farms in distress to increase production, commercialisation, employment, and food security. However, there has been a clear lack of co-ordination of DAFF and DRDLR in delivery of these initiatives, and in some there was also a lack of clarity in relation to target groups, resulting in reduced take-up.

Another expert from the University of the Western Cape discussed the National Land Allocation and Recapitalisation Control Committee (NLARCC), established to oversee the allocation of land for redistribution. She reported that researchers were unable to find evidence of proper governance of land allocation as required by policies: (i) that ‘the recommended lessees should have been selected from an updated district database of potential beneficiaries (a database maintained by Director: Land Reform)’, (ii) ‘in the absence of a district database of potential lessees, the Director: Land Reform shall apply transparent mechanisms to ensure that such a database exists. Such mechanisms may include advertisements in local newspapers.’

She stated that in the absence of a means test and leveraged grant, there is no way to assess the degree to which the purported target beneficiaries are in fact being targeted, and which of these target groups are being prioritised. There are thus no measures in place for Parliament or the public to assess whether the right to equitable access to land is being realised, or the land reform budget is instead being diverted to politically connected elites. This is particularly striking in relation to the

Recapitalisation and Development Programme of 2010, which provided no beneficiary selection criteria at all. A DPME commissioned report on Recap found that it disproportionately benefitted the wealthy compared with the poor, and had resulted in no jobs being created in some provinces despite expenditure of up to R48 000 000 per project.

Voices of the public

Many of the speakers in public hearings spoke about corruption and abuse within the redistribution process.

For example, a speaker from the Free State suggested that corruption is a serious problem at present. He said, *'the officials of government in this PLAS Bantustan Programme interfere now and then. The national minister has introduced a new policy to say you must form district land reform committees, you as farmers you must decide who must get a farm, but what is happening now is that even though the committee will recommend that such and such a person must get the farm but at the end of the day, the officials are not in favour of that person. That is what is delaying that process'*.

He also asserted that *'sometimes someone has got a farm, he has been allocated the farm, he is not working on that farm, he gets it today and signs the forms, the following day some commercial white farmer comes in and he pays a certain amount'*.

Themba Mzimela at the KwaZulu-Natal hearing also emphasised the prevalence of corruption, and stated that *'some community members who lodged complaints are kept in the dark by government officials, who fraudulently alter the names and numbers of people on the beneficiary lists. Some people who are supposed to be listed in court proceedings are deliberately and fraudulently left outside the process in order to dilute their claims or in order for corrupt government officials to personally benefit from the land claims'*

Dikeledi Motsumi from Kroonstad, discussed the allocation of farms at the Free State hearing, and said *'there needs to be a proper system to identify the people who are going to be allocated these farms, and there must be clear legally binding criteria to indicate which people are going to be given farms. Otherwise they are just going to find a random lady, who is going to be given a farm when she knows nothing about farming. That farm is not going to be productive. It is going to be her farm in name only'*.

An unidentified speaker in Mpumalanga also focused on corruption, stating that, *'Government officials,*



especially in the provinces [are a problem]; I speak of the land in Endlovini; and if they are present here they can speak for themselves, because their land was sold by four project officers and one of them bought a Polo Vivo car. Project officers that we look up to, to conduct verification and evaluation processes, on the other side they change everything to be the ones who benefit. Large tracts of land belong to government officials’.

Analysis of legislation passed

Existing legislation

The legislation governing land redistribution is the Provision of Certain Land for Settlement Act 126 of 1993, which provides for the designation of land for settlement purposes and financial assistance to people acquiring land for settlement support. While it is an apartheid-era law, passed by the National Party government during its own limited and pre-emptive attempts at land reform, it remains the legislation that empowers the Minister to appropriate funds for disbursement as land purchase grants or subsidies, and for direct state expenditure on land acquisition, settlement services and production support. It has since been renamed twice: first, as the Provision of Land and Assistance Act, by an amendment, Act 26 of 1998; second, as the Land Reform: Provision of Land and Assistance Act, by an amendment, Act 58 of 2008. While it is therefore an apartheid-era law, the amendments to the Act by Parliament have provided a mandate to the Minister to continue to appropriate funds to enable land redistribution under changed conditions.

Act 126 and its various amendments create wide-ranging power for the Minister to acquire, maintain, plan, develop or improve property, or to delegate these powers to any state entity or any other body or person. Progress with land redistribution, and its outcomes, therefore needs to be assessed against both Act 126 (which empowers the Minister) and the Constitution (which mandates equitable access to land).

Were the right laws passed?

Act 126 is inadequate as a vehicle to guide the implementation of land redistribution. It does not define ‘equitable access’ in a meaningful manner, and provides no guidance as to how beneficiaries

are to be selected, how land suitable for redistribution is to be acquired, how post-settlement support is to be provided, how the land tenure security of beneficiaries is to be secured, and says nothing about the role of local authorities in land reform planning and implementation. It does not assist in aligning the different sub-programmes of land reform to each other in a coherent manner. It is an inadequate vehicle for giving meaningful effect to the Constitutional commitment to ‘foster conditions which enable citizens to gain access to land on an equitable basis’, and for correcting the gross spatial inequalities inherited from the past.

A key gap in the legislative framework for land reform, and especially in relation to land redistribution, is the absence of an overarching framework law that guides and directs the programme as a whole, as well as its various sub-programmes. No such law exists at present.

A key object of a framework law would be to clarify who the key beneficiaries of land reform should be, so that the goal of ensuring equitable access is achieved. It should also provide a clear set of principles to guide the detail of policy and programme design, and ensure good governance. The latter crucially includes mechanisms for transparency and accountability. The Panel has heard substantial evidence that the governance of the programme has been far from optimal, and in many cases has meant that, even when the budget is fully spent and many hectares are acquired or transferred, the objectives of land reform have not been met. Act 126 of 1993 is clearly inadequate to these tasks.

Key questions that should be answered, either in legislation or in policy on land redistribution, include:

- (1) Who should get the land?
- (2) How should the land be used – what type and scale of farming? Should land be redistributed to enable settlement and multiple livelihoods, including in urban areas? Or should it be exclusively for farming? How will land reform help to address spatial inequality?
- (3) How should land be identified and acquired? Should redistribution be restricted to those properties that are offered for sale – i.e. no targeting? Or should there be area-based priorities?



- (4) How is land to be valued? What should the state, or beneficiaries, pay for land? Should this be a 'market' price, a negotiated price, or a price determined on the basis of Section 25(3) of the Constitution? If the latter, how should 'just and equitable' compensation be defined?
- (5) What rights should beneficiaries have? Should they be owners of the land? Or long-term lessees? What is the rationale for leasing, and should those who don't pay lose their land? Does the state have the capacity to enforce leases and extract rents – now and in the future when more properties are obtained? Should land be held by traditional councils on behalf of communities, by beneficiaries through communal property institutions, or by community members themselves?

On each these core questions relating to land redistribution, existing law and policy is unclear.

Legislation has failed to meet the objectives outlined in the Constitution and in policy documents

Evidence presented to the Panel via commissioned research reports, roundtables and public hearings over the past year has demonstrated profound problems in the conception and implementation of the land reform programme. These extend beyond issues of how land is acquired (whether via the market, expropriation or confiscation) and relate more generally to the ways in which beneficiaries are chosen (especially in relation to land redistribution); land is identified; land reform is planned at the level of local government; tenure rights are recognised or conferred; the quality and effectiveness of post-settlement or post-transfer support that is provided; and the equality or inequality of power relationships between land reform beneficiaries and strategic partners or mentors. In addition, there is a high level of demand for land in urban areas, for purposes of human settlement, that land reform does not address at present. These problems are generating immense frustration and in some cases, anger, within the ranks of land reform beneficiaries and other citizens.

Unintended consequences

The increasing evidence that a degree of elite capture has taken place in land reform in general, as well as in land redistribution in particular, is in part an unintended consequence of the inadequacies

of Act 126 of 1993. Similarly, the fact that land reform is beset by governance problems, such as lack of adequate transparency and accountability, as well as a declining budget, is in part due to the lack of a coherent framework law for land reform.

Implementation of legislation

This chapter has described the ineffectiveness of the land redistribution sub-programme. In summary, redistribution has been slow when assessed against both its own targets and those of society's expectations, highly uneven in spatial terms, and benefitted women much less than men. Targeting of the poor and vulnerable has not been effective, and has seen slippage over time so that many recent beneficiaries are the relatively well off or well connected rather than the poor. The livelihoods of most beneficiaries have not been improved greatly. Post-transfer support has generally been inadequate, in part because of poor coordination among government departments and between levels of government. Urban land reform has been neglected, despite its potential to underpin effective human settlement programmes. The budget for land acquisition and transfer has declined over time, in part, because of poor outcomes that can be attributed to the lack of an overall strategic framework within which land redistribution can be assessed and the Department held accountable for delivery.

Filling in the legislative gaps

The primary purpose of new legislation is to establish principles that must underpin the implementation of all land reform programmes. The proposed Bill, therefore, would not substitute for existing land reform legislation. Rather, it would establish core principles that apply in a transversal manner so that there is coherent alignment and consistency across land reform programmes. Further, it would provide clear direction and prescribe the manner in which land redistribution is operationalised and implemented. This includes the redistributive component of laws such as the Extension of Security of Tenure Act of 1997 and the Land Reform (Labour Tenants) Act of 1996. It would also guide the provision of effective post-settlement support services to all land reform beneficiaries, including those who have lodged successful land claims through the restitution programme.



It is clear that here has been inadequate transparency in the implementation of the land reform process, and insufficient accountability of government departments to parliament and the public at large. To strengthen the land reform process there is a need to improve the quality and effectiveness of cooperative governance across all spheres and levels of the state. In addition, the principle of cooperative governance must extend across society as a whole, since land reform is in the common interest and is ultimately a shared responsibility of all citizens. To ensure that these principles of good governance are implemented in practice, there is thus a need for a coherent framework of overall principles and provisions that guide the land reform process.

Recommendation 3.1

Proposal for a new framework law on land reform

The Panel proposes new framework legislation that addresses the deficiencies in law and policy described above, and provides potential solutions in the form of a coherent and consistent set of guiding principles; definitions of key terms such as ‘equitable access’; clear institutional arrangements (particularly at district level); requirements for transparency, reporting and accountability; and other measures that promote good governance of the land reform process. It would also allow government to consider both urban and rural land reform as part of a broader land reform programme, designed to address the spatial restructuring objectives of the National Development Plan, and thus address spatial inequality. The precedents for such legislation include the National Environmental Management Act No. 107 of 1998 and the Spatial and Land Use Planning Management Act No. 16 of 2013.

Finally, the absence of a law on land redistribution to give full effect to Section 25(5) of the Constitution is another constraint on effective land reform: The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis. This proposal seeks to address that gap as well.

The text below sets out the possible framework for a National Land Reform Framework Bill. A rough draft Bill has been prepared for illustrative purposes and is annexed as L1.

Principles

Land redistribution principles

The Panel has seen evidence that changes in policy and practice since the 1990s mean that there is no transparent system to ensure that land redistribution gives priority to the landless and the poor. Land redistribution needs to address an array of different land needs, but the requirement of Section 25(5) in the Constitution of 'equitable access' implies that priority must be given to those most in need. A system for rationing the scarce public resources available is needed.

The Panel is concerned that there is no longer adequate provision in policy and practice for the provision of land for non-agricultural purposes – specifically, for rural and urban settlement and for multiple livelihood purposes, which are the mainstay of poor families. It has also heard evidence that, despite policy commitment to gender equality, women constitute only a small proportion of beneficiaries. The Panel would like to see more robust provisions to tailor land reform projects to meeting women's interests and needs, and to promoting gender equality in land access and land control.

Further, coherent plans are needed to ensure that whatever land is acquired for redistribution is part of integrated development planning at the local level, and forms part of provincial plans. Such plans must be informed by an appreciation of who wants what land for what purposes. They must also present a strategic vision for overcoming the legacy of spatial apartheid, in both the rural and the urban areas. Put simply, land redistribution needs to break down the divides between white and black, rich and poor, in both our cities and the countryside. For this to happen, the targeting of land, and the selection of people to benefit, must happen in a more strategic and coordinated manner that is transparent and can be seen to give priority to the poor and landless and their land needs.



Land restitution principles

The Panel has learnt of widespread dysfunction in land restitution projects where claimants gain few if any benefits in practice, due to institutional arrangements that see either strategic partners or dominant claimants monopolising land and other resources. The key to avoiding such situations in the future is to affirm the rights of all claimants to choose the manner in which they seek restitution, including their right to opt into or opt out of group-based claims. The Commission can determine the manner in which this is operationalised, but a statement of broad principle is needed in legislation to underpin this. More broadly, 'equitable redress' under restitution can be understood to be redistributive, so there is an overlap between restitution and redistribution.

A major controversy has emerged about the parameters of land restitution, and the wide array of potential claims that fall outside the ambit of the Act, especially due to the cut-off date of 19 June 1913. Clearly, due to the manner in which colonial conquest and dispossession proceeded across the country, this prejudices the interests of those descended from the communities dispossessed earliest, especially in what are now the Northern Cape and Western Cape. Simply put, due to the vagaries of history and colonial interests, their claims cannot be addressed within the current law. However, the Restitution of Land Rights Act empowers the Minister to address such claims – that are legitimate but not valid in terms of the eligibility criteria of the Act – by giving them priority within the land redistribution programme. There is no evidence that any mechanism exists through which this can be done, nor that the Minister has done so to date. The Panel proposes that the Minister must not only be empowered to address claims falling outside the cut-off date of the Act, via the redistribution process, but must be required to provide reasons for doing so or not doing so.

Land tenure reform principles

Apartheid denied black people rights in land, not only via dispossession but also by imposing a discriminatory tenure system that created a second-class set of rights. This was most clearly the case in relation to rights to land derived from customary law, or similar systems of norms and values, and involving group-based (or social) land tenure systems. A clear statement of principle is required that gives high priority within the land reform programme to securing such rights, both urban and rural.

In the proposed legislation, the right of people to choose their land rights system and the system of land rights governance they prefer must be affirmed. Similarly, the informal rights held by millions of South Africans who live in informal settlements in urban and peri-urban areas must be affirmed, and choices provided in relation to the form in which land rights are recorded and secured over time.

The Panel has also heard extensive and worrying evidence that despite the constitutional requirements of Section 25(6), implementation of tenure reform laws has been weak and ineffective. This is particularly the case with the Extension of Security of Tenure Act 62 of 1997 and the Land Reform (Labour Tenants) Act 2 of 1996. Court judgments confirm that the developmental provisions to provide for secure long-term rights, under both these laws, have largely not been implemented. The proposed law must place a positive obligation on the executive to secure the land tenure rights of farmworkers and farm dwellers, as well as to make available alternative land to farm dwellers and labour tenants on a long-term and secure basis.

Identification of target groups and their prioritisation

The majority of South African citizens are eligible to become beneficiaries of land reform. Effective implementation of tenure reform programmes can benefit large numbers of people: residents in the communal areas of the former Bantustans; occupiers of commercial farms; and occupiers of land in informal and peri-urban settlements.



Effective implementation of the land restitution programme can benefit large numbers of people previously dispossessed of rights in land, or their descendants. However, in the land redistribution programme, clarity about who the target groups are and how their competing interests and needs are to be weighed up, is urgently needed.

The Provision of Land and Assistance Act 126 of 1993 (as amended) provides inadequate guidance on this core question: who is land reform for, and who should be the primary beneficiaries? For this reason, a strong principled statement is needed on who are the various target groups, but also which principles should guide their prioritisation. As argued above, the new law must provide a clear definition of what constitutes ‘equitable access’ as provided in Section 25(5) the Constitution. It needs to specify how the rights and interests of those who have property or other resources of their own and those who do not, those who have other livelihood resources and those who do not, should be addressed within the programme. Given the absence of any rationing system equivalent to the housing subsidy (or the prior land reform grants which were set at specific levels), such statements are needed to guide the allocation of public resources to ensure that the constitutional requirement of ‘equitable access’ is realised in practice.

Beneficiary selection

Who should land reform benefit? With respect to the restitution process, this is clear: claimants with valid claims should benefit. With respect to the labour tenant reform process, this is clear: labour tenants with valid claims should benefit. However, with respect to the land redistribution process, the question of who should benefit is far from clear. The Panel has engaged with evidence that the current process of selecting beneficiaries is not transparent or subject to public review or parliamentary oversight. With respect to tenure reform, and the interventions required to ensure that farm dwellers and residents in communal areas have their tenure secured via ESTA or IPILRA, there is similarly no clarity on how and why the state chooses to intervene or not to intervene. So there needs to be guidance as to the state’s selection of beneficiaries for both redistribution and tenure reform.

While there has been reference to public and participatory processes of land reform in various policy documents, the Panel is not convinced that the selection of beneficiaries has been transparent, or guided by such processes. The area-based planning (ABP) processes initiated more than a decade ago have foundered, been revived in some areas, and in others not. Many have been driven by consultants without substantial and meaningful public participation. Most importantly, to conduct a transparent and principle-driven selection of beneficiaries, the Department needs to know from which potential population of beneficiaries it is selecting. For this to be the case, it is essential that public participation processes lead to the creation of a list of those who want land for a variety of purposes. It is only once it is known who wants land, what kind of land they want and for what purposes that beneficiary selection can be conducted in a transparent and accountable manner, taking full cognisance of the requirement of 'equitable access' to land as required in Section 25(5) of the Constitution.

Land acquisition and the choice of land for redistribution

The willing buyer, willing seller principle has shaped South Africa's land reform process to date, despite this not being contained in the Constitution. It has been a policy choice, and one that has led to particular farms being acquired and redistributed. Often there is no good fit between these particular farms and the real needs of local people; rather, the farms are acquired merely because they have been offered for sale by their owners. This is not a good way to run a land redistribution programme, and the Panel has heard evidence of people having no choice but to take land that does not fit their priorities and needs, for instance land that is far away from towns and infrastructure, or big farms rather than smallholdings.

Legislation to guide land reform should address how specific land is identified for redistribution and its prioritisation. Area-based planning should be promoted so that there are opportunities for local people to participate in setting priorities for which land should be acquired and redistributed. This should relate not only to the demand for land for agricultural purposes, but also land for settlement. Where agricultural land is identified,



the availability of adequate water and water rights must be assessed. Such processes should cross-reference the district land reform committees and require the involvement of district and local municipalities in these committees and prioritising areas for redistribution, and joint planning must ensure ongoing support from local government within the ambit of Integrated Development Plans (IDPs). Once such areas or specific properties are identified for land reform, the state may choose to make offers to purchase, negotiate or expropriate such properties. Legislation should not dictate the manner of acquisition but the full range of options must be spelt out.

Transparency and accountability

The proposed law must provide effective mechanisms for transparency in and accountability for the implementation of land reform policies, to allow the public and their representatives in parliament to assess whether or not the executive arm of government is delivering on its constitutional commitments. The suggestions below specify how such transparency and accountability is to be achieved, and emphasise the central importance of ensuring that the main beneficiaries of land reform are the poorest and most vulnerable sectors of society. Other measures of performance, such as the location and area of land transferred or secured through land reform, are also specified as reporting requirements. This section also requires that district-level land reform implementation frameworks provide the framework for reporting on progress, and that these reports be included in annual reports at national level.

Subdivision

The state must proactively promote the subdivision of large-scale landholdings in situations where those in most need are in want of smallholdings to address their land needs. Subdivision in such situations must be undertaken so as to promote the availability of smallholdings, to promote equitable access. The district land reform implementation plan will take into account the needs reflected in land redistribution applicant registers and waiting lists when planning for proactive subdivision of land reform land, whether previously state land or commercial farmland.

Commonage

Commonage is a public asset that is held by the state precisely for the provision of access to land for ordinary people. Given that municipalities own commonage, national government must cooperate with and support municipalities to use and manage their commonage, including by assisting with infrastructure grants and financially supporting the acquisition of additional land to augment and expand municipalities' commonages. A commonage programme initiated in the 1990s showed relative success in providing poor people, particularly livestock owners, with access to land for grazing, as well as access to small allotments for cultivation, especially by women. In these ways, promoting the use of commonage can make a significant contribution to realising the vision of land reform and promoting equitable access to land.

There have been several constraints to the commonage programme. First, many municipalities have rented out their commonage to commercial farmers, often in return for very nominal rents. This constitutes a subsidy for commercial farmers from the citizens of the areas, and must be stopped. Bringing public land back to public use is a priority, alongside the need to expand and improve the infrastructure and management of commonages. One of the reasons why commonage land is so important and strategic for poor people is that they can access such lands in the immediate vicinity of rural towns – they are able to use public agricultural land without foregoing other livelihood opportunities in towns, and the social infrastructure (schools, clinics, etc.) that these afford.

For these reasons, any legislation to guide land reform should privilege commonage as one of the important ways in which access to land can be expanded and made more equitable. Policy decisions may determine whether the state chooses to proactively expand commonages around the country. Legislation should require that both the Department of Rural Development and Land Reform, and municipalities around the country, ensure that commonage is made available in a manner that promotes equitable access and prioritises the needs of the poor and landless, that they acquire secure and long-term rights, that commonages are well managed, and that, where groups of commonage users are formed, they are assisted to develop institutions capable of democratically managing the land, water and other resources that they use.



Allocation of secured long-term use and benefit rights

Equity in access to land and equity in tenure arrangements go hand and hand and are co-dependent. Without respected, supported and resilient tenure, land reform and redistribution will not be sustainable. All persons who receive a grant of equitable access to land and property rights under Section 25(5) including statute law, common law and customary law, shall be entitled to participate in any decision about the form of tenure right under which the grant will be held into the future. Land redistribution beneficiaries should be able to choose their preferred form of tenure and the statute will provide statutory support for the procedure to be followed and the institutions to underwrite the tenure forms. Entry and exit rules can promote meaningful use of the redistribution and tenure grant, and penalise unearned profits and speculation. Rights must be protected and enforceable by way of accessible and effective remedies.

Tenure transformation is about increased diversity in the way land is owned and used: in other words, more variety in ownership and management arrangements (private, public, partnership, community or not-for-profit) which will decrease the concentration of ownership and management control in a limited number of hands, particularly at local level, to promote sustainable and equitable rural development.

Alternative dispute resolution: Land Rights Protector

There must be provision for alternative dispute resolution, to provide for facilitation and mediation, and to refer matters for conciliation. Where land disputes cannot be resolved through these processes, the Panel proposes that such disputes can be referred to a Land Rights Protector – either in the proposed Land Framework Bill or in separate legislation. Any land dispute that involves conflicts between citizens/land occupiers and any state institution or state officials should be directly referred to the Land Rights Protector, as in this case conciliation would constitute a conflict of interest for the state institutions or officials involved. The panel proposes that mechanisms to promote alternative dispute resolution must be promoted, except for such cases where a Land Rights Protector must take over cases, investigate, and produce findings and recommendations for remedial action.

Restitution

Constitutional mandate

The Restitution of Land Rights Act of 1994 and its amendments are underpinned by the constitutional imperative contained in Section 25(7) of the Constitution, which states: ‘A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.’

In addition, the following sections of the Constitution are relevant to this section’s themes:

- Section 25 of the Constitution, to ensure the protection of property rights including measures designed to foster conditions that enable citizens to gain access to land on an equitable basis;
- Section 26 of the Constitution, to have the right of access to adequate housing which includes an equitable spatial pattern and sustainable human settlements;
- Section 24 of the Constitution, to have the environment protected for the benefit of present and future generations through reasonable legislative and other measures; and
- Section 27(1)(b) of the Constitution to ensure that the State takes reasonable legislative measures, within its available resources, to achieve the progressive realisation of the right to sufficient food and water.

Overview of policy goals informing legislation

The programme of Land Restitution allowed a person or community dispossessed of land rights after 19 June 1913 as a result of past racially discriminatory laws or practices, to lodge a claim for the return of that property or for equitable redress. The Land Claims Commission and Land Claims Court were set up to implement the programme of Land Restitution.



Overview of trends since 1994: Insights from diagnostic reports, commissioned papers and roundtables

The diagnostic reports on the performance of land restitution, along with research conducted by experts on the subject, raise the following issues:

There are still more than 7 000 unsettled, and more than 19 000 unfinalised, ‘old order’ claims (claims lodged before the initial cut-off date of 1998). At the present rate of finalising 560 claims a year, it will take at least 35 years to finalise all old order claims; new order claims (lodged in terms of the now repealed Restitution of Land Rights Amendment Act of 2014) that have already been lodged will take 143 years to settle; and if land claims are reopened and the expected 397 000 claims are lodged, it will take 709 years to complete Land Restitution.

The Land Claims Commission was not set up to deal with the number of claims lodged. The Commission has long had poor capacity: staff lack the legal and historical training necessary to do their job; the filing systems and digital database are in disarray; and high staff turnover contributes to poor institutional memory. With regard to record-keeping, as of 2014, Genesis Analytics found that files ‘were substantially incomplete and as a formal record of proceedings did not comply with the administrative requirements of the legal process that underpins restitution’. (Genesis, 2014, p. 5) They also found ‘no less than 50%’ of files in three provinces ‘chaotic’ and, alarmingly, less than 3% in these same provinces were found to be ‘in order’. (Genesis, 2014, p. 5). A recent NASYREC programme of digitising documents was poorly implemented, but even this badly digitised material is no longer available. Research reports that have been paid for by the Commission are not easily accessible and as a result effort is duplicated at considerable cost to the Commission.

In 1999 the Commission was given the capacity to settle claims administratively, out of court, to speed up the process of land restitution. This decision had unforeseen consequences. Administrative settlement made the process ‘personality driven’, ad hoc, and vulnerable to corruption. One outcome is that the Commission has been very inconsistent with spending on restitution awards. A striking example is that R1.1 billion was spent on the Mala Mala claim, despite the finding of the Land Claims Court, and an initial decision by the Minister that land restoration would be unfeasible. The community, recently formed for the purpose of lodging the land claim, was also not in fact eligible for restitu-

tion, but this fact was ignored by the Mpumalanga Land Claims Commission, despite the findings of a historical research report that was paid for by the Commission (Delius and Hay, 2016).

Another method for speedily settling claims was to ‘bunch’ them together, creating artificial Communal Property Associations (CPAs) in the process. In doing this, the Commission ignored the definition of ‘community’ eligible to apply for restitution. CPAs are often dysfunctional, a key issue noted in the public hearings. Furthermore, the Commission has not been effective at researching claims, and, as noted above, has frequently settled claims despite a lack of credible research – something that was only possible due to the administrative process introduced in 1999.

Furthermore, despite their responsibility to conduct or assess research, staff lack the required historical and legal skills for this job. In terms of relevant historical research skills, staff are not provided with training in South African rural history or historical research methodology, and cannot read the Afrikaans documents that form the bulk of relevant archival documentation in researching land claims. In terms of legal training, staff are often unaware of the implications of the Restitution of Land Rights Act in terms of eligibility for restitution and validity of land claims, as well as the importance of case law (Delius and Hay, 2016). The timescale provided for researching claims is often too short.

Unsurprisingly, there are many unresolved overlapping and conflicting claims. These contribute to ethnic and tribal tension, and xenophobic attitudes, as communities form narratives for why they, and not others, are entitled to large swathes of land. Because of extremely poor information systems, overlapping claims are even discovered after claims to the same land have been ‘settled’. As a result, projects are stalled, claimants cannot develop the land, and they often have to hire lawyers at considerable expense. Some claimants suggested that without money to hire lawyers, poorer communities are unable to progress with their claim. Unable to adequately process claims despite their legal powers, the Commission has referred many cases to court. Some of these cases, where claims have been ‘bunched’ and artificial CPAs created, stand little chance of success, if the definitions contained in the Act will be used to assess the validity of the claim.

Few guidelines were provided for the Commission to determine just and equitable settlement and feasibility. Many restitution awards are inconsistent and do not provide real redress, particularly



when claimants are compelled to take smaller cash settlements, or the emphasis on keeping land productive compels claimants to enter into strategic partnerships against the wishes of some. The resultant confusion and dissatisfaction has led to the Land Claims Court becoming overwhelmed with cases. Despite the enormous volume of often very complex cases, there are no permanent judges of the Land Claims Court.

The economic and developmental outcomes of restitution have been very poor. A study conducted by the Community Agency for Social Enquiry (CASE) found that the majority of the 179 land restitution projects they assessed were not meeting their developmental objectives. Where agriculture was the main objective, 83% of projects underperformed; where settlement was the main aim, 75% of projects underperformed, and where ecotourism was the main aim, 88% of projects underperformed (cited in Ramutsindela et al., 2016, pp. 41 – 42). A further concern is that the focus on ensuring the continued productivity of farmland may end up disempowering claimants as they have less say in what to do with land. It may also result in benefits flowing to service providers and strategic partners rather than beneficiaries (Ramutsindela et al., 2016). Many claimants feel disempowered by the process.

The focus on providing post-settlement support has not dramatically improved outcomes and places an unreasonable burden on the Commission to perform duties that are in the mandate of other government departments. A fundamental issue identified in numerous reports on the performance of land restitution, is that the Commission has been given, or has taken on, too many responsibilities outside of its remit (Genesis Analytics, 2014). This further compromises the Commission's ability to keep up with core tasks, such as records management, communication, and research. It also has budget implications: in 2014, 25% of the Commission's project payments budget was allocated to post-settlement support (Genesis Analytics, Expenditure and Performance Review of the Restitution Programme, 2014).

Underlying many of the problems experienced by the Commission is confusion between the purpose of restitution, which is to provide redress to specific claimants for the loss of specific pieces of land, and the goals of land redistribution, which are to ensure the racially equitable distribution of land in the country (Delius and Hay, 2016). As a result, the Land Claims Commission has been put under pressure to settle large claims involving the transfer of large areas of land to as many

people as possible, rather than focusing on the merits of each individual claim and settling each claim separately. It is vital that the goals of redistribution be advanced without compromising the programme of restitution. Other programmes of land reform must focus on bringing about land redistribution and opening up economic opportunities in rural areas to all previously disadvantaged South Africans, and not just to relatively few, based on 'tribal' belonging.

Following the President signalling, during the 2013 State of the Nation Address, that government would consider reopening the lodgement of land claims (and also explore exceptions to the 1913 cut-off date), the Restitution of Land Rights Amendment Act 15 of 2014 was passed by the Fourth Parliament and signed into law on 30 June 2014. It provided for the reopening of the lodgement of land claims for a further period of 5 years (1 July 2014 to 30 June 2019). Lodgement duly commenced on 1 July 2014. The Act was challenged in the Constitutional Court by the Land Access Movement of South Africa (LAMOSA), and judgment was handed down on 27 July 2016, declaring the Amendment Act invalid, ruling that the public participation process had been inadequate. The court ordered that all old order claims need to be finalised before new claims can be settled, and before land claims can be opened again. In effect, the Commission is interdicted from processing claims lodged after 1 July 2014 until Parliament re-enacts legislation reopening lodgement.

The Land Claim Commission's response to the LAMOSA judgment was to say it would settle all outstanding claims within two years. It then put out a news brief saying that all outstanding claims would be researched by March 2017, and settled by March 2019. However, the research panel set up by the Commission has not developed an adequate strategy to produce both the quantity and quality of research that is required. What is urgently needed is a panel of experts with the required historical and legal background to produce an innovative strategy for addressing the enormous task at hand.

In terms of public perceptions and expectations, the damage had already been done. Further talk about 'pre-colonial audits' has not helped matters. As recently as February 2017 (during a debate on the State of the Nation Address), the Minister of Rural Development and Land Reform, Mr Gugile Nkwinti, confirmed plans to mount a 'pre-colonial audit of landownership, use and occupation patterns' which would be followed by legislation on restitution without compensation. This was repeated a few weeks later on 3 March 2017 by the President on the occasion of the opening of the



National House of Traditional Leaders. The Panel during its public hearings and expert roundtables heard many submissions calling either for the removal of the 1913 cut-off date, or for significant exceptions to be made to it.

The Panel does not support changes to the 1913 cut-off date. Restitution was designed to address the process of forced removals that happened after 1913 mainly through the operation of laws such as the 1913 and 1936 Land Acts, Section 5 of the Black Administration Act and the Group Areas Act. It was not designed to address the process of dispossession that happened prior to 1913 largely through wars of conquest. In many instances the people who were dispossessed do not have the means to provide legal evidence of their history. Very few would be able to prove how they, or their families, were dispossessed in a court of law. There is the additional problem of different groups having occupied different areas at different periods of time before the wars of conquest. Which of these groups would get the land? Those who were there first? And how to prove who was there first in the mists of time? As recommended in relation to the proposed Land Framework Act we believe that proposed law must contain specific sections that provide redistributive remedies for groups such as the Khoi and San who were dispossessed prior to 1913

The recent Private Members' Draft Bill proposes to reopen land claims in 2021, although it also states that old order claims need to be finalised before new claims can be processed. However, as noted above, research findings are that, based on recent performance and the most recent publicly available work plans of the Commission, it will take between 35 and 43 years to finalise all old order claims.

Table 3.3: Projected rate of finalisation and settlement of claims (based on 2015/16 performance and 2016/17 targets)

Claims to be finalised or settled as of 19 August 2013 (1)	2013/14	Performance according to Annual Reports (2)			Remaining claims as of June 2016 (based on column 1-4):	Total claims to be settled or finalised as at March 2017 (3)	Years to be settled and finalised at 2015/16 rate of performance	Target for claims to be settled or finalised according to annual performance plan 2016/2017 (4)	Years to be finalised at targeted rate according to annual performance plan
		2014/15	2015/16						
Settled	8733:	270	428	617	7418	7418	12	615	12
Finalised	20592	292	372	560	19368	N/A	34.6	454	42.7

Calculations are based on the following sources:

- CRLR presentation to Parliament 19 August 2013 (accessible at pmg.org.za/committee-meeting/16204/)
- Commission for the Restitution of Land Rights Annual Reports 203/14; 2014/15; 2015/16
- News brief from commission for the restitution of land rights; www.ruraldevelopment.gov.za/news-room/news-flash/file/5169
- Commission on Restitution of Land Rights, Annual Performance Plan 2016/17, pp. 20 – 21.

Once old order claims are settled, new order claims will need to be settled. Before the Restitution of Land Rights Amendment Act of 2014 was set aside, up to 80,000 new claims had already been lodged, and it was estimated by the Regulatory Impact Assessment that 397,000 new claims are likely to be lodged with the CRLR. (CRLR Strategic Plan 2015 – 2020, and Annual Performance Plan 2015/2016, p.11). As indicated above in this chapter, at the Commission’s current rate of finalisation (560 claims a year), new order claims already lodged will take 143 years to settle. If, in the wake of a possible reopening of claims the expected 397000 are lodged, the process of Land Restitution will take 709 years.



This projected timeline cannot be wished away by setting unrealistic deadlines such as those announced by the Land Claims Commission and the Private Members Draft Bill. Obviously, it is also not possible to wait 43 years to reopen land claims. Rather, steps need to be put into place urgently to address the fundamental problems causing the poor performance of land restitution. These measures should be formalised in a Land Restitution Amendment Bill.

Voices of the public

The following section reflects a selection of key issues raised by speakers at the public hearings.

‘Our experience... has made us poorer than before we engaged in this land restitution because we are running to courts instead of developing the land.’ (Ms March Motene at the North West hearing)

A number of speakers referred to the conflict, and enormous waste of time and expense in litigation, caused by competing or overlapping land claims, or competing stakeholder interests in particular land under claim.

Particularly alarming is that many of these overlapping land claims emerged only after claims for the same land had been ‘finalised’. The Barokologadi community, for example, reported that they had lodged a successful land claim over some high-value land in North West, but when the land was transferred to them they found that other people outside the claimant community insisted on grazing their cattle there against the wishes of the Barokologadi CPA. It transpired – or was alleged – that these people had lodged their own competing land claim to the farms, which had already been transferred to the Barokologadi CPA. A further issue that deserves special attention is that claimants who are themselves poverty-stricken and see land restitution as a way out of poverty, have to deal with the economic repercussions of overlapping claims themselves, for example, needing to pay legal expenses.

The issue of ethnic and ‘tribe-based’ claims and the 1913 cut-off date also surfaced.

‘Back then there was ubuntu. Today ubuntu has been eroded. There is lack of tolerance in our communities. There is tribalism.’ (Speaker at Limpopo Province hearing)

'It seems like our government has turned Black people against Black people. You don't engage in in-depth research and ethnographic studies, you just take my land and give it to another person or take their land and give it to us, this is disturbing.' (Unidentified speaker at Limpopo hearing)

Chief Pienaar, speaking on behalf of the Griqua people, pointed out that while it is said that 'we are all equal', some were 'practising discrimination against specific minorities like us, the Griqua people'. He hinted at overlapping or conflicting claims with baTswana and baSotho who have been allocated the land that belonged to the Griquas, but was taken from them in terms of 19th century laws.

The problem of dysfunctional communal property associations received a lot of attention during the public hearings.

'Because of the CPA Act, the communities are always in conflict, they fail to make productive decisions, and thus hampering the improvement of food security, reduction of poverty and the improvement of the livelihoods of the beneficiaries.' (Lefa Barrington Mabuela at the Limpopo hearing)

'Land amounting to thousands of hectares was restituted to over 65... families, and farming equipment, irrigation networks and other water sources such as boreholes, immovable properties such as houses and storage facilities were part of the total package of the land parcel given to the communities... Today I stand here before you and all I can account for is an eye-sore of ruins... I can account for stretches of land that lies unattended and unproductive, I can also account for hundreds of poverty-stricken and underdeveloped beneficiaries of the failed restitution process. The millions worth of land is non-existent in the minds of many beneficiaries like me...' (Mr K Dingiswayo at the North West hearing)

'...there were supposed to be elections, members refused to vacate their positions, and there were conflicts. We tried to show them the law and our constitution but they still refused to vacate their positions on the CPA...there was no accountability, there were no reports produced and no financial records shown to the community.' (Billy Masha at the Limpopo hearing)

Allegations of incompetence and corruption, prevalent at all of the Panel's hearings, were particularly pointed on the question of restitution.



'We think that the government...is led by vultures. Imagine a parliamentarian coming down to us, just to loot our money...Since the Land Claims Commission was not time framed, they developed an interest in our claims and they started to loot everything there. It's chaos indeed.' (A speaker at the Limpopo hearing)

'You passed legislations that encouraged us to put up land claims, and when the claims that we put get successful, the land ends up belonging to corrupt civil servants. When they realise that a plot of claimed land has some minerals, they take that for themselves, and that pains us. We were even surprised that there is a budget for post settlement support...since 2008 we have been engaged in this battle and are surprised to hear that this budget was used for other purposes whereas it should have been given to us. We don't receive any assistance from the state, and what is disgusting is that some of your ministers have taken our land...Must we allow the government that we elected to treat us as outcasts?' (A speaker at the Limpopo hearing)

Many speakers also complained that the government is too close to a landowning elite that they protect – and join – at the expense of the poor. One speaker gave the example of ZZZ, one of South Africa's largest agri-businesses, owning substantial properties in Limpopo and other provinces:

'ZZZ company is the advisor to the premier when it comes to agriculture; it is also the advisor to the president when it comes to agriculture, and the land that we have claimed, among other farms is the land that ZZZ occupies there. Do you think that ZZZ can advise Zuma to take that land and give it back to the communities? They will hold the land, so we are not very comfortable with this government.' (Speaker at Limpopo hearing)

Sowing divisions

Much of what was said in the public hearings points to the deep divisions sown through land restitution, as a consequence of overlapping and competing claims, and dysfunctional CPAs. But some speakers said that the government actively encourages people to blame other groups for problems that the government in fact has caused. Specifically, speakers pointed out that the government was trying to exacerbate racial divisions between whites and blacks, and to blame traditional leaders, when in fact government officials are themselves capturing the benefits of land restitution at the expense of claimants, and government has given some traditional leaders 'unaccounted for powers'.

Disempowerment of claimants and lack of justice

One of the issues that is evident above but was also addressed quite explicitly was the lack of empowerment of claimants because the Land Claims Commission and Department for Rural Development and Land Reform take control of outcomes and sometimes negotiate on their behalf. This has created a great sense of injustice, particularly as white landowners and business people are seen as being more empowered – and enriched – than claimants themselves in this process.

‘We never said we want farms. The fact that those occupying the land have turned it into farms is not our problem and has nothing to do with the fact that we want our land back. Why is it that when a person asks to be given back what belongs to them, they are asked what they are going to do with it? If it was your sedan car that was stolen, assuming that the land is a car, and later on the stolen car is recovered, and you go to the police station to claim it back, you find out that your sedan car was converted into a van, and the police tell you that they cannot help you with anything and that you must negotiate with the thief, and the thief tells you that because I converted the sedan car to a van you must pay for costs of converting it, and he tells you that he has been using it to carry passengers on a certain route and that if you have no intention of using the car for that purpose you are not going to get it back. The thief continues and says they found the car with only a little amount of petrol the day I stole it and so reimburse me for the petrol I poured in it. I ask a question: what kind of a country is South Africa where, when you claim for your land or when you claim for communal land, the questionnaire must be answered in English? When even the space provided for in the questionnaire for you to provide details of the land you are claiming is very small and you are forced to identify the land by the name given to it by the person who forcibly removed you from it.’ (Speaker at KZN hearing)

Frustration with the slow pace of land reform was evident in most submissions from people who were embroiled in land claims. A farmer from Mpumalanga raised the concern of the impact of land restitution on the economy, and raised the concerns of farmers – as opposed to land claimants – more broadly.

‘The reopening of claims brings a lot of uncertainty to our members with regards to future developments of business. I picked up this uncertainty among emerging black farmers, farmers



who are beneficiaries leasing land from government. Some of them received notices of claims on land they lease. Let me also mention the frustration of commercial farmers due to tenants' claims. It seems that a lot of these claims are not valid at all. At the same time landowners experience frustration because of land claims as well as damages to property caused by the so-called occupants that do not respect formal agreements between themselves and the farmers regarding household safety on the farm, like for instance the number of cattle allowed to be kept on the land.' (Mpumalanga public hearing)

Analysis of legislation passed

The Restitution of Land Rights Act of 1994 and its subsequent amendments had a number of flaws.

- The definition of community was not detailed enough.
- No eligibility criteria were provided for the necessary qualifications of Commission staff or for the requirement of a training programme to equip staff with skills in the performance of the Commission's functions.
- Section 6 outlining the functions of the Land Claims Commission was not detailed enough to provide the Commission with proper guidelines, and failed to list functions essential to ensuring accountability.
- Section 7 of Act 7 of 1996, Section 10 of Act 63 of 1997 and Section 6 of Act 18 of 1999, which gave the Commission powers to settle claims administratively out of court, were misguided and had negative consequences.
- Section 33 of Act 22 of 1994, as amended by Section 13 of Act 63 of 1997 did not provide enough detail regarding guidelines for determining feasibility or equitable redress.
- The Act did not specify the positive obligations on other arms of the state to fulfil the goals of land restitution.
- More land claims were lodged than the Land Claims Commission was equipped or had the capacity to deal with.

- Weak capacity has been compounded by poor management of critical functions of the Commission such as records management.
- The Commission has been unable to manage the process of validating or researching claims adequately. Administrative settlement of claims has resulted in ad hoc, personality-driven settlements, which frequently ignore the validity of claims to specific farms.
- The definition of 'community' was not adequately adhered to in the lodgement, acceptance and settlement of claims. There have been many overlapping claims. Because of the failure to quickly and effectively address overlapping claims, land restitution has brought conflict, diverted resources away from rural development and frustrated the dreams of poor communities.
- Many communal property associations are dysfunctional and government attempts to resolve this problem have so far tended to disempower people further, with some people arguing that too much power is being given to chiefs, and others feeling excluded and disempowered when government makes unilateral decisions regarding their restitution awards.
- Many people whose claims have been 'finalised' do not see these awards and have experienced no benefits. People overwhelmingly blame corrupt government officials for this state of affairs.
- There is a deep distrust of the government at all levels, from officials of the Land Claims Commission and Department for Rural Development and Land Reform, to local premiers, to Members of Parliament, who are seen to have captured the benefits of land restitution for themselves.
- The uncertainty caused by the programme has a negative effect on the rural economy, and also on social relations between conflicting claimants (often on ethnic or tribal lines) and between claimants and white landowners – tensions that some feel the government may even be trying to encourage.



- Land restitution has so far been a slow process, and even finalising all ‘old order’ claims may take another 40 years – by which time many current claimants will be dead. Members of the public are angry and have seen few benefits of land restitution coming to them, despite billions of rands being spent.

Implementation of legislation

Implementation has been poor at every level. While the budget has been criticised for not being high enough to cover the costs of restitution (for example purchasing land required) the Commission has consistently underspent the budget, suggesting that the fundamental problems lie with capacity and systems. Choices around spending have been poor. There has been political meddling in land restitution, both in terms of unreasonable targets for redistribution, as well as in terms of individual restitution awards, which has damaged the integrity of the process.



Recommendation 3.2

1. Land claims lodged on or before 31 December 1998 need to be resolved expeditiously, consistent with the order of the Constitutional Court in the LAMOSA judgment.
2. The 1913 cut-off date must be retained.
3. The statutory independence of the Commission from the Department of Rural Development and Land Reform needs to be restored and regional land claims commissioners appointed in terms of Section 4(3).
4. The capacity of the Commission needs to be rationalised:
 - The work of the Land Claims Commission involves both complex legal settlements/transactions and complex litigation, and people with the required skills are needed to staff it. Officials need to have relevant background and historical and legal training, and need to undergo further training for their specific roles. This involves training in the process of recording and administering claims, and managing an appropriate filing system.
5. The Land Claims Court needs to be stabilised by the appointment of permanent Land Claims Court judges. This is a problem that has been left unaddressed for some seventeen years. This requires:
 - Enacting the Restitution of Land Rights Judicial Amendment Bill, already prepared and attached as a separate document; [Annexure L2]
 - Pursuant to enacting the Bill, appointing a permanent Judge President and judges of the court.
6. Create an independent panel within the Commission to research claims.



6.1 Section 6 of the Restitution Act requires the Commission to investigate the merits of land claims. Section 9 should be used to create a panel within the Land Claims Commission or appoint an organisation that provides an independent, qualified research panel to research claims and assist the Land Claims Court in reviewing improperly consolidated claims that have been referred to the Court. The panel/unit must –

- 6.1.1 review the current database and eliminate discrepancies;
- 6.1.2 screen all claims, starting with those that have been referred to the Land Claims Court but are not progressing;
- 6.1.3 consider objectively if claims meet the requirements under Section 2 of the Act;
- 6.1.4 if not, amend the Commission’s recommendation to the Land Claims Court in the referral report to dismissal of the claim, or if the claim has not yet been referred to court, de-gazette the claim in terms of Section 11A and apply Section 11(3) or (4);
- 6.1.5 where the Commission has improperly consolidated claims and the consolidated claim has been referred to the Court, either the referral must be withdrawn or the referral report must be amended to provide for the referral of the distinct claims.

6.2 Where the Commission has created an artificial, consolidated community, either the referral must be withdrawn or the referral report must be amended to remove any reference to the artificial community and substitute the true claimants as the claimants before court.

6.3 Claims still to be investigated, including those lodged under the invalid 2014 Amendment Act (when the time comes for their investigation in terms of the LAMOSAs judgment), need to be dealt with by the specialist panel or unit. Amendments to the Restitution Act that are urgently required include:

amendments to the definition of 'community' to –

- 6.4.1 Incorporate the principles established in the Kranspoort judgment;
- 6.4.2 Ensure that the interests of those truly dispossessed are not diluted by piggy-backing on claims by persons not dispossessed of rights in land, including traditional communities or traditional leaders not dispossessed in the manner contemplated in the Constitution and the Restitution Act; and
- 6.4.3 Ensure that the definition of community keeps with the initial intention of the Restitution Act, which was not intended for pre-1913 claims.

6.5 The definition of community would thus need to incorporate at least the following elements:

- 6.5.1 Community when considered at the time of dispossession means any group of persons whose rights to land are derived from shared rules determining access to land held in common by such group, and/or who used land with a sufficient degree of autonomy and cohesion at the time of dispossession; and includes part of such group.
- 6.5.2 Community when considered at the time of lodgement of a claim means any group of persons which has substantial commonality with the community as it was at the time of the removals, and which shows a sufficient degree of cohesion in the present, beyond family connections alone.



6.6 The provisions requiring Land Claims Court scrutiny and approval of settlement agreements must be re-enacted, prescribing specific criteria for the Court to consider, including criteria for –

- 6.6.1 approving just and equitable compensation paid to current owners; and
- 6.6.2 joint ventures, lease-backs and similar arrangements forming part of settlement agreements;
- 6.6.3 ensuring consistency of treatment of claimants and claims;
- 6.6.4 substantive provisions to allow decisive and effective intervention where CPAs and trusts have become dysfunctional, particularly as a result of consolidation of claims, creation of artificial communities or failure to apply the *Kranspoort* judgment;
- 6.6.5 terminating the role of the Commission following a restoration award or order in line with the *Meer* judgement in the *Shongwe* case (46/2009) which holds that ‘Once a restitution award is made the Act provides no further function for the Commission’. A different body with the capacity to deal with post-settlement support needs to take over following a restoration award or order;
- 6.6.6 clarification of the meaning and application of the concept of ‘feasibility’ of restoration as referred to in Section 33 of the Restitution Act, including the introduction of clear criteria for the adjudication of feasibility of restoration;
- 6.6.7 provisions imposing strong and enforceable duties on the DRDLR and on other departments and spheres of government to provide a full range of technical, financial, resource, administrative, accounting and other support to claimants who receive restoration of land and relieving the Commission of any duties in this regard;
- 6.6.8 provisions ensuring the co-ordination of the provision of such support.

The question of equitable redress needs to be revisited:

7.1 In respect of financial compensation as contemplated in Section 35(1)(c) –

7.2 criteria for the determination of compensation must be incorporated by way of an amendment to the Act, or by way of a combination of amendment and regulation based on –

7.2.1 the nature of the rights lost;

7.2.2 ensuring consistency of treatment of claimants, whether they receive compensation determined by the Land Claims Court or the Commission;

7.2.3 justice and equity

7.2.4 eliminating arbitrariness, such as basing the amount on the amount of the housing grant in some cases, but not others;

7.3 With regard to consistency between people who get land and people who get other forms of restitution, it should be kept in mind that equitable does not need to mean equal.

7.4 The criteria for equitable redress must be determined based on advice from legal experts, valuers, and economists and such other experts as may be appropriate.

As regards alternative state-owned land as contemplated in Section 35(1)(b) of the Restitution Act, the line ‘the granting of an appropriate right in alternative state-owned land’ should be amended to read ‘the granting of an appropriate right in alternative land’, along with provision for the expropriation of alternative land where this is necessary.

A draft Restitution of Land Rights General Amendment Bill is attached as Annexure L3 for illustrative purposes.



Serious consideration should be given to making the restitution process document-based and only permitting oral evidence where the documentary record is incomplete or where there are disputes of fact that can only be resolved through the hearing of oral evidence. This would speed up the decision-making process of the Land Claims Court on claims.

Where a claimant dies subsequent to the lodging of a claim and without leaving a will, Section 2(3)(b) of the Restitution Act is unclear as to whether only the oldest descendant in each line of descent may be substituted as claimant or all living descendants may be so substituted. This needs to be amended to clarify that only the oldest surviving descendant in each line of descent may be substituted.

Speculation by persons in government and leadership positions about revisiting the 1913 cut-off date must end as because it:

- fails to take into account that it is constitutionally entrenched in Section 25(7) of the Constitution;
- raises false expectations; and
- if implemented through a constitutional amendment would flood the Commission with profoundly difficult claims and prejudice existing claimants.

Mechanisms to enforce accountability and implementation

The Act must be amended to provide for formal reporting by the Commission and the Minister to Parliament and to the Judge President of the Land Claims Court at specified intervals, say yearly or every second year, on progress in the implementation of the Restitution Act as amended. This should involve a written report, as well as a process of accounting to the court in person.

The role of CPAs and trusts in land reform

The constitutional and legislative mandate

Section 25(5) requires the state to take reasonable legislative and other measures to foster conditions that enable citizens to gain access to land on an equitable basis. Entities that hold land reform land communally must therefore enable citizens (beneficiaries) to access such land on an equitable basis.

Section 25(6) states that those whose tenure is legally insecure as a result of past racially discriminatory laws or practices are entitled through an Act of Parliament, either to tenure which is legally secure or to comparable redress.

Where the resolution of such insecure situations results in group landholding arrangements, these must ensure that the tenure obtained is secure through the entities established.

Problem statement

More than 8 million hectares of land has been transferred through land reform – redistribution, restitution and tenure reform after 1994. The majority of these hectares are held by Trusts or Communal Property Associations (CPAs) – a total of about 3 000 entities. The Department's Annual report on CPAs of 2015-2016 reported that only 208 of the 1 490 registered CPAs were compliant with the Act².

The commissioned Diagnostic Report on Land Reform (2017) noted the following with regard to Trusts and CPAs:

1. The entities often consist of large groups of people living in different places, with varied resources, assets, skills, and interests in the land they once owned; inevitably producing



complex and conflictual group dynamics centring on land use and tenure issues, particularly regarding individual rights and benefits.

2. They are underresourced and have very limited and ineffective support and oversight from government, and there is a serious lack of communication between the entities and officials.
3. There is a lack of specification of rights in their founding documents. The substantive rights of members are not clearly spelled out and defined. The process of establishing land-holding entities tends to be poorly designed and facilitated. Many of them have founding documents that do not reflect the understandings of their members or are poorly aligned to local land tenure practices.

The Diagnostic Report commissioned by the Panel asserts that major investment in supporting existing CPAs and trusts, and in establishing more robust institutions for new claims, as recommended by the 2005 CSIR study, is needed.

The CPA Amendment Bill ('the Amendment Bill') was recently introduced in the National Assembly. The substantive amendments introduced relate to the introduction of the office of the Registrar of CPAs, the requirement of a land use plan and the requirement for consent from the Department by the community should they intend to encumber, lease or sell their property. The amendments propose that the state retains ownership over the property and CPA's role be downgraded to that of land management, as opposed to ownership.

At the public hearings of the Panel, people told of their experiences of capture of resources by elites, of embezzlement of funds, of the lack of support from government, of the tensions between traditional leaders and CPAs and of the lack of any positive change to their livelihoods.

In summary, there are two main ways in which the difficulties faced by CPAs and Trusts emerge – the lack of careful establishment of the entities resulting in dysfunctional entities from the beginning; the lack of support to fledgling entities who have a significant task in ensuring security of tenure and social development through improved livelihoods.

If land holding entities are dysfunctional, land cannot be productively used and the constitutional imperatives of ensuring equitable access to land and tenure security are flouted.

Recommendation 3.3

1. The Department should dedicate a budget and costed plans with clear capacity requirements and performance indicators for the recommendations below to be implemented effectively.
2. Register all land holding entities in land reform as CPAs. This would extend the benefits in the CPA Act to Trusts and would provide the Department with oversight of all legal entities in land reform. The Master's office does not have the capacity or legal authority to address or resolve the complex disputes emanating from land reform trusts.
3. It is recommended that new regulations in the CPA Act must be introduced to require a detailed process guided by the Department which enables the community to determine land use, user right allocation or confirmation, rights management and administration systems and structures – agreed to prior to concluding the constitution. This process must enable members to draw on either existing or preferred customary systems for managing their land rights and, where necessary, transform these to democratise rural areas and bring the applicable customary law in line with the Constitution.
4. There is a need for a new form of land right that is not ownership, and is not leasehold, but that is secure and administered properly – internally and externally – by the CPA Registrar, by the local municipality and by the Deeds Office as suggested in the proposed Land Records Act in the Chapter on Spatial Inequality. It is crucial to make these rights visible for people who have lived all their lives with no official recognition of their land rights, despite arguments about whether these are real rights from a common law perspective. As discussed elsewhere in this report, family rights based on customary law are rights both in the sense that they are real entitlements for the participants, and that they can be defended against the world. It is time these rights were confirmed by accurate recordal.
5. It is recommended that a robust land administration system be developed. This system needs to be linked to a recordal system in local government and through the Department's CPA registrar to the Deeds Office to ensure external oversight of the security



of land tenure in CPAs. This system would also provide reliable data on how much land has been transferred under the different programmes of land reform i.e. redistribution, restitution and tenure reform, and the identity of the beneficiaries.

6. Building staff capacity in the Department and in service providers who are contracted to establish and support CPAs (and trusts) is urgently required. A modular staff training programme is required for officials to practically understand the complexities of establishing CPAs.

7. A key phenomenon among CPAs and Trusts is where they have been established to amalgamate a number of communities or groups under a single entity in restitution, or many individuals in a group as part of a redistribution project – a practice causing significant and ongoing levels of conflict or dysfunctionality. The Act provides for dispute resolution but not for a situation that enables members to voluntarily leave the CPA and set up a separate CPA with its own land. The Act must be amended to provide clarity as to how such amalgamated CPAs can unbundle themselves, and in large CPAs enable the many dormant or inactive members to withdraw from the CPA.

8. The monitoring of performance of both the CPAs and the Trusts is limited in both Acts. The CPA Act requires an annual report to be submitted to the Director-General but it does not set out the detail that should be contained in it. It is recommended that the financials of a CPA should be attached to this report.

9. The current CPA registrar in the DRDLR has very limited capacity and consequently provides little or no monitoring or support to CPAs. The draft amendments to the CPA Act in 2016 provide for enhancing the Registrar in terms of the CPA Act. This requires greater clarity on the role and nature of support to CPAs. It is recommended, given the extent of land that such entities hold, use and manage, that a significantly improved facility be provided for which includes an expanded CPA Registrar and the allocation of a commensurate budget and powers to intervene to support CPAs in their functioning. This will include providing support with the land use plan, office infrastructure, staff, and governance support to the management committee, including training.

10. Section 9 (1) (e) (iv) in the current Act prohibits the purchase of shares in non-listed companies. This has had many unexpected effects. It is recommended that the Act be amended to allow for the purchasing of shares in non-listed companies but to ensure that, prior to acquiring shares, the management committee must among others be subject to the provisions of Section 12.

11. When a court places a CPA under administration of the Director-General as determined in Section 13 of the Act there must be greater clarity of the role played by the Registrar. The provisions for the appointment of Statutory Management in Section 5A of the Financial Institutions (Protection of Funds) Act 28 of 2001 provides further insight to possible measures to be introduced in this regard.

12. To enhance internal and transversal accountability within CPAs it is recommended that the CPA Act be amended to require the following:

- the appointment of a Finance Management Committee;
- that CPA Constitutions should require a two-tier governance structure that distinguishes executive and non-executive responsibilities;
- that amendments are introduced to guide the relationships between CPAs and the other legal entities that they establish to carry out specific functions for the success of their developmental objectives; and
- as part of these accountability dimensions an ombudsman-type structure should be established to deal with complaints and enforce compliance in terms of the CPA Act and to which members and office-bearers can refer matters and obtain support as required.

The recommendations in this document are contingent on there being sufficient staff capacity in the department, which is currently a severe constraint. If any of the recommendations are to be implemented successfully, the Department will have to address both the numbers of staff and their capacity – and this will be expensive.



The recommendations in this document are contingent on there being sufficient staff capacity in the department, which is currently a severe constraint. If any of the recommendations are to be implemented successfully, the Department will have to address both the numbers of staff and their capacity – and this will be expensive.

In summary a high proportion of the existing land reform legal entities are either defunct or in a severely weakened condition. This is part of the reason that 4.3 million hectares, acquired through land reform, is currently out of production. Land reform has therefore provided few benefits for the majority of those accessing land through the programme. While there are many factors which contribute to the failure of land reform, the inadequacies in the operation and management of land holding entities is a crucial factor. This needs to be addressed if we are to turn this situation around – particularly if further land reform is to happen, and particularly in addressing the lack of land administration in the former homelands. The implementation of the recommendations highlighted in this document will go a long way towards remedying the situation and making land reform mean something to the people of South Africa.

Security of tenure

Constitutional mandate

The right to tenure security is recognised in Section 25(6) of the Constitution. This provision states that ‘[a] person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or comparable redress’.

Section 25(9) stipulates that Parliament pass legislation to give effect to this provision.

Introduction to tenure security and specific laws

Apartheid denied black people rights in land not only via dispossession but also by imposing a discriminatory tenure system that created a second-class set of off-register and largely informal forms of land occupation. This applied particularly in relation to rights derived from customary law, involv-

ing group-based (or social) land tenures often in the former homelands. People living on farms and on the outskirts of the cities were also rendered structurally insecure in that they had, and continue to have, no recorded or enforceable rights to land that they may have occupied for many decades.

There is a fundamental correlation between vulnerable forms of tenure and the geography of spatial inequality and poverty that remains entrenched in South Africa. The Panel discusses this correlation and the factors driving it, in a cross-cutting chapter about spatial inequality that pulls together the implications for poverty and inequality, social cohesion and inclusive citizenship. We propose that a system of affordable recorded land rights that is accessible to all South Africans at family and individual level is a prerequisite to tenure security being achieved, and to economic and political inclusion. We put forward proposals in this regard in the chapter on Spatial Inequality.

This section on tenure security does not focus on those broader issues but restricts itself to laws about tenure security, legislative gaps and problems of implementation. First it discusses tenure security in communal areas. The two laws at issue here are the Interim Protection of Informal Land Rights Act of 1996, and the Ingonyama Trust Act of 1994. It then discusses tenure security on farms, with the two laws discussed being the Extension of Security of Tenure Act of 1996 and the Land Reform (Labour Tenants) Act 3 of 1996. Urban tenure issues are dealt with in the chapter on spatial inequality

Section 25(6) and the Interim Protection of Informal Land Rights Act (IPILRA)

Constitutional mandate

Despite the constitutional imperative to secure and protect land tenure, there remains no substantive legislation to defend communal land tenure. The only existing legislation is IPILRA. This was introduced as a ‘holding measure’ or ‘safety net’ to ensure temporary legal protection of tenure for people in communal areas while the state developed comprehensive legislation to give effect to Sections 25(6) and (9) of the Constitution. IPILRA has been renewed annually since 1996, given Parliament’s failure to introduce such comprehensive legislation. A key finding of the Panel is that Parliament has not yet met this obligation in respect of the 17 million South Africans who live in the former homelands.



Section 25(6) envisages both that vulnerable land rights must be made legally secure, and that due to the forced overlapping of land rights during apartheid, in some instances people will have to be provided with alternative redress because others may have stronger or more compelling rights to the land in question. It thereby includes a redistributive component, which recognises that were all rights to be confirmed in situ, past dispossession would be entrenched.

In addition to Section 25, Section 7 of the Constitution mandates the state to ‘respect, protect, promote and fulfil’ the rights contained in the Bill of Rights, which includes the right to tenure security for those whose tenure is insecure as a result of previous racially discriminatory laws or conduct. The obligation to ‘respect’ places a duty on the state not to impair a person’s existing right to tenure security. In other words, the state must refrain from interfering directly or indirectly with the tenure security that people have realised for themselves. The state would fail to comply with this obligation if it were to pass legislation that weakens the rights that people have in relation to land. The obligation to ‘protect’ requires the state to take measures to prevent others, including individuals, groups and corporations, from interfering with the right to tenure security of those living in communal areas.

It was in compliance with this duty that the state enacted IPILRA. However, this obligation does not end with the enactment of protective legislation, it also requires that the state ensure that such protective legislation is effectively implemented in practice. The obligation to ‘promote’ and to ‘fulfil’ the right to tenure security requires that the state ‘adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures toward the full realisation of the right’ to tenure security.¹ In other words, Section 25(6) places a duty on the state to be active in finding ways to realise these rights for people, over and above enacting instruments to prevent harm to these rights.

² See the United Nations Committee on Economic, Social and Cultural Rights, ‘General Comment No. 14: The Right to the Highest Attainable Standard of Health’ (2000), UN Doc E/C.12/2000/4, p. 33. Although this is in the context of the right to health, the legal obligations are similar in relation to the rights created in terms of section 25(6) of the Constitution.

Overview of policy goals informing legislation

IPILRA was introduced in 1996 to provide immediate protection to vulnerable rights holders while a more comprehensive law was being developed. Informal land rights were elevated to the status of property rights in that the Act provides that people may not be deprived of informal rights to land without their consent, except by expropriation. This was not only to ensure protection from eviction but also to ensure that people with informal rights be included as stakeholders in any development and other decisions affecting their land rights. IPILRA applies not only to all land in the former homelands, but also wherever people occupy land as the ‘beneficial owners’, which means freely and openly, and without consent. This was in recognition of the fact that during apartheid black people with *de facto* and undisputed rights to land were denied any legal protection for such rights.

Interim Procedures were adopted by the Department of Land Affairs to govern situations where the Minister of Land Affairs was required to sign approvals pertaining to communal land in his capacity as the nominal owner of the land. These Procedures set out the processes of consultation required for the Minister to uphold the rights guaranteed by IPILRA when approving contracts pertaining to communal land. However IPILRA rights exist not only on state land in rural areas but also in urban areas where there is beneficial occupation.

The 1997 White Paper on Land Reform acknowledged that the task of developing comprehensive legislation to give full effect to Section 25(6), including its redistributive component, is a difficult one that needs to take into account various complexities. These included the following:

- Overlapping and conflicting interests in densely populated areas;
- Overlapping different forms and hierarchies of rights (some statutory, some customary, some freehold, some recorded, some unrecorded);
- A Deeds Registry system that recorded only common law rights and not customary law rights;
- Tension between the requirements of the Deeds Registry system to match delineated land parcels with delineated owners, and the nature of customary land rights that are generally family based and allow for nested and relative rights at different levels of social organisation;



- Large areas of unsurveyed state land, especially in the Eastern Cape; and
- The political stand-off between traditional leaders and municipalities in relation to the ownership status of state land, and in relation to responsibility for land administration, allocation and planning.

After IPILRA was enacted in 1996 the Department of Land Affairs produced the White Paper on land policy in 1997 and began work on the draft Land Rights Bill. Both asserted the principle that people whose occupation of land was rendered legally insecure because of apartheid are the *de facto* or underlying owners of the land. The structure proposed was that the ownership of land must vest in the people who occupy and use it, rather than in leaders holding it in trust 'on their behalf'. The White Paper stressed that this was imperative for people to be able to hold leaders to account, and would apply equally whether people chose traditional or elected structures to administer common property areas.

The preamble to the Land Rights Bill included the following:

- Millions of people who occupy, use or have access to land in communal areas, particularly in the former homeland and former South African Development Trust areas, do not have secure tenure;
- There is a critical overcrowding of land and overlapping of rights and interests in land in these areas contributing to severe poverty, disputes and underutilisation of land;
- Much land in these areas vests in the State and there is widespread confusion about the status of land rights and about who may make decisions in respect of the land. This confusion contributes to disputes and delays, inhibiting development and investment in the land.

It stated that it was desirable:

- That people living in these areas acquire secure land rights and decision-making powers in respect of the land which they occupy and use and that investment and development be promoted;
- That people whose land rights are diminished or compromised as a result of forced overlapping of rights and interests acquire additional or alternative land;

- To clarify the legal status of rights on state held land in these areas, to provide for the registration of such rights and to provide for accountable structures to represent communal rights holders in decisions and transactions regarding their rights.

At around the same time, however, the Department also introduced the Communal Property Associations Act as a means to enable groups of people who had applied for, and obtained, restitution to be able to take ownership of the land being restituted to them. While this law attempted to put in place procedural mechanisms to ensure internal accountability, it defaulted to the single owner paradigm of the Deeds Registry system, with ownership vesting in the Communal Property Association. It provided only procedural remedies to families and individuals to enable them to hold CPA committees to account, not family based rights to specified areas within the boundaries of the CPA.

Overview of trends between 1994 and 2010

Some traditional leaders interpret the introduction of landowning CPAs as a threat to their status. Others continue to work closely with CPA committees. However a lobby approached government with concerns that for groups to have title to discrete areas of land undermined their authority because such groups became ‘independent’ of their control. They redoubled demands for the ownership of ‘communal land’ to be transferred from the state to traditional leaders or ‘tribes’. This had been the intention of the KwaZulu government prior to the end of apartheid. The National Party government together with the Inkatha Freedom Party enacted the Ingonyama Trust Act in 1994 just before the transition to democracy. This Act transferred the trusteeship of land in KwaZulu from the national minister to King Goodwill Zwelithini. The intention at the time was that the land would later be surveyed into specific parcels and transferred to ‘tribes and communities’ in KZN as delineated in terms of the Bantu Authorities Act of 1951.

In an effort to expedite land reform after 1994 the Department of Land Affairs began to transfer farms to large groups of people who took ownership through either CPAs or Trusts. This was in respect of both restitution and redistribution projects. With hindsight, prioritising delivery over the intricate and time consuming job of identifying specific rights holders, and where appropriate awarding land to smaller units for separate families and groups has locked people into large dysfunctional groups where they struggle to hold their leaders to account. This problem was exacer-



bated by weaknesses in the restitution process, which prioritised speed of delivery over thorough investigation into the validity of claims, and sometimes amalgamated conflicting claims, rather than attempting to resolve disputes.

A clear issue emerging from the restitution and redistribution reviews commissioned by the Panel, as well as the public hearings, is that despite attempts to secure rights on a group basis, individual and family rights within groups are often disregarded, whether by traditional leaders, CPA committee members or the strategic partners imposed through the Recapitalisation Programme. Thus people require stronger and more clearly delineated individual and family-based rights to be able use their land effectively and to hold leaders to account. To some extent CPAs fell into the very trap that the tenure policy had warned against in relation to tribal ownership.

In 1999, a new Minister of Land Affairs was appointed. She stopped work on the draft Land Rights Bill that had sought to vest ownership of communal land in the occupiers and users of the land. She took a different approach that was responsive to the concerns and claims expressed by traditional leaders. Work began on drafting a new Communal Land Rights Bill (CLRB).

The CLRB provided traditional leaders with far-reaching powers over rural land. It also enabled the Minister to endorse title deeds held by Trusts, CPAs and individuals over to the Traditional Council within whose jurisdiction they fell. Land-owning communities, including those who had bought land historically were concerned that this undermined their property rights.

The Bill was contested in Parliament, but speedily enacted shortly before the 2004 elections. Four rural communities challenged it as undermining the Constitution. They won in the North Gauteng High Court in 2008 on the basis that the Bill undermined, rather than enhanced security of tenure, and again when that judgment was referred to the Constitutional Court for confirmation in 2010. The Constitutional Court found the rushed parliamentary process to be invalid and struck down the Act in its entirety.² During the hearing at the Constitutional Court Deputy Chief Justice Dikgang Moseneke said that there was a ‘crying need for land reform’ in South Africa, but ‘to use the Black Authorities Act of 1951 as a platform for reform after 1994 is simply incredible’.

3 *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* 2010 (6) SA 214 (CC)

Overview of trends between 2010 and 2017

Despite the fact that the Communal Land Rights Act was declared invalid in 2010, government support for its premises served to deepen the growing uncertainty about the status of land rights in communal areas.

Minister Nkwinti announced in 2013 that he no longer supported the existence of Communal Property Associations in ‘communal areas’. He said that government could not support landownership by ‘communities within communities’. An affidavit by a Chief Director from the Eastern Cape in litigation about the delayed transfer of land to the Cata CPA revealed that the Minister had placed an internal moratorium on transferring title to CPAs in former homeland areas. This explains the long delays that many restitution and redistribution beneficiaries were complaining of in the settlement of outstanding claims.

A dispute arising from one such delay finally reached the Constitutional Court in 2015.³ The Court was critical of the then Minister of Land Affairs’ decision to override the community’s choice that the land be transferred to a CPA, and instead transfer it to a Trust headed by Kgosi Nyalala Pilane. The Court insisted that the Department honour the community’s choice and implement the provisions of the CPA Act as required by Section 25 of the Constitution.

Tensions are extremely high in areas where mining is taking place on communal land. The TLGFA provided a veneer of legality to the actions of those traditional leaders who purport to have the sole authority to represent rural people in negotiations with mining houses. But the veneer has peeled away. Even the Department of Co-operative Governance and Traditional Affairs has admitted that 14 years after the law was enacted most traditional councils are not legally constituted.

In any event traditional leaders do not have the legal authority to sign deals in respect of state-held land. Only the Minister has this authority, and he like others, is bound by IPILRA to obtain the consent of rights holders before he authorises surface leases that will impact on land rights.



Voices of the public

The public hearings indicate that people on the ground attribute their current tenure insecurity to collusion by government officials who have failed to enforce existing legal checks and balances, so that elites are enabled to profit from land and mining deals.

A speaker in Mpumalanga highlighted that *'Rural communities still do not own land. They continue to live under an old legal system...People live on the land but they do not own the land'*. He laments the intention of the land reform legislation: *'Instead of ordinary people getting back the land, the land is given to senior government officials and politicians. They are taking the land that is supposed to be owned by ordinary people...People continue to suffer because the land is sold...It is common here in Mpumalanga where I live that traditional leaders sell land to foreigners.'* He gives the example of Nkomati local municipality, where the levels of unemployment are very high. Yet *'day in and day out the land is sold by traditional leaders to foreigners.'*

In KwaZulu-Natal, a speaker told the Panel:

'We live in great hardship in South Africa. We are dispossessed of our land by development, by the mines, and we get no compensation or benefits out of the so-called development on our ancestral land. We are not consulted. We have turned into non-entities with nothing, and yet we are the rightful owners of the land. We don't have certainty as to what is going to happen to us and our land.'

According to another speaker in KwaZulu-Natal: *'Investment deals are concluded by the traditional leader without consulting with, or even informing, the community, who simply see bulldozers and trucks on the job. Dynamiting operations crack the walls of houses; coal dust covers roofs so that it becomes impossible to harvest rain water; the same soot covers grass and renders it unfit for grazing. The traditional leader does not want to account, refuses to attend meetings.'*

With regard to implementation, there is a widespread sentiment that the laws that do exist are not implemented and rural peoples continue to have their constitutional rights trampled.

Insights from commissioned reports and round tables

Communal areas remain sites of persistent poverty and inequality. Far from recent law and policy enhancing security of tenure, they have rendered people living in the former homelands, who

bore the brunt of forced removals and the Land Acts, vulnerable to dispossession. Not since 1986, when the policy of forced removals was abandoned by the apartheid government after concerted resistance by rural people, have rural people been as structurally vulnerable to dispossession as they are currently.

Not only has Parliament failed to enact a proactive law to secure tenure as required by Sections 25(6) and (9), but government has failed to enforce the basic protective rights set out in IPILRA.

The unintended consequence of the lack of legislative protection for the land tenure of rural people is that powerful players have been able to strategically take advantage of their vulnerabilities. These actors include transnational mining companies, foreign investors, traditional leaders, traditional councils, and commercial farmers, who continue to benefit from the lack of state regulation to address the structural inequalities and vulnerabilities created by colonialism and apartheid.

The insecurity that comes with economic deprivation is compounded by continued tenure insecurity. These conditions have created an enabling environment for what is referred to globally as 'land grabs', referring to the leasing and buying of large swathes of land held under customary tenures by foreign investors. Scholars have argued that governments play a critical role in enabling or containing land grabs (Wily, 2012). 'Land grabs past and present have relied upon legal manipulations which deny that local indigenous ('customary') tenures deliver property rights, thereby legalising the theft of the lands of the poor or subject peoples' (Wily, 2012).

To promote foreign direct investment and stimulate economic growth governments often 'actively welcome commercial land investors and structure legislation accordingly' However, assumptions about the benefits of these land deals should be carefully scrutinised. As Wily writes:

'[T]he benefits to host governments are opaque. Aside from likely personal rewards to facilitators and signatories, and the strategic conviction that such investments offer the new path to growth ... the answer must lie in anticipated technology transfer, prompts to infrastructure development, the pickings and leavings of products not fit for export, and most of all, the promise of jobs. As suggested above, these are not yet forthcoming' (Wily, 2012).

The World Bank recently released a report on land grabs, which shows that land grabs occur mainly in



countries where land buyers can exploit governments that are plagued by corruption. These governments are unable to adequately regulate land transactions, and are unable to prevent buyers from targeting the poorest rural communities (especially those living according to communal land tenure systems).

The lack of tenure security has been exacerbated by a total breakdown in land administration. Confusion and contestation about the legal status of communal land is compounded by the existence of overlapping and competing authorities, and overlapping and competing versions of land rights. Existing records of old systems of land rights such as PTOs are not preserved, and are instead even denied in some instances. This makes it very difficult for people to prove the history of their land rights and assert them in the face of threats or the denial that land rights ever existed at family and individual level.

Vulnerability of women

Women's land rights are generally still more insecure than those of men, in part because of wider social prejudice but also because the implementing agencies charged with securing rights have not confronted these inequalities sufficiently strongly. A representative from the Maehengwa CPA in Limpopo submitted: *'We thought that when women are engaged in an endeavour that would empower them, they would be supported. We posed this question to the Land Claims Commission, as to whether they give women-lodged claims a priority as they are the ones who were marginalised the most, and they said they don't care who lodged the claims, and they have too much backlog to be considering the gender of claimants.'*

In her submission in KwaZulu-Natal, Mrs S Ngubane stated that rural women suffer in relation to land allocation and tenure security. In many areas land is allocated only through men. She said that only two traditional leaders in KwaZulu-Natal allocate land to women in their own right... *'In particular, women should own land because when a husband dies, the widow invariably gets expelled, a phenomenon that has been prevalent since the onset of HIV-AIDS, where a husband's death was automatically blamed on the woman'*. She further argues that *'Single women are particularly hard-hit; their rights are trampled on daily in a cycle that sometimes involves collusion between traditional leaders and the woman's male relatives.'*

Communal Land Tenure Bill

During the course of the year, Minister Nkwinti announced that a Communal Land Tenure Bill would be introduced in June 2017. The latest version of the Bill provides that a community can, by a resolution supported by at least 60% of the households in the community, choose to have its communal land managed and controlled by one of three institutions: a traditional council; a CPA; or the Ingo nyama Trust. In reality, the CLTB offers communities an artificial choice because the government's Draft Policy Paper on CPAs states that no new CPAs will be established in areas where traditional councils already exist⁴, meaning throughout the former homelands. It is important to note that the power to register CPAs lies only with the Department of Rural Development and Land Reform – which has strongly opposed and undermined CPAs in practice as highlighted in the Constitutional Court's 2015 judgment about the Bakgatla baKgafela CPA. This means that the Bill defaults to the same paradigm as the Communal Land Rights Act, large sections of which were stuck down by the North Gauteng High Court in 2008, and the entire Act by the Constitutional Court in 2010.

The chances of the CLTB passing constitutional muster this time around are even slimmer. In the interim Traditional Councils have failed to transform as required by the TLGFA, and COGTA has conceded that most are not legally valid. Furthermore the scale of the Department's failure to enforce and protect IPILRA rights is now well documented, as are the consequences for the tenure security of the most vulnerable South Africans. This does not mean that most traditional leaders dispossess rural people, but it shows that rural people are structurally vulnerable to abuse of power by traditional leaders, even when such leaders do not have the legal powers the Bill would confer.



Recommendation 3.4

Protection against dispossession

The most urgent task in the current context is to provide meaningful protection to vulnerable groups faced with external mining or other investment deals that will negatively impact on their land rights. Such rights holders must be properly consulted, and their consent obtained for others to use the land they occupy and use. If they withhold their consent, the investment company must be required to apply to court for the expropriation of their rights, and the court must then balance the interests of the rights holders with those of the investment company within the parameters of Section 25 of the Constitution. IPILRA should be amended to make this explicit.

What is required for this to be achieved is for IPILRA to be respected and enforced by the Department of Rural Development and Land Affairs, by mining companies, and by traditional leaders.

Given the structural inequality between those with informal rights and those empowered by the MPRDA and the TLGFA, and the failure to comply with IPILRA in the past, it is important that all three laws set out in clear terms that any agreement that does not comply with IPILRA is invalid. To give effect to this, any agreement affecting communal land must be required to include an annexure of the steps taken to ascertain the informal rights on the land in question, and the steps taken to obtain consent from those affected, including a list of those consulted and proof of their consent.

IPILRA currently has to be renewed on an annual basis. It must be amended to make it a permanent piece of legislation and remove the requirement of annual renewal.

IPILRA as currently worded permits community override in instances where a right is being regulated in the interests of the wider community, and to fulfil the relative rights of other community members. The Law Reform Commission has criticised this override for being too far-reaching and for allowing uncompensated deprivation of property.

IPILRA should be amended to address this criticism, especially insofar as occupation and use rights are concerned. Since the introduction of the TLGFA there is a further issue, pertaining to the definition of community. The TLGFA has been interpreted to define communities as tribes, which in some instances number over 100,000 people. In the light of this, it is recommended that a much more limited override be allowed – only by people whose rights are directly affected, and only in respect of access rights to land, not in respect of use and occupation rights.

Registered ownership of most communal land currently vests in the state. That is the result of our colonial and racial history. The people who are entitled to the benefits from the land are those who occupy it and use it, many (but not all) of whom have a claim to customary law ownership of the land. Currently some traditional councils claim the right to the benefits from the land (e.g. rental or compensation for use of the land by others.) This is not correct: the people who are entitled to those benefits from the land are the people who use the land, and who lose that use. IPILRA should state explicitly that the holders of informal rights are deemed to be the owners of the land in question for the purposes of any revenue from the land or any compensation for use of the land, which would otherwise flow to the registered owner. Any such revenue or compensation shall be paid to them and not to the state. For example, where a mining company uses land in terms of a mining right granted in terms of the MPRDA, it is obliged to pay compensation to the owner. Such compensation should be paid to the people who are deprived of the use of the land, namely the holders of informal rights to the land, and not to the state (the registered owner).

Finally the provisions related to beneficial occupation of land need to be updated. One of the informal rights protected by IPILRA is beneficial occupation of the land. The Act provides that beneficial occupation is protected where the person concerned has been the beneficial occupier of land for five years before 31 December 1997. This means that beneficial occupiers only qualify for informal rights if they have lived on the land since December 1992.



Because it is such a long time since IPILRA was passed, beneficial occupation is now protected only if the person concerned has occupied the land for 25 years. It was not the intention of the Act to impose such a long period in respect of beneficial occupation. It is proposed that IPILRA be amended to provide that beneficial occupiers of land qualify in terms of IPILRA after three years of beneficial occupation.

A system of registration that confers unrestricted ownership on one person in respect of a piece of land may be appropriate where there are no other rights in the land. Where, however, there are also other rights holders, as is the case under customary law, this form of registration undermines the co-existing rights of others. Typically, the 'registered owner' will be a male, and other rights holders, particularly women and children, become the vulnerable holders of unregistered 'secondary' rights. There is therefore a need for systems of land records to take into account the nature of nested and relative rights within customary systems. The unintended consequence of land titling programmes creating winner-takes-all disputes that dispossess the vulnerable has led organisations like the World Bank and UN Habitat to move away from titling to the model of a continuum of rights.

The early land reform laws sought to disaggregate the concentrated power of common law ownership by creating specific tenure rights for those who were denied them during apartheid, and deducting these from the power of the common law owner. More recently land policy has defaulted back to the dichotomy between common law ownership (held by the state) and leases or 'conditional use rights' for the beneficiaries of land reform. A poignant irony is that some traditional leaders are not advocating a system of property rights that takes customary law into consideration. Instead they argue that common law ownership should vest in their institutions, as opposed to the people living on the land.

Quoted below are the operative provisions of the proposed strengthened PILRA:

Deprivation of informal rights to land

- No person may be deprived of an informal right to occupy or use land without their consent;
- No person may be deprived of an informal right of access to land without their consent; provided that
 - where access to land is shared by a group, a person's informal rights to access land may not be deprived without the consent of the group in terms of the customs or practices of the group; and
 - the customs or practices of the group shall be deemed to include at minimum that a decision that affects access rights may only be taken by a majority of households who will be deprived of access by the decision.
- No consent granted in terms of this section shall have legal effect if it is not recorded as required by the Act.
- The rights established in this section are subject to the provisions of any law that provides for the expropriation of land or rights in land.

Decision-making

- Before a decision to consent or not to consent is made, the person proposing the deprivation shall appoint an independent facilitator to conduct a decision-making process.
- The independent facilitator must:
 - identify and record the households whose informal rights to land will be directly affected, including whether such rights are to occupy, use or access land, with due regard to shared and overlapping rights to the land;



- identify and record the nature of all of the informal rights to land,
- identify and record the decision-making processes of the group including, if any, minority views on such processes;
- identify and record any particularly vulnerable persons, having regard to sex, age, and child-headed households;
- identify and record the identities of up to two representatives nominated by the household, provided that at least one representative per household shall be a woman. Where a household includes over five members, the number of representatives shall increase to include at least one representative for every five household members, with at least half of the representatives being women;
- ensure that the directly affected persons are adequately informed about the proposed decision and its reasonably anticipated consequences through meetings and/or household-level consultations;
- produce a record of all views expressed orally or in writing by affected households.

Security of tenure issues related to the Ingonyama Trust Act

Introduction

The KwaZulu-Natal Ingonyama Trust Act No. 3KZ of 1994 (the Act) was enacted just days prior to South Africa's first democratic election and came into force on 24 April 1994. In terms of this Act, the Ingonyama Trust was established to hold all the land that was owned by or belonged to the KwaZulu Government in the name of the Ingonyama as sole Trustee for the benefit, material welfare and social well-being of the members of the tribes and communities living on the land. The Act was significantly amended in 1997 to create the Ingonyama Trust Board (ITB) to administer the land. In 1994 this land did not, as did other Bantustan land, vest in one of the governments

or administrations listed in Section 239 of the Interim Constitution as it had vested in the Ingonyama Trust in terms of the Ingonyama Trust Act. This legislation is therefore unique to KZN and the Ingonyama Trust Board has control over land in ways that far surpass anything the Minister of Rural Development and Land Reform has in all other provinces. Seemingly, the difference between KwaZulu-Natal and other provinces is precisely the existence of the Ingonyama Trust Act.

The deficiencies and ambiguities in this Act and its amendments and the ramifications thereof have had a far-reaching effect on the communities and residents on the land concerned. The Panel proposes the review of the Ingonyama Trust Act with a view to repeal or to amendment.

While the Trust has wide-ranging powers to manage the land registered in its name, there are various provisions in the Act that provide protection for the land rights of the beneficiaries, in particular that the Ingonyama shall not infringe upon any existing rights or interests.

Overview of trends since 1994: Insights from commissioned research and round tables

The Trust is meant to exist and function subject to existing land rights under customary law and not act in ways that undermine and abrogate such customary and other underlying land rights. However, the Trust in some instances, regards itself as the outright owner of land and therefore not subject to any duty to consult or to obtain community consent in dealing with the land. This has given rise to instances where the Trust has leased land to external third parties (for example shopping centres) without having first consulted and obtained the consent of those whose informal or customary land rights were subsumed by the shopping centre.

Dispossession of customary rights: Replacing customary rights and PTO certificates with residential leases

Prior to 1994 Permission to Occupy certificates (PTO) were issued as part of a land tenure system that existed in KZN and elsewhere in South Africa on non-surveyed land. PTOs were issued in terms of regulations, and they conferred statutory rights on holders. PTOs were not issued everywhere and in many situations, people occupy and use land on the basis of customary tenure rights without written records. In terms of the Upgrading of Land Tenure Rights Act 111 of 1991 (ULTRA) PTOs



could be upgraded to ownership after surveying the land. This is an indication of the strength of such underlying rights. However the Act was never effectively implemented because of the costs and complexity entailed in surveying land and transferring title. In KwaZulu-Natal PTOs were kept alive after 1994 first by the KwaZulu Land Affairs Act 11 of 1992 and then by Government Notice 32 of 1994.

Annual reports of the Ingonyama Trust indicate that the Ingonyama Trust decided that PTOs should no longer be issued, and has over the years pursued a programme of converting PTOs and existing customary rights in land into lease agreements for both business and residential purposes.

The standard ITB lease agreement provides for a 40-year term, and a 10% annual increase on rental. It compels the 'lessee' to fence the property within six months. The lessee must obtain written permission to build and record all improvements, and submit this to the ITB. The ITB is entitled to cancel the lease agreement for failure to pay rent. All buildings and structures that have been built on the land will belong to the Ingonyama Trust when the lessee vacates the premises.

Significant income is generated for the Ingonyama Trust by such lease agreements. In the 2015/2016 period rental income was R96 130 563. There is little evidence that the revenue generated by leases is used for the benefit of communities or their material well-being. The Trust has built up very substantial reserves.

Ownership of land in townships

The Act originally applied to rural and urban land within the former KwaZulu and included townships known as 'R293' or 'Trust' townships, established in terms of Proclamation R293 of 1962. This meant that the underlying ownership of township land including public places and streets, vested in the Ingonyama Trust. In an attempt to rectify this, the Amendment Act of 1997 provided that the Act shall not apply to townships, and that the land is to vest in the relevant municipality. There is however evidence that the Trust has retained land in townships, and is dealing with this land as if it were the outright owner – continuing to exercise exclusive power to allocate the land, authorise its use, and collect revenue from the land. R293 township sites qualify for upgrading of tenure rights in terms of ULTRA. There has however been widespread failure to implement ULTRA.

Public finance management

The National Assembly's Portfolio Committee on Rural Development and Land Reform has criticised the Trust for its lack of transparency, and concerns have been raised about the revenue received by the Trust and the apparent failure on the part of the Trust to use this revenue for the benefit of beneficiaries.

The Auditor General of South Africa analysed the Trust's compliance with applicable financial legislation, and found that the financial statements were not prepared in accordance with the financial reporting framework prescribed by the Public Finance and Management Act 29 of 1999 (PFMA), that goods and services were procured without inviting competitive bids, and that the accounting authority did not adequately exercise its oversight responsibilities with regard to the implementation and monitoring of internal controls for financial reporting and compliance with legislation.

The ITB is a public entity in terms of the PFMA and its executive authority is accountable to Parliament for the performance of its duties. The Ingonyama Trust is also subject to Section 217 of the Constitution, which requires it to comply with the principles of fairness, equity, transparency, competitiveness and cost-effectiveness.

Voices of the public

A speaker at the KZN hearing lamented the victimisation of citizens by developmental projects. He argued that when developmental initiatives are introduced, poor citizen's lives are disrupted without their consent. A businessman described how his business was shut down because of outstanding rental fees to the Ingonyama Trust. This was in spite of his having a Permission to Occupy Certificate and having made payments to the traditional leader. A speaker from Jozini submitted that in 2012, Jozini community members were invited to the Jozini Thusong Centre and asked to bring their identity documents. Without explanation, they were told to 'join' the Ingonyama Trust. He now receives monthly rental statements reflecting mounting debt to the Ingonyama Trust. Other speakers complained of the Ingonyama Trust having authorised quarries and other forms of development on their land without their consent. They complained that the benefits from these developments go to the Ingonyama Trust, as opposed to themselves.



Recommendation 3.5

Amendments, repeals, implementation

The Panel motivates for the repeal of the Ingonyama Trust Act to bring KwaZulu-Natal in line with national land policy, and to secure land tenure for the communities and residents concerned. If repeal is not immediately possible, substantial amendments must be made. They must secure the land rights of the people affected, and ensure that the land vests in a person or body with proper democratic accountability. There is also a pressing need to create mechanisms to investigate and resolve complaints by people whose rights have been infringed by the Trust, or whose rights may be infringed in the future.

Ownership of this land vests in the Ingonyama as trustee. If the Act is either amended or repealed, this will not result in automatic transfer of ownership to the people on the land, which is a complex process. The ownership will vest either in the national government or in some other body designated for this purpose. Currently, the ITB and some traditional councils claim the right to the benefits from the land (for example rental or compensation for use of the land by others.) This is not correct: the people who are entitled to those benefits from the land are the people who use the land, and who lose that use. Many (but not all) of them have a claim to customary law ownership of the land. If the Act is either amended or repealed, the repealing or amending Act should state explicitly that the holders of rights to the land (users and occupiers of the land) are deemed to be the owners of the land for the purposes of any revenue from the land or any compensation for use of the land, which would otherwise flow to the registered owner. Any such revenue or compensation shall be paid to them and not to the Ingonyama, the Trust (if it continues to exist) or the state. For example, where a mining company uses land in terms of a mining right granted in terms of the MPRDA, it is obliged to pay compensation for surface rights to the owner. Such compensation should be paid to the people who are deprived of the use of the land, and not to the state or the Ingonyama (the registered owner).

Repeal

The Repeal Act should provide for the repeal of the Ingonyama Trust Act of 1994 and for the disestablishment and dissolution of the Ingonyama Trust. It should include provisions for the transfer of the Trust land, assets, liabilities, rights and obligations to the Minister responsible for land affairs as custodian on behalf of the members of the communities and residents concerned.

Amend

An Amendment Act should provide for the amendment of the Act to ensure that trust land (including all land registered in the name of the Ingonyama as trustee for the Ingonyama Trust) is administered for and on behalf of and for the benefit of the members of the communities and residents concerned. It should also include provisions amending the composition of the Ingonyama Trust Board, which should fall under the auspices of the Minister responsible for land affairs, to provide that trust land shall be subject to national land programmes, to reiterate that the Act shall not apply to land in all townships, to provide for a trust fund, and to preserve the records of the Trust and establish a 'land register'.

Trust Land Register

A Repeal Act or Amendment Act should provide for the preservation of the records of the Ingonyama Trust and the ITB. A 'Register of Trust Land' should be established, which should contain the prescribed information. This should be available for inspection by any person during ordinary office hours and it should also be accessible to the public by electronic means (see Chapter 2 for Land Records Act proposals).

Dispute resolution

A Repeal Act or Amendment Act should provide mechanisms by which an aggrieved person, community or resident whose existing rights or obligations were affected by the administration of the Trust or ITB may lodge a dispute or institute proceedings.



It should provide that the aggrieved person, community or resident may within five years lodge a dispute with an 'Ingonyama Trust Administrator', or institute proceedings in the magistrate's court or the Land Claims Court. If all the parties consent thereto, proceedings may be instituted in the High Court.

Security of tenure for farm dwellers, farmworkers and labour tenants

Parliament passed two main pieces of legislation intended to give effect to the state's Constitutional obligations for land tenure that is legally secure for farm dwellers and farmworkers. These are the Extension of Security of Tenure Act (No 62 of 1997) commonly referred to as ESTA and the Land Reform (Labour Tenants Act) (No 3 of 1996). ESTA addresses the tenure rights of farm dwellers residing on land owned by others and it sets out the rights and duties of landowners and farm occupiers, and the procedures that must be followed to lawfully evict a person from the farm. The Labour Tenants Act protects the insecure tenure and land rights of labour tenants⁵ as distinct from farmworkers. Both have redistributive components in that ESTA provides for on and off-farm settlements and the Labour Tenants Act makes provision for labour tenants to acquire land. The Labour Tenant Act sets out to protect all labour tenants as of 2 June 1995. Chapter 2 of the Act also seeks to protect the land tenure of labour tenants by requiring magistrates to refer eviction applications directly to the Land Claims Court.

Despite the constitutional provisions and legislative frameworks, evictions and other human rights violations for people living and working on farms have continued unabated.

⁹ Section 1 of the Labour Tenants Act defines those qualifying as labour tenants as:

- (a) A person who is residing or has the right to reside on a farm;
- (b) A person who has or has had the right to use cropping or grazing land on the farm, referred to in (a), or another farm of the owner, and in consideration of such right provides or has provided labour to the owner or lessee;
- (c) A person whose parent or grandparent resided or resides on a farm and had the use of cropping or grazing land on such farm or another of the owner, and in consideration of such right provided or provides labour to the owner or lessee of such or such other farm. This includes a person who has been appointed a successor to a labour tenant in accordance with the provisions of Section 3, (4) and (5), but excluding a farmworker'.

Overview of policy goals informing legislation

The existence of farm dwellers and farmworker communities, living on land that is legally owned by other persons, should be located in the historical context of colonialism and apartheid and the development of large-scale white commercial agriculture in South Africa. Such existence is a manifestation of the legacy of land dispossession and displacement of black people from their land and confinement to the native reserves, compelling those that remained to provide agricultural labour as farmworkers or as labour tenants. The democratic government set out to redress such injustices from 1994. Policy mechanisms that sought to transform farm dwellers' and farmworkers' tenure rights can be traced to the White Paper on Land Policy (1997), the recent Green Paper on Land Reform (2011) and the recent Draft Policy on Strengthening the Relative Rights of people working the land.

The 1997 White Paper on Land Policy

The White Paper on Land Policy⁶ (the White Paper) identified the need to protect the rights of occupiers on privately owned land as well as those of the owners of that land.

Tenure reform requires that legislation be promulgated which protects the rights and interests of both owners and occupants...Alternatives which enable people to escape their status as insecure and subservient on land belonging to others must be created, including the provision of additional land on which people can enjoy independent land rights (DLA (1997)).

The White Paper stated that both farmworkers and labour tenants were seen as priorities for a pro-poor land redistribution programme:

Redistribution aims to provide the disadvantaged and the poor with access to land for residential and productive purposes. Its scope includes the urban and rural very poor, labour tenants, farmworkers as well as new entrants to agriculture (DLA (1997)).



Farmworkers and labour tenants were characterised as being representative of the most vulnerable and insecure sections of the population. Living on land legally owned by others was recognised as creating special challenges in relation to securing equitable access to land and housing:

The White Paper envisaged two main settlement options for farmworkers:

- Off-farm settlement options involving the purchase of land and establishment of housing and service infrastructure close to existing farm employment and other employment opportunities; and
- On-farm settlement options of different kinds.

As will be examined below, Section 4 of ESTA requires the Minister to make available subsidies in support of these varied settlement options.

Since labour tenants fell outside the Restitution of Land Rights Act, the White Paper argued that they should be given preferential status and financial assistance in land redistribution and land development programmes. The White Paper also noted that:

In districts where the Land Reform (Labour Tenants) Act, 3 of 1996, is applicable, local Land Offices would need to be provided with special capacity to administer the Act (DLA (1997)).

Land policy also sought to limit evictions given that:

In rural areas, the eviction of farmworkers and labour tenants has resulted in a swelling of the numbers of landless and destitute people, and invasions of public or privately owned land often follow (DLA (1997)).

The 2011 Green Paper on Land Reform

In 2011 DRDLR released a Green paper on Land Reform. In the section dealing with farmworkers the following was observed:

There is a strong view that the real problem in land reform in general, and in the protection of the rights and security of tenure of farm-dwellers, in particular, may be that of a

total-system failure (TSF) rather than that of a single piece of legislation, e.g. Extension of Security of Tenure Act (ESTA).

In the case of farmworkers and dwellers, this failure would reflect in a number of aspects: inadequate articulation of policy and legislative regime to protect farmworkers and dwellers; poor implementation of existing policies and legislation by organs of the state; weak enforcement of legislation by law-enforcement agencies; the judicial system not being worker-friendly in handling eviction cases; labour unions not organising effectively on farms; non-complementary (almost adversarial) relationship between non-governmental organisations and state organs in addressing problems of farm-dwellers; and, poor or non-existent monitoring, co-ordination and communication among state organs, within and across the three spheres of government, and other interested parties, on matters negatively affecting the rights of farmworkers and dwellers (DRDLR, 2011).

Despite the frank acknowledgement of this multifaceted failure to implement ESTA in the Green Paper, commissioned research reports and oral submissions by the members of the public to the Panel suggest that going forward the DRDLR has failed to adequately engage with and address these issues in its subsequent policies and plans.

Tenure security policy for commercial farming areas

DRDLR released a tenure security policy for commercial farming areas in 2013. According to the policy document:

The proposed policy seeks to resolve the diverse and complex range of land rights and tenure insecurities that have emerged in the course of historical change in a manner that seeks to accommodate the various categories of persons with vested interests in land. Accommodation of these interests may involve strengthening of the existing rights, curbing unlawful evictions, according to redress options (e.g. alternative land acquisition), development of sustainable rural settlements or any other suitable alternatives considered through agreed mechanisms (DRDLR, 2013).



The policy acknowledges that:

Farmworkers and dwellers continue to be the most tenure insecure and many are often evicted despite the plethora of measures to mitigate this. Part of the continued unabated eviction and voluntary movement off the farms is a result of the increased mechanisation of farming and casualisation of labour as well as the conversion of land to low intensity labour utilisation enterprises such as mining, game farming and other leisure activities.

The policy chronicles the failure of farmworker equity schemes and empowerment ventures to realise meaningful benefits for farmworkers and dwellers. It observes that in some instances land redistribution has exacerbated the tenure insecurity of farm dwellers and labour tenants already residing on redistributed land. It acknowledges that tenure security law has not achieved the intended outcomes due to ‘poor enforcement and resource endowment’ of ESTA and LTA. It also notes that ‘tenure policy has been unclear about how public services are to be provided to indigent people living on privately owned farmland’.

The policy indicates that the DRDLR should make available a dedicated tenure grant for farm dwellers and related beneficiaries to secure permanent rights to land.

Draft policy: Strengthening the relative rights of people working the land

In 2013 DRDLR released a further draft policy entitled Strengthening the relative rights of people working the land, which was followed by final proposals in 2014 (DRDLR, 2014). These policy documents incorporated elements from the policy discussed above and reiterate that there has been ‘a total-system failure (TSF)’ of land reform ‘to protect the rights and security of tenure of farmworkers and dwellers’. The draft policy further acknowledged that ‘farmworkers as a specific category of people in need of land for agricultural production are rarely prioritised in the land redistribution programme’ (DRDLR 2013).

The policy proposed that each farm owner would cede 50% ownership to workers based on the number of years of ‘disciplined service’ spent on the farm:

- 10 years – 10% share equity on ownership of land
- 25 years – 25% equity share
- 50 years – 50% equity

The final policy proposals envisaged that:

The Government will pay for the 50% to be shared by the labourers, but the money will go into an investment and development fund (IDF) to be jointly owned by the parties constituting the new ownership regime. The fund will be used to develop the managerial and production capacity of the new entrants to landownership, to further invest on the farm as well to pay out people who wish to opt out of the new regime.

This document, which became known as the 50/50 policy, has been widely criticised as being unworkable and unaffordable (Hall, 2014). Concerns have also been raised that it creates further perverse incentives, which could result in the pre-emptive eviction of farmworkers. There were also concerns that the policy was fundamentally out of step with the approaches advocated in the National Development Plan (NDP), which advocated a land reform model in which district committees will identify 20% of commercial agricultural land in a district. Despite widespread criticism, 50 pilots were approved in 2015. As will be discussed later, about 15 projects have been transferred and 5 awaited transfer by June 2017.

From the above, it is clear that DRDLR has consistently acknowledged the failure to effectively implement ESTA and by implication the LTA. However subsequent policy documents have failed to practically address the problems identified and find ways to better secure the tenure of farmworkers, farm dwellers and labour tenants.

Overview of trends since 1994: Insights from previous enquiries, Panel's diagnostic papers, commissioned reports and round table discussions

Extension of Security of Tenure Act

South African Human Rights Commission hearings in 2003 and 2007

In 2001 the South African Human Rights Commission (SAHRC) initiated a three-phase process of research, public awareness and public hearings on alleged human rights violations on farms, which culminated in a report in 2003 (South African Human Rights Commission, 2003).



Follow-up public hearings resulted in a second SAHRC report (2007), which recorded that the then Minister of Land Affairs was of the view that ESTA was not implementable.

The SAHRC Inquiry investigated why ESTA Section 4 subsidies were not being awarded. The DLA responded that the approvals process was slow because all projects required the final approval of the Minister. DLA was requested to provide statistics on the number of Section 4 subsidies approved but the SAHRC report recorded that 'these were not forthcoming' (South African Human Rights Commission, 2003). This highlights a persistent concern about the unavailability of reliable data as a basis to assess the performance of the land reform programme. Overall the SAHRC report found that there was:

- Widespread non-compliance with ESTA.
- A 'disturbing lack of knowledge of ESTA by all role players' (South African Human Rights Commission, 2003).
- A 'complete lack of compliance with the legislative provisions of ESTA in some court proceedings resulting in farmworkers being evicted in terms of common law' (South African Human Rights Commission, 2003).
- High numbers of evictions associated with the change of farm ownership.
- A failure of the state to adequately train its officials to implement legislation resulting in a high rate of illegal evictions.
- Lack of access to adequate housing for many farmworkers. The report noted that the Department of Housing 'demonstrated little understanding of the rural context' and that they were 'clearly not grappling with the issues of farming communities' (South African Human Rights Commission, 2003).
- Inadequate provision of emergency housing, and required that 'relevant government departments submit a reasonable plan to the SAHRC that addresses people in crisis situations after an eviction' (South African Human Rights Commission, 2003).

The SAHRC report identified lack of political will to implement the law and provide services to

farmworkers and dwellers as the primary cause of failure as opposed to attributing this to the inadequacies in the laws passed to protect farmworkers' rights.

The evidence from these sources makes it clear that the Department of Land Affairs (DLA) and its successor the Department of Rural Development and Land Reform (DRDLR) have failed to provide adequate resources for the implementation of ESTA and the LTA.

The Labour Tenants Act

The implementation of the Labour Tenants Act has suffered from even greater neglect than ESTA, as the department effectively refused to implement the law since the early 2000s. This refusal and the plight of labour tenants became the subject of proceedings initiated in 2013 in the Land Claims Court. This sought to address 10 914 labour tenant claims, which remained unsettled. In December 2016, the Land Claims Court granted an order appointing a 'Special Master of Labour Tenants' who is required to produce a plan in collaboration with the DRDLR to implement labour tenant claims.

The presiding judge in the case, Judge Thomas Ncube, noted in his judgment that:

From the history of the litigation, it is apparent in my view, that the Department has not been able to comply with its own timeframes or to provide accurate information on how far the collation of labour tenants claims has progressed...Effective relief is undoubtedly required by the many thousands of vulnerable labour tenants' (LRC, 2016).

Judge Ncube found that Minister Nkwinti and the Director-General acted in a manner, 'inconsistent with Sections 10, 25 (b), 33, 195 and 237 of the Constitution of the Republic of South Africa' and that a 'Special Master of Labour Tenants' shall be appointed by no later than 3 March 2017 to supervise the Director-General and the Department in respect of the pending labour tenant claims under Sections 16, 17 and 18 of the Act.

The DRDLR is currently in the process of appealing this judgement.



Voices of the public: Insights from public hearings

An NGO activist provided the following assessment of ESTA:

'ESTA, which is aimed at protecting or giving tenure rights to people who are living on commercial farms; we generally refer to them as farmworkers although in the Act they are referred to as occupiers. There are progressive pieces in ESTA but thus far what we have noted, sadly, is that ESTA has only been used as a tool to facilitate eviction of farm dwellers from White commercial farms. Progressive sections like Section 4 of ESTA, which says that when there is an imminent threat of eviction, farm dwellers must be prioritised for access to land by local government, which are the municipality and the provincial land reform offices. We know that sadly, to this date as Nkuzi, we haven't heard of any farm dwellers who have benefitted from Section 4'. (Vasco Mabunda at the Limpopo hearing)

A representative of organised agriculture argued for an economics-led approach to land access and redistribution for farmworkers.

'Another question that was raised here is to alleviate poverty among farm dwellers and farmworkers. If we do not think in economic terms we are not going to alleviate poverty among these people. We must also realise that land does not alleviate the plight of the poor, but the utilisation of land through sustainable agricultural practices'. (Danie du Plessis at the Mpumalanga hearing)

A farmworker provided a different perspective on the economics of agriculture:

'I wish to convey these points on behalf of farmworkers in Nkomazi. We leave our homes at 03h00 to go to work. We also work on Saturdays. I would like to know why we are not paid for working on Saturdays. We ask that you look at this matter, because there are people from Mozambique working in the farm and they live in compounds. Over 365 South Africans lost their jobs and yet there are Mozambicans working in the farm. We are slaves in the farms but the ANC is celebrating freedom when we are not enjoying freedom'. (Desmond Sibiya at the Mpumalanga hearing)

The coordinator of a network of land NGOs highlighted the unintended consequences of the 50/50 policy.

‘With regards to farmworkers and farm dwellers, we are sad to say that the expected benefit of the relative rights of the farmworkers policy, the 50/50 policy...has led to pre-emptive dismissals and evictions as we have already seen under ESTA and an increase in the use of labour brokers. The policy only benefits few farmworkers with a long-standing service record’. (Dr Monique Solomon at the KwaZulu-Natal hearing)

A farmworker highlighted the vulnerability of workers to eviction when farms were sold and requested that the state give consideration to farmworkers being able to purchase the land.

‘We are asking government that when people are evicted and the farm is being sold, in order to prevent hunger, let it be the case that those farm dwellers, if they had the wish to be bought those farms and they had the capabilities to work, let them work so that their lives may progress by way of precisely preventing this poverty.’ (Ntate Mosegigi at the Free State hearing)

Analysis of legislation passed

ESTA seeks to extend protection to all people living on farms, regardless of whether they are employed there or not. The Act refers to these people as ‘occupiers’. It affords these occupiers the legal rights to continue to live on and use the land they occupy. ESTA does make a distinction between occupiers who took residence after 1997 and those already living on farms prior to the Act’s promulgation, giving stronger tenure rights to the latter. ESTA also gives tenure rights to workers and their families who are too old or ill to work, as well as giving the family of a deceased labourer a ‘grace period’ of a year in which to find alternative accommodation (Atkinson, 2007).

The Act sets out the legal requirements and process, which owners need to follow to legally evict an occupier – provided that the eviction is ‘just and equitable’. Evictions, which require a court



order, can only be achieved under two circumstances. Firstly, if the occupier breaches his contract of residence by causing unlawful damage to property or persons on the land, by intimidating and threatening other occupiers, and by assisting the unlawful occupation of private land. Secondly, evictions are allowed if the relationship between employer and employee has collapsed and cannot be repaired. Regardless of circumstance, the landowner is mandated to ensure that the evictee and their family have access to 'suitable alternative accommodation'.

With regard to ESTA and the rights of women and dependent members of the household, Samaai (2006) has noted that:

Under the common law rules of eviction, if the owner instituted eviction proceedings against the male head of the household, the wife and the dependents were cited as 'all those who derive title under him'. This perpetuated the discrimination against women on farms and represented a situation that had to be addressed by ESTA, as well as the courts dealing with farm dweller evictions.

Were the right laws passed?

The issue in this instance has less to do with the content of the law than the acknowledged failure in its implementation. The significance of 'total system failure' for the Panel review is enormous. As delegates at the National Land Tenure Summit in 2014 argued, 'total system failure requires a total system re-design, with adequate resourcing' (Hall, 2016). Considerable scepticism has been expressed that the ESTA Amendment Bill discussed below will result in any such change.

The ESTA Amendment Bill

The ESTA Amendment Bill is being debated in Parliament. The Legal Resources Centre in their submission has critiqued the Bill for failing to provide sufficient measures to ensure security of tenure for all occupiers. It has argued that Sections 8(2) and 8(3), which provide the principal grounds relied on by the owners of farms for ESTA eviction orders, remain unchanged and as such render occupiers vulnerable.

Our experience is that in most successful eviction cases, all that the owner has to do is to show that the labourer/worker has been dismissed and that there are no pending proceedings before the CCMA. In our experience, most farm labourers/workers are not aware of their rights at the CCMA and they often sign settlement agreements arising from their employment disputes without fully understanding that an eviction application will follow (Legal Resources Centre, 2016).

The LRC has proposed that Section 9(3) of ESTA should be amended so that it is expressly stated that a court cannot grant an ESTA eviction order in the absence of a probation report and a report from the local municipality on the availability of emergency housing. It has observed that cases are often heard without a probation officer's report being prepared.

Were the laws designed and drafted correctly? Any significant flaws related to substance and of process?

Both ESTA and LTA were passed early in the land reform programme. From its inception ESTA met with widespread criticism from landowners – many of whom responded to the law by pre-emptive eviction. It has been argued that the law has largely failed to protect farmworkers from arbitrary eviction and secure their rights to land, family life, housing, tenure security, dignity and access to services.

Did legislation meet its objectives as outlined in the Constitution and policy documents?

Policy priorities have shifted with time, which has negatively impacted on the implementation of both ESTA and the LTA. The use of alternative policy in place of the implementation of existing legislation has led to both neglect of constitutional obligations and the reducing of right envisaged therein. For example, Section 4 of ESTA states that:

4. (1) The Minister shall, from moneys appropriated by Parliament for that purpose and subject to the conditions the Minister may prescribe in general or determine in a particular case, grant subsidies—



- (a) to facilitate the planning and implementation of on-site and off-site developments;
- (b) to enable occupiers, former occupiers and other persons who need long-term security of tenure to acquire land or rights in land; and
- (c) for the development of land occupied or to be occupied in terms of on-site or off-site developments.

In practice, the award of subsidies has been minimal, which impacts significantly on farmworkers' rights to housing and tenure security.

The use of policies such as the Proactive Land Acquisition Strategy (PLAS), Settlement Land Acquisition Grants (SLAG), Land Distribution for Agricultural Development (LRAD) to settle labour tenant claims, has in many cases provided lesser rights than those envisioned in the LTA.

What were the unintended consequences?

In relation to farm dwellers, the legislative and policy framework has become increasingly confusing and contradictory, without clear focus. There have been a wide range of policy proposals that don't take forward the aims of ESTA and the LTA, and therefore the Constitution. For example, the Draft Policy entitled Strengthening the Relative Rights of People Working the Land (better known as the 50/50 policy) discussed above is an incoherent and potentially dangerous policy.

The most dangerous aspect of these policy proposals is that workers and their families living on farms should not have rights to live where they are, but rather should earn their tenure by performing a set of 'duties and responsibilities'. The policy even suggests that land rights management committees will decide who stays and who goes. Such a provision would have grave consequences, and represents a step backwards from the promise of tenure security made in the Constitution of 1996 and in ESTA in 1997.

Implementation of legislation

How effective was implementation, including funding (budget allocation), institutional and political support?

As noted above there is widespread agreement that minimal resources have been allocated to the implementation of two pieces of legislation. The DRDLR have never produced comprehensive or costed plans to implement the LTA or ESTA. A further challenge with implementation of legislation has been that a broad range of Government officials do not fully understand the legislation protecting farm dwellers – this includes SAPS members, DRDLR and Municipality officials. This has a negative impact on eviction cases, for example Section 9 (3) of ESTA provides that in each eviction case there must a report compiled by the probation officer.





Recommendation 3.6

General recommendations

Training

- Government needs to develop and implement a training programme for the South African Police Service (SAPS), Prosecutors and Magistrates on understanding, interpretation and implementation of ESTA and LTA.
- The South African Police Service needs to ensure that ESTA violations appear on the database of the SAPS.

A National Register of Evictions

- A National Register of farm dwellers
 - A National Register of farm dwellers still living on farms to record off-register rights, tied into a National Register of ALL off-register rights.
 - The register should be compiled by a Chapter 9 Institution or the Legal Aid Board.

A review of legal assistance to farm dwellers

- Legal assistance for farm dwellers is currently offered via the Land Rights Management Facility. This is managed by the DRDLR, who contracts a private company via tender procedures to manage a panel of lawyers to provide legal services around land rights. However, many farm dwellers remain inadequately supported and represented, due to absence of referrals to the LRMF and lack of skills and expert knowledge of some lawyers appointed to the panel of service providers.
- A thorough review of legal services provided to farm dwellers should be undertaken, with recommendations for an improved system. It is worth noting that it could potentially reduce the cost to Government and improve the delivery of legal services to farm dwellers if the Legal Aid Board take responsibility for providing these legal services again.

Information campaigns about farmworkers' land rights and communal land rights

- Government must at all times disseminate information in farming communities about farmworkers rights. Such information can be captured in the form of posters that highlight key messages from ESTA and IPILRA.
- This information should be widely circulated in most rural and far-flung parts of South Africa and must be on display in all police stations, post offices, municipalities, traditional councils offices and other public spaces.
- The Department of Justice and Constitutional Development should regularly update prosecutors, magistrates and judges about new ESTA and IPILRA judgments, and how these change the jurisprudence.

The ESTA Amendment Bill went to the National Assembly in Parliament on 15 February 2015, following a long process of consultation, which began with public submissions to the Portfolio Committee in December 2015. Some submissions argue that it appears as if the DRDLR doesn't wish to amend the sections of ESTA that have been repeatedly proven to be problematic. Instead, they propose the introduction of a Land Rights Management Board (LRMB) and Land Rights Management Committees (LRMC). The function of these structures is unclear, as is what benefit they will bring to farm dwellers. The Bill does not explain how these will address the limited capacity for enforcement in the existing duty-holder, i.e. the Department.



Recommendation 3.7

ESTA Amendment Bill

Section 1(b)

The Bill establishes a definition of 'dependant' whereas the Act contains no such definition. Section 1(b) defines a dependant as 'a family member whom the occupier has a legal duty to support'. First, this is not the meaning of dependant in South African common law, which includes recognition of dependants to whom a person has no legal duty. Second, this provision infringes on the right to family life, especially in the context of extended households including relatives other than spouses, parents and children and grandchildren. Third, what is the purpose of defining 'dependant'? The purpose appears to be to exclude (a) non-relatives who live with occupiers on farms and (b) relatives including adult children who live with occupiers on farms. Fourth, this provision therefore seems to serve the purpose of excluding a category of people living on farms from the protections provided in ESTA. If enacted, this would disproportionately affect poor and unemployed young adults, and especially young women.

This definition should be removed or expanded to include a much broader definition of 'dependant', in line with customary and common law.

Section 1 (c)

No amendments have been suggested by DRDLR despite the controversial nature of this section. This relates to a limitation in the income of occupiers, which is stipulated in the Regulations as R5 000 a month. There is no justification for why the income of a family should restrict their rights to occupation. This section should be removed.

Section 6 (d)

While the Bill proposes that the state pays landowners for providing accommodation and services to occupiers, it proposes that occupiers maintain their dwellings at their own cost. There are two problems with this. First, this imposes an unfair requirement of occupiers, who are typically poor.

Second, where owners construct dwellings for occupiers, this is fixed property, and any maintenance and improvement accrues ultimately to the owner. This section should be amended to provide occupiers the right to maintain and improve their dwellings but not to impose a duty on them to do so.

Section 8 (2)

The section states that ‘the right of residence of an occupier who is an employee and whose right of residence arises solely from an employment agreement, may be terminated if the occupier resigns from employment or is dismissed in accordance with the provisions of 35 the Labour Relations Act’. This section should be removed as rights of occupation are not tied to employment.

Section 8 (5)

An occupier’s right to reside should not depend on his/her family member’s right. This section should be removed.

Section 9 (3)

This section of ESTA should be amended so that it expressly states that a court cannot grant an ESTA eviction order in the absence of a probation report and a report from the local municipality on the availability of emergency housing. In addition, it should be compulsory for a probation officer to be present in court at the time of hearing of ESTA cases.

Section 21

The Bill proposes to amend Section 21 to indicate that the Director-General may refer disputes to the Board for mediation or arbitration. In principle, we strongly support the emphasis on mediation and arbitration as forms of alternative dispute resolution. However, this requires that the Board is suitably constituted and skilled to undertake mediation and arbitration. This contradicts the purpose of establishing the board as a ‘stakeholder.



Section 23 (5)(c)(i) and 23 (5)(c)(iv)

These sections should be amended to replace the title 'Attorney-General' with the title 'Director of Public Prosecutions' As South Africa no longer has an Attorney-General.

Section 23 (2)

This should be amended to include municipalities as officials, and the words 'under this Act' should be removed, to enable basic services (including sanitation, potable water and energy) to be delivered on farms by Municipalities. The end of this section should be reworded to read: '... or the Municipal Services Act.'

Other issues

- Dedicated budget and human resources must be ring-fenced for ESTA implementation, monitoring, accountability and Section 4 grants, and aligned with the National Housing Code.
- The DRDLR must set up and maintain District Registers of Section 4 of ESTA cases. This should detail the circumstances of the case and which relate to applications to access subsidies for on-site or off-site settlement for farm dwellers, both successful and unsuccessful. The DRDLR must collect and collate data on implementation of Section 4 of ESTA and make it publicly available, including how many Section 4 cases were implemented; and if they were not, then the reasons for this.
- Consideration should be given to rezoning land on which farm dwellers reside from agricultural land to residential land, in terms of Spatial Planning and Land Use Management Act (SPLUMA).
- Long-term occupiers who are currently living on farms should have their tenure security strengthened for them and their family by being able to acquire title or equivalent secure rights to land either on or off the farm.

Labour Tenants Act

The Panel recommends that Parliament carefully monitor the DRDLR's progress on implementing the LTA. A comprehensive, properly costed and resourced implementation plan for the LTA is a critical starting point. Until this has been developed by the DRDLR, progress is likely to remain haphazard, underresourced and poorly managed. The risks around poor implementation need to be fully assessed and managed, learning lessons from past failures.

- LTA Regulations should be amended to include protection for labour tenant when a restitution claim is lodged on land where labour tenants reside, i.e. the claims are overlapping.
- The DRDLR have attempted to create a new database of LTA claims; a process that remains incomplete and inaccurate. It is critical that this process is finalised and robust research is undertaken to update information and track missing claims. Progress should be reported to Parliament.
- There are amendments to the legislation needed, e.g. an amendment to Section 16(1) (d), which relates to the cut-off date for applications. There are labour tenants who did not lodge claims by 31 March 2001 and were thus excluded. Moreover, some claims that were lodged were lost by the DRDLR, and claimants should have the chance to relodge their applications.
- The reference in Chapter II Section 3(20) to labour tenants being able to acquire land that they were using on 2 June 1995 should be removed. They should be able to acquire land that they may have been able to use prior to this date, as their use rights might have been reduced by landowners.
- The highly regulated process that the LTA dictates should be revised to allow a more flexible and adaptable process that would best benefit labour tenants. However, many labour tenants are elderly and the processing of their claims has already been delayed by 16 years, and will take many more years to process. There is a significant risk that starting the process of amendments will be used as an excuse to further delay the processing of the existing claims. It is critical this does not happen.



- The LTA states that an eviction notice must be sent to the DG. However, the DRDLR has failed to provide the mediation required by Section 11 of the LTA, and thus eviction orders are granted without adequate support to labour tenants. Amendment is needed to make the provisions for mediation compulsory before the matter is heard in Court.

To ensure that restitution claims are not prioritised over labour tenant claims an amendment is needed to LTA.

Recommendation 3.8

Section 9 (2) of LTA should be removed. An associate's right to reside should not depend on a labour tenant's right. Section 9 (2) states that 'On the death of a labour tenant who has retained the right to occupy the farm in terms of the provisions of Subsection (1), all his or her associates may be given 12 calendar months' notice to leave the farm'

Sections 22 (4) (d), 24 (1) and 24 (2) of LTA should be amended. The word 'applicant' should be substituted with the words 'the Department of Rural Development and Land Reform'.

Section 13 (1A) (b) should be removed from the LTA. Section (1A) states that 'With the exception of issues concerning the definition of 'occupier' in Section 1 (1) of the Extension of Security of Tenure Act, 1997 (Act 62 of 1997), if an issue arises in a case in a magistrate's court or a High Court that requires that court to interpret or apply this Act and: —

(a) no oral evidence has been led, such court shall transfer the case to the Court and no further steps may be taken in the case in such court;

(b) any oral evidence has been led, such court shall decide the matter in accordance with the provisions of this Act.'

Conclusion

The Panel is reporting at a time that 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 is at a time when the budget for land reform is at an all-time low of less than 0.4% of the national budget, with less than 0.1% set aside for land redistribution. Moreover, those who do receive redistribution 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 under-utilised. 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 our recommendations, we have proposed amendments to existing laws to ensure that these rights are effectively promoted, enforced and upheld. Laws we propose 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. We have 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 Ingotyama 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 and also articulate 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 that it cannot accommodate. The problems that currently beset restitution, cannot be addressed without effective, forward-looking redistribution taking place at scale.

The Panel 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 co-existing land rights. This is discussed in chapter 5. 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. 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.

At the end of the day, 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 in rural ‘homelands’, or tenancy in urban areas. 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 farm workers 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 this chapter 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 a convincing argument can be made that land reform will redress poverty and inequality and on that basis deserves a meaningful increase in its share of the national budget.

CHAPTER 4

SOCIAL COHESION AND NATION-BUILDING



Judge Navi Pillay



Abstract

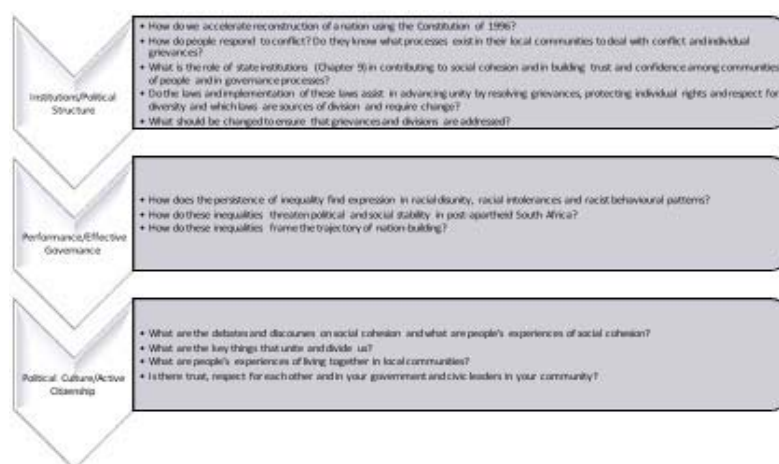
South Africa recently achieved democracy, following more than three centuries of colonial and apartheid rule. The previous dispensations were characterised by an absence of social cohesion due to structural and institutionalised opposition to any efforts at nation-building. These were characterised by 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.

Introduction

Focus of the assessment

The inquiry in this chapter is shaped by a set of key questions developed by the High Level Panel, grouped into the three core elements that have an impact on political and social citizenship: institutions/political structure, performance/effective governance, and political culture/active citizenship as depicted in Figure 4.1 below.

Figure 4.1: Questions guiding the inquiry



Problematising social cohesion in the South African context

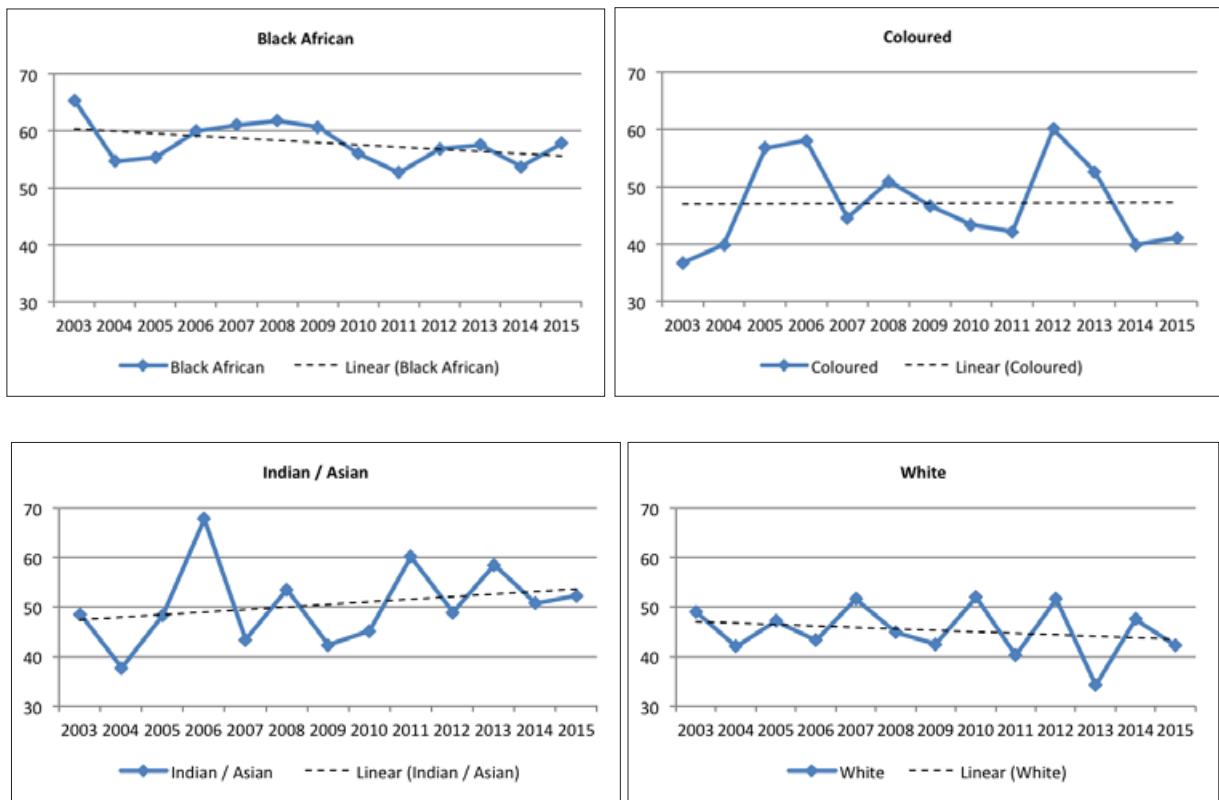
The concept of social cohesion has become an increasingly significant part of South African policy discourse over the past ten years: on the one hand, it reflects the imperative of building a democratic post-apartheid nation-state and on the other, the increasing anxieties regarding current fragmentation along the lines of race, class, gender, and ethnicity. Social cohesion is critical to the objectives of the developmental state, which, as is argued, requires a 'social compact' to rally all sectors of society together around a common national vision of transformation. This would require a commitment from all sectors (public and private) of society to national development through investing in South Africa's people (education to build individual capabilities and resilience, health care, and safety and wellbeing), in building the capacities of institutions, and investment in South



African businesses. Nevertheless, there is a significant gap between policy aspirations towards social cohesion and the actual state of social solidarity in the country. As the Twenty Year Review states, ‘Public opinions on race relations, pride in being South African, and identity based on self-description all show little improvement or a decline’ (The Presidency, 2014). Most importantly, there is a high level of mistrust between members of the different race groups, as indicated in Figure 4.2.

The data in Figure 4.2 indicates that the attitudinal responses of the country’s racial minorities to the question about trust in other race groups showed significant degrees of fluctuation between 2003 and 2015.

Figure 4.2: Proportion of the group who agreed that ‘people of different racial groups will never trust each other’, 2003 – 2015



Source: HSRC South African Social Attitudes Survey (SASAS) 2003 – 2015.

Besides the cleavages that originate in the racial divide, other threats to social cohesion include high levels of inequality, poverty and unemployment, high levels of crime, violence and substance abuse, service delivery failures, increasing levels of distrust in the country's democratic leaders and institutions, marginalisation/exclusion of certain sectors of society, and xenophobia.

Social cohesion is a complex concept. South African policy documents have a tendency of emphasising consensus in the realm of values as critical to creating social cohesion. However, survey data from the South African Reconciliation Barometer and the South African Social Attitudes Survey indicates that the majority of South Africans continue to trust people of their own ethnic and language group primarily. The majority identify themselves in terms of these ethnic, language and racial groups rather than a single South African identity. On the other hand, the majority of citizens appear to continue to feel relatively high levels of general national pride, although their trust in institutions is declining.

The legacy of apartheid as a spatial construct creates a further challenge to social cohesion and the emergence of a shared South African identity.

Social cohesion has been identified as a key national priority in a number of policy and strategic documents, particularly since 2004. These include the Social Cohesion and Social Justice in South Africa study conducted by the Human Sciences Research Council (HSRC) (The Presidency, 2004), and the Presidency's Macro-Social Report, *A nation in the making: Macro-social trends in South Africa* (The Presidency, 2006), which made a significant contribution to introducing the concepts of social cohesion, social capital and social justice into policy discourse. This was followed by the Presidency's Fifteen Year Review (The Presidency, 2008), the National Planning Commission's Diagnostic Overview (National Planning Commission, 2011a), the National Development Plan (National Planning Commission, 2011b) and the Presidency's Twenty Year Review (The Presidency, 2014). Efforts to develop a comprehensive strategy to respond to the challenges of social cohesion include the Department of Arts and Culture's briefings to Parliament in 2010 in the wake of a conference on 'Building a Caring Nation' (Department of Arts and Culture, 2010a; 2010b), the Department's draft National Strategy on Social Cohesion and Nation Building (Department of Arts and Culture, 2012), which was debated and discussed at a multi-stakeholder summit on social cohesion in 2012, and most recently the Medium-Term Strategic Framework (MTSF) 2014 – 19, which includes nation-building and social cohesion as Outcome 14.



The Fifteen Year Review defined social cohesion as ‘that which gives a society the capacity to co-operate in a way that creates the possibility for positive change’. It emphasised the importance of a socially cohesive state to meet the goals of the developmental state, which, it argued, would require the loyalty of citizens, despite uncomfortable ‘trade-offs’. The Review argued that in a developmental state both state and society must be mobilised together ‘for a big push based on broad national consensus’ (own emphasis) (The Presidency, 2008). The 15 Year Review conceptualised social cohesion as having ‘material’ and ‘spiritual’ dimensions that should be addressed through human development and nation-building that ‘seeks to promote pride in being South African, a sense of belonging, values, caring for one another and solidarity among South Africans’. (The Presidency, 2008).

The Department of Arts and Culture (DAC), on the other hand, contended in 2010 that South Africans seek social cohesion in order to create a ‘caring, compassionate, fair and equitable society’ (Department of Arts and Culture, 2010a). Thus, the mission of resolving problems of crime and violence, xenophobia, racism and labour unrest are goals in themselves. But other statements about social cohesion suggest that these goals are only interim steps toward establishing a unified society that can then comply more effectively with government development planning. This latter reading is suggested in the definition of social cohesion, also provided by the DAC:

Social cohesion refers to those factors that have an impact on the ability of a society to be united for the attainment of a common goal. It is the extent to which members of a society respond collectively in pursuit of these shared goals and how they deal with the political, socioeconomic and environmental challenges that are facing them (Department of Arts and Culture, 2010b).

Racial, cultural, political, religious, class, gender or age divisions are not discussed as problems, but as ‘factors impeding the building of a cohesive society’, which must be solved in order to achieve the social unity necessary to attain the real goals of national development (Department of Arts and Culture, 2010b).

The National Planning Commission’s Diagnostic Overview identified one of the key challenges facing South Africa as the fact that ‘South Africa remains a divided society’. The document therefore argued that such a social compact could form the basis for ‘meaningful consensus’ in order to

realise the aspiration of healing the divisions of the past and achieving social justice (National Planning Commission, 2011a).

The NDP identified ‘Transforming society and uniting the nation’ as a critical part of its vision for 2030 and as an essential tool that can reduce poverty and inequality. The plan noted that ‘social cohesion and nation-building matter – both as an end – state and a facilitator’ (National Planning Commission, 2011b). The strategy to address the question of social cohesion incorporated three elements – reducing poverty and inequality; promoting mutual respect, inclusiveness and cohesion based on the constitutional imperative that South Africa belongs to all who live in it, and that there is equality before the law. The third element referred to the notion of active citizenship, i.e. citizens should have ‘a deeper appreciation of their obligations and responsibilities to each other’ (National Planning Commission, 2011b). The overarching vision the NDP articulated for 2030 was that ‘South Africans will be more conscious of the things they have in common than their differences’ (National Planning Commission, 2011b).

The NDP set out five long-term nation-building goals for South Africa. These goals were: knowledge of the Constitution and fostering constitutional values; equalising opportunities, promoting inclusion and redress; promoting social cohesion across society through increased interaction across race and class; promoting active citizenry and broad-based leadership; and achieving a social compact that will lay the basis for equity, inclusion and prosperity for all.

In the wake of the NDP a draft Social Cohesion Strategy was formulated by the DAC, which was subsequently debated at a multi-stakeholder summit in 2012. The National Strategy for Social Cohesion argues that one of the most important routes to social cohesion is through what it calls ‘civic nationalism’. The Strategy states that: ‘Making citizenship central to South African national identity means empowering South Africans to behave as citizens’ on a number of levels.

The document distinguishes the related concepts of social cohesion from nation-building. It defines social cohesion as ‘community based and located at a micro-social level’, as ‘the degree of social integration and inclusion in communities and society at large, and the extent to which mutual solidarity finds expression itself among individuals and communities’ (Department of Arts and Culture, 2012). Nation-building is defined as a ‘macro-social process’,



...whereby a society of people with diverse origins, histories, languages, cultures and religions come together within the boundaries of a sovereign state with a unified constitutional and legal dispensation, a national public education system, an integrated national economy, shared symbols and values...to work towards eradicating the divisions and injustices of the past; to foster unity; and promote a countrywide conscious sense of being proudly South African (Department of Arts and Culture, 2012).

Most recently, the MTSF 2014 – 19 identified Outcome 14 as ‘a diverse socially cohesive society with a common national identity’ (The Presidency, 2014b). It states that the overarching objectives for the period until 2019 in relation to nation-building and social cohesion will be ‘reducing inequality of opportunity, redress, enabling the sharing of common space, awakening the populace to speak when things go wrong and to be active in their own development as well as engendering the knowledge of the Constitution and fostering the values contained therein’ (The Presidency, 2014b). It identifies the following sub-outcomes that will be measured on an ongoing basis based on the NDP’s five nation-building goals, which are: fostering Constitutional values; equal opportunities, inclusion and redress; promoting social cohesion across society through increased interaction across race and class; promoting active citizenry and leadership; and fostering a social compact.

The progressive realisation of socioeconomic rights

Introduction

During the apartheid era in South Africa, the denial of socioeconomic rights for the black majority was institutionalised through legislation passed by respective Parliaments from 1948. The apartheid era perpetuated and entrenched racial discrimination by restricting access to socioeconomic rights that existed in the segregation era that preceded it. For instance, when old age pensions were introduced for the elderly in 1928, Africans were specifically excluded from benefitting. By the time apartheid was introduced, the social security system had already been extended to all race groups, but with racially differentiated benefit levels. During apartheid, black South Africans experienced the lowest benefit levels in all aspects of socioeconomic rights such as housing, education and healthcare as opposed to white South Africans. In addition, differential benefit levels were different for the various race groups within the black community.

One of the priorities of the first post-apartheid government was to remove discrimination in access to socioeconomic rights, as well as to entrench fitting rights that are applicable to all in general, and children and older persons in particular.

Constitutional mandate

The Preamble of the Constitution of the Republic of South Africa (1996) includes the commitment to improve ‘the quality of life of all citizens and free the potential of each person’, and the entrenchment social justice. In Section 1 of the Constitution, respect for the ‘human dignity’ of everyone is in the foremost position, along with the ‘achievement of equality’, and the ‘advancement of human rights and freedoms’. These provisions provide explicit recognition that equality will not be achieved merely by a constitutional declaration of formal equality before the law. Rather, there will necessarily be a protracted process during which ‘human rights and freedoms’ will be ‘advanced’ while being constantly guided by the fundamental value of human dignity. The primary socioeconomic principles that led to our deep divisions and inequality receive particular attention in the commitment in sub-paragraph b. of Section 1 of the Constitution to non-racialism and non-sexism as key founding provisions of our new society.



A broad range of fundamental rights is included in Chapter 2 of the Constitution, the ‘Bill of Rights’. Included in this transformative document are the ‘second generation’ socioeconomic rights (SERs) that create entitlements for material conditions for human welfare. These include the right to a safe environment (Section 24), to equitable access to land (Section 25(5)), to have access to adequate housing and to be protected from arbitrary evictions (Section 26), to have access to health care services, sufficient food and water, and social security and assistance (Section 27), of children to shelter and basic nutrition, social services and health care services (Section 28(1)(c)), and to basic education and further education (Section 29).

However, some of the socioeconomic rights are subject to limitations set out in the Constitution. For instance, the government is only obliged to provide adequate housing if it takes reasonable steps, within available resources, to achieve the progressive realisation of adequate housing for all. Similar limitations are placed on the right to have the environment protected; to gain access to land on an equitable basis; to have access to adequate health care, including reproductive health care, sufficient food and water, and social security and assistance; and to further education. By contrast, the government is obliged to provide all children with shelter and basic nutrition, social services and healthcare services; and to provide everyone with basic education, including adult basic education. The focus in this section of the chapter is on social assistance since housing, health care and education are dealt with elsewhere in the Report.

Social assistance

Overview of policy goals informing legislation

Poverty is one of South Africa’s main concerns, and government policy acknowledges social assistance as indispensable for the eradication of poverty. The White Paper for Social Welfare, 1997, provides the framework for a developmental social welfare system to deal with the discriminatory social welfare system characteristic of the apartheid era. The White Paper stipulated that: ‘a uniform social grants system is being created, which involves legislative changes, the development of uniform regulations, the rationalisation of computer systems and the development of a national social grants register and automated fingerprint technology’. At the heart of the grants system are various cash transfers to beneficiaries. The main components of the social assistance programme

are the Child Support Grant (CSG), State Old Age Pension Grant, the Disability Grant, the Foster Care Grant, and the Care Dependency Grant. In 2004, a national government agency was established to implement and administer social grants, the South African Social Security Agency (SASSA).

The National Development Plan's (NDP) vision is a society where opportunity is not determined by race or birthright; where citizens accept that they have both rights and responsibilities. Most critically, the NDP seeks a united, prosperous, non-racial, non-sexist and democratic South Africa. Constitutionally, the South African government is compelled to distribute social assistance to everyone that is incapable of supporting themselves and it is mandated to take this right seriously for all (National Planning Commission, 2011). The objective of the social assistance programme is to alleviate and reduce poverty, vulnerability, social exclusion and inequality.

Overview of trends since 1994: Insights from diagnostic report, submissions, commissioned papers and roundtables

A mere 4.2 million beneficiaries of social grants in 2002 were counted in South Africa. This has grown to approximately 17 million, with total expenditure on social grants in the 2017/2018 financial year reaching about R150 billion. With the exception of grants for foster care, in 2011, social grants accounted for more than 70% of the income of the bottom quintile (up from 15% in 1993 and 29% in 2000). Social grants included, the entire spectrum of population ranked by income percentiles saw income growth between 1995 and 2005. But without the grants as part of income, those below the 40th percentile saw a significant decline in their income. In other words, without the grants, two-fifths of the population would have seen its income decline in the first decade after apartheid (World Bank, 2011a).

Overview of trends since 1994: Voices of the public

In a written submission to the Panel's public hearings in Mpumalanga, Veronica Mangane stated that: 'Poverty and service delivery is still a very big problem in our community. There are families who do not get social services, child grants and also the conditions they are living under are appalling.'



Beauty Msindwana stated at the Gauteng public hearings that: ‘We would like the government to be lenient with us women who receive grants by giving us jobs; we support our children and the grandchildren with this R1,500.’

Novumzi Mphunyuka requested at the Gauteng public hearings that the government : ‘...be lenient with us women by considering pensionable age to be 55 years, because we don’t even reach 60 and our children are struggling with getting employment.’

Sibongile Khumalo, who attended the Gauteng public hearings, added that: ‘We are grateful to the government, which took God’s place by being a provider to the orphans and the widows by giving us social grants to raise our children.’

A written submission made by an unknown person at the Panel’s Limpopo public hearings included the following concerns:

‘Caregivers are not all getting their grant in aid. I’m not too sure how the selection is made. Caregivers do not have the option to go and look for jobs to sustain themselves so government should monitor this process on a monthly basis. It is also advisable that caregivers are present when the food parcels are delivered since they are the ones responsible for everything at home and they know better. Then there are young women who get a child grant but they use it for gambling. We suggest that they be given a food voucher rather. Others get the old age grant on the old aged people’s behalf yet they are not looking after them. The government must also monitor this to ensure that the old aged are taken care of.’

Analysis of legislation passed

In its analysis of legislation aimed at the progressive realisation of socioeconomic rights, the Panel found that the main challenges related to implementation instead of limitations in the relevant laws (as is the case with most of the legislation assessed by the Panel). It found that, in part, this gives rise to the need for the introduction of institutional measures to enable Parliament – as the representative of the public – to ensure compliance with legislation and implementation of the policies and programmes arising from the relevant legislation, including the introduction or stricter enforcement of penalties for non-compliance.

The Panel also 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 only possible if the government continues to place emphasis on designated groups in existing affirmative action legislation, policies and programmes. Thus, emphasis must be placed in realising socioeconomic rights for black people in general, and women and people living with disabilities in particular, 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 representivity. 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.

Recommendation 4.1

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.

The Panel also noted that the progressive realisation of socioeconomic rights, protection of rights and elimination of discrimination, achievement of democracy through active citizenship and governance, and success in nation-building have been undermined since 1994 by a large number of implementation challenges, which require evidence-based research to identify root causes of these challenges and appropriate measures to resolve them.

The Panel assessed a number of key laws and arrived at recommendations on only one. (Please note that several laws that impact on the progressive realisation of socioeconomic rights are dealt with in other Chapters.)



The Social Assistance Act 13 of 2004

Relationship to social cohesion: It is important to develop or retain a well-maintained social security system based on solidarity, since this is an indication of one of the principal means of fostering social cohesion. Constitutionally the South African government is compelled to distribute social assistance to everyone that is incapable of supporting themselves and it is mandated to take this right seriously for all (National Planning Commission (2011b)).

The Social Assistance Act was enacted to assist in securing the wellbeing of all citizens and to provide effective, transparent, accountable and coherent government in respect of social assistance.

This Act was amended in 2008 in order to equalise eligibility of the pensionable age between men and women, which currently is 60 years. This Act applies to all citizens of South Africa to the extent that it also covers refugees and therefore promotes social inclusion. Furthermore, the Act helps beneficiaries gain access to the resources and opportunities necessary to participate fully in economic, social and cultural life and to enjoy a standard of living that is considered normal in the society in which they live.

Summary of challenges that have been identified 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 documents and attachments to reports for extending orders ready for courts on due dates. It is therefore inevitable for orders to lapse. In 2011, an estimated 123,236 children's foster care orders lapsed without being extended and a large number of such orders were due to expire each month. Currently, there is no common definition of what constitutes a disability. The eligibility criterion for the disability grant marginalises people suffering from HIV and other chronic illnesses.

Recommendation 4.2a

Parliament should use its powers to introduce the following legislative changes to the Social Assistance Act 13 of 2004:

- i. the Act should be amended to enable teen mothers and child-headed households to receive the CSG simultaneously for themselves and the children in their care;
- ii. the Act should be amended to align it with the Children's Act, allowing supervising adults supporting child-headed households to apply for the CSG on behalf of the children under their supervision;
- iii. the Act should be amended to deal with the lapsing of foster care grants; and the Act should be amended to include a widely accepted definition of disability.

Challenges with implementation: In theory, the current means test allows government to target the truly needy; however, it also leads to inclusion and exclusion errors (Brockhoff (2013)). In addition, it opens the door to corruption and fraud. In terms of implementation challenges, the means test has been found to be a barrier to completion of an application (Economic Policy Research Institute, 2011). For a beneficiary who is illiterate, or who has difficulty with the language (which mostly is English), the questions required by the means test are particularly difficult. Furthermore, the means test questions involve financial concepts like *ex gratia* payments or dividends, which most of the time are new and potentially confusing (and intimidating) to beneficiaries (Economic Policy Research Institute, 2011).

A range of other implementation challenges have been identified, including a lack of transparency in the social grant system as a whole; collusion between commercial and administrative sectors; grants not being earmarked for particular purposes; grants are not indexed against inflation; there are no provisions to address the plight of individuals who have no income but do not meet the criteria to receive grants; and there is no co-ordination between the social grants system and Community Works and Community Works Programmes.



Recommendation 4.2b

Parliament should ensure the following steps are taken to improve implementation of the Social Assistance Act 13 of 2004:

- i. simplify or eliminate the means test;
- ii. resolve SASSA's capacity constraints;
- iii. improve transparency;
- iv. address collusion between the commercial sector and administrators of social grants;
- v. circumscribe grants and earmark them for particular purposes;
- vi. grants should be indexed against inflation;
- vii. be a means of addressing the plight of individuals who have no income but do not meet the criteria to receive grants should be prioritised; and
- viii. the Departments of Social Development and Public Works should collaborate to ensure that Community Works Programmes complement social assistance programmes.

Rights and discrimination

Introduction

South Africa's history of oppression, exclusion, dispossession and the selective advancement of certain groups above others, in particular, the white minority, resulted in the systematic discrimination against and exclusion of black people in all facets of economic, political and social life. Prior to 1994, there was no concept of equality before the law. Both the state and society disrespected the human rights of those who were socially excluded and marginalised. Deeply entrenched discriminatory practices became the norm, and the predominant value system promoted an understanding of women as inferior to men at all levels of society. Certain other vulnerable groups of society, such as people with disabilities and the elderly, were even further excluded and marginalised, leaving them at a greater disadvantage and vulnerable to further social risks. The advent of democracy in 1994 presented the South African government with the opportunity to change the life trajectory of black people and the most vulnerable members of society. The emphasis was placed on an equitable society and entrenching civil and political rights of those who had been historically excluded from participating in the mainstream of society.

Constitutional mandate

The right to equality is introduced into the South African constitutional framework by the Preamble to the Constitution. The Preamble sets the Constitution as the foundation 'for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law'. Guided by this objective, Section 1 lists the 'achievement of equality' and 'non-racialism and non-sexism' among the founding values of the country's constitutional democracy. Equality as a fundamental constitutional value resonates through the text of the Bill of Rights and is the first right enumerated in the Bill of Rights. Section 9 of the Constitution is notably detailed. Section 9(4) of the Constitution requires the enactment of legislation to give effect to the constitutional commitment to equality and non-discrimination. This legislation has taken the form of the Promotion of Equality and Prevention of Unfair Discrimination Act (the Equality Act – PEPUA), which is one of the legislative building blocks of the transformative process that aims



to eradicate behavioural patterns modelled on past discriminatory policies and practices. The provisions of the Act are intended to address systemic inequalities and unfair discrimination that manifest themselves in the institutions of society and the practices and attitudes of South Africans insofar as these undermine the aspirations of our constitutional democracy.

The Constitution provides equal protection to many vulnerable groups, including LGBTQ+ (lesbian, gay, bisexual, transgender, intersex and queer) persons. In 1996, South Africa was the first country to adopt a Constitution that protects people from discrimination on grounds of sexual orientation. The Constitution prohibits religious discrimination and specifies that freedom of expression does not extend to advocacy of hatred based on religion. It provides for freedom of religion, belief, and opinion, including the right to practice one's religion, and to form, join, and maintain religious associations. It also allows religious observances in state or state-supported institutions provided they are voluntary and conducted on an equitable basis. The Constitution also provides for the promotion and respect of languages used for religious purposes. Section 6(1) of the Employment Equity Act prohibits unfair discrimination, whether directly or indirectly, against an employee in any employment policy or practice on grounds including race, gender, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, and birth.

Racism, racial discrimination, xenophobia and related intolerances

Overview of policy goals informing legislation

The origin of the 2016 Draft National Action Plan (NAP) to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance is to be found in the Constitution and in South Africa's treaty obligations, specifically, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), as well as South Africa's commitments arising from the Third United Nations World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (the Durban Declaration and Programme of Action). The Department of Justice and Constitutional Development (DOJ&CD) established a national interdepartmental Steering Committee comprising 20 government departments, four Chapter Nine Institutions, and ten Civil Society Organisations

to assist in the conceptualisation, planning and development of the draft NAP. The draft NAP was finally launched on 29 February 2016. This was followed by a series of provincial public consultations. The public was also given an opportunity to make written submissions on the Plan by 31 August 2016. The revised NAP will then be submitted to Cabinet for approval and will be used **to develop a comprehensive public policy against racial discrimination, xenophobia and related intolerance.**

Besides the various laws that protect the rights of religious, cultural, linguistic and identity groups, the NAP specifically addresses discrimination on the grounds of religion, culture, language and identity. For instance, it is stipulated that the NAP will take cognisance of, and deal with, 'forms of racial or religious intolerance and violence, including Islamophobia, anti-Semitism, Christianophobia and anti-Arabism manifested in particular by the derogatory stereotyping and stigmatisation of persons based on their religion or belief'. The Constitution also created a number of specialised human rights bodies to protect and promote the rights of specific constituencies, including the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, and the Pan South African Language Board.

The NAP provides a framework for the development of programmes and measures to, among others, promote human dignity through the promotion and protection of human rights; raise awareness of anti-racism, equality and anti-discrimination issues; encourage the collection of data; strengthen programmes for individuals and groups encountering racial discrimination, xenophobia and related intolerance, and facilitate the amendment and/or adoption of legislation with a view to improving the protection of victims.

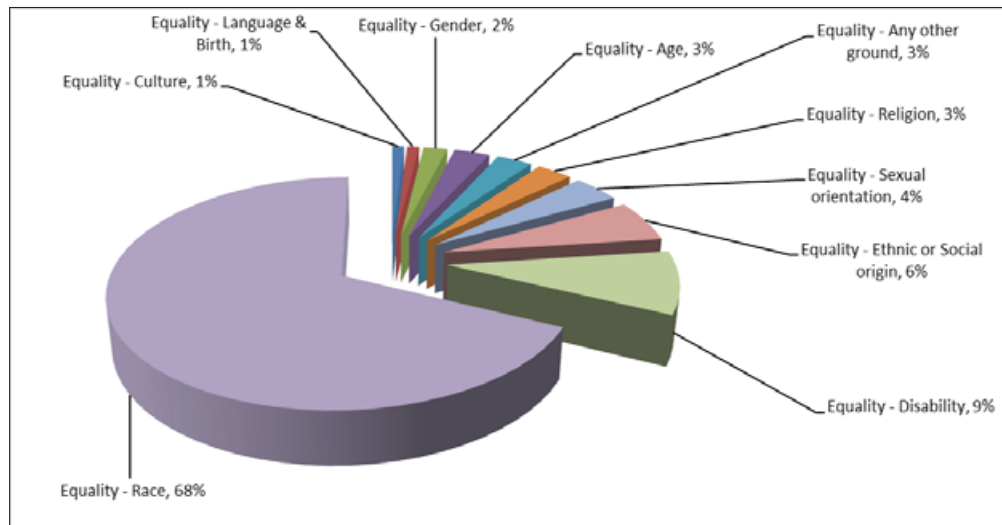
Overview of trends since 1994: Insights from diagnostic report, submissions, commissioned papers and roundtables

Race is still one of the most salient lines of fracture largely because of the country's history of white minority rule and resistance to apartheid. The increasing number of racist hate crimes in the past few years illustrate this, and is indicative of the challenges the country still has in overcoming the legacy of its past. They also make it apparent that there are deep-seated feelings of interracial dislike and mistrust, which are often expressed privately and publicly in the form of harmful stereotypes.



The South African Human Rights Commission (2016a) reported to the roundtable on 14 September 2016 that it had received a total of 716 equality-related complaints in the financial year ending 31 March 2016, representing over 16% of all complaints. Over half of these matters represented allegations of unfair discrimination on the basis of race. It provided a breakdown of equality-related cases in 2015 – 2016.

Figure 4.3: Equality-related complaints received by the South African Human Rights Commission between 1 April 2015 and 31 March 2016



The Commission noted that these figures demonstrate that issues of racial discrimination still remain a considerable challenge in our society. They do not, however, provide a comprehensive view of the level of race-based discrimination experienced nationally, but may at best be an indicator of the systemic nature of race-based violations.

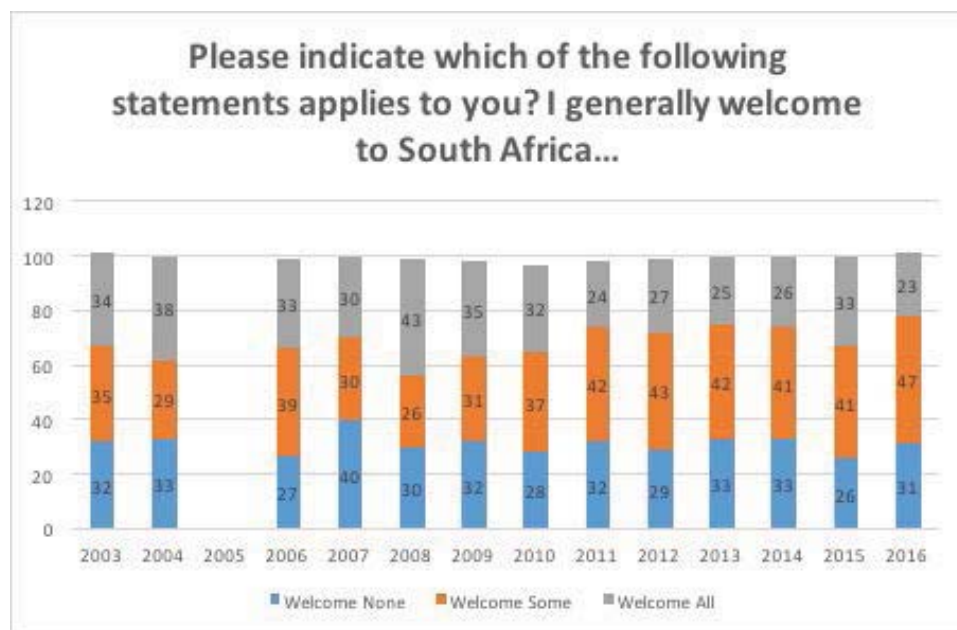
The development of a high degree of social cohesion so necessary to achieve prosperity and equity in South Africa requires that government gives legal recourse to victims of racism. Legal recourse is provided for in PEPUDA.

Despite the prohibition of discrimination on the grounds of religion, there have been several notable instances of religious discrimination or intolerance. For instance, in 2014 a member of the Cape Town city council representing the Al-Jama-a Party, a Muslim party supported by the Muslim Judicial Council (MJC), tried to close the Open Mosque in Wynberg, Cape Town, citing a bylaw

requiring public establishments to provide adequate parking space. The MJC was the principal group objecting to the Open Mosque, which allowed non-Muslims, including LGBTIQ+ individuals, to attend services and also allowed women to lead prayers. The city council opposed the closure and the mosque continued to operate. On October 4, a suspected arson attack occurred at the Open Mosque. The following weekend, a car rammed the mosque’s gated entry and damaged video surveillance equipment (United States Department of State, 2014).

The HSRC presentation at the Panel’s roundtable in KwaZulu-Natal drew attention to the following ‘xenophobic’ attacks: in December 1994, protesters in Alexandra Township marched on their local police station to demand that all Malawians, Mozambicans and Zimbabweans ‘go home’, leading to the anti-immigrant riots known as ‘Operation Buyelekhaya’ (Go Back Home) in December 1994 and January 1995; the May 2008 anti-immigrant riots, which left 62 dead and more than 100 000 displaced; and in April 2015, violent riots broke out in several urban areas of South Africa’s KwaZulu-Natal and Gauteng provinces. The results of a national survey were presented, including the following table, which illustrates perceptions of foreigners held by South Africans (Human Sciences Research Council, 2016).

Table 4.1: Overall perceptions of foreigners in South Africa, 2003 – 2015



Note: The 2005 SASAS round did not include a question on perceptions of foreigners.



Overview of trends since 1994: Voices of the public

Andile Goba made a written submission in which he stated:

‘...as a 16 year old I experience racial discrimination on a daily basis between the white, coloured and black people and I questioned myself: ‘why is this still happening in a democratic society?’ We live in a society where discrimination still exists, but in different degrees. Non-black people still view us (black people) as a Kafar (sic), they feel superior because of their skin colour, language and laugh about our accent.’

However, in its submission to the Panel, the South African Institute for Race Relations drew attention to a 2015 survey, which found that experiences of racism are ‘at odds with the social media view that South Africa is so ridden with racism that it stands on the brink of a race war’. The results of the survey on this issue were submitted to the Panel and are set out in the table below.

Table 4.2: Experience of racism

If you do notice racism in your life, in what ways have you noticed it?					
	African	Coloured	Indian	White	Total
Experienced no racism	79.4%	81.2%	55.7%	75.3%	78.5%
Attitude towards people of different races	13.1%	10.9%	18.0%	18.2%	13.6%
Job discrimination	4.1%	2.4%	17.3%	2.2%	4.1%
Other	3.4%	5.5%	9.0%	4.3%	3.8%

Source: South African Institute of Race Relations (2016).

Problem statement

Despite the existence of several laws that are aimed at eliminating racism and other forms of discrimination, South Africans continue 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.

Recommendation 4.3

Parliament should ensure that the National Action Plan (NAP) to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance is finalised with sufficient opportunity provided for public consultation on the NAP to ensure that it is widely accepted, and that the necessary measures are put in place to ensure that it is implemented and that Parliament develops the necessary institutional capacity to monitor this and similar transversal measures and seeks to play a leadership role in building a nonracial society.

Problem statement

The Constitution has provided for the establishment of a number of institutions that can partner with Parliament to protect the rights of individuals and groups, and progressively bring about the elimination of discrimination. Another conclusion reached by the Panel is that ideally there should exist a proactive relationship between Parliament and the Chapter 9 institutions. The latter should be strengthened to the extent that departments take them seriously (especially in terms of providing needed information). Parliament must recognise the Chapter 9 institutions as strategic in the monitoring and implementation of relevant key legislation, policies and programmes relating to rights.



Recommendation 4.4

Parliament should ensure that the Chapter 9 institutions play a central role in the implementation of legislation, policies and programmes that protect the rights of individuals, groups and vulnerable individuals by:

- i. urgently building on the Asmal Report with the objective of strengthening and ensuring the effectiveness and reachability of Chapter 9 institutions;
- ii. introducing additional regulating mechanisms for these institutions to ensure their independence;
- iii. ensuring the timeous appointment of Commissioners of the Chapter 9 institutions;
- iv. where needed, strengthening the powers of the Chapter 9 institutions to ensure that their requests for co-operation and recommendations are taken seriously by departments and Parliament, and enforceability is ensured; and
- v. providing Chapter 9 institutions with appropriate resources.

Analysis of legislation: Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

Relationship to social cohesion: The Promotion of Equality and Prevention of Unfair Discrimination Act (the Equality Act) is one of the legislative building blocks of the transformative process that aims to eradicate behavioural patterns modelled on past discriminatory policies and practices. Section 16 of the Equality Act provides that every high court is an Equality Court in its area of jurisdiction. Magistrates' courts are designated Equality Courts by the Minister of Justice.

The purpose of Equality Courts is to adjudicate matters specifically relating to infringements of the right to equality, unfair discrimination and hate speech. The remedies that an Equality Court may impose are forward-looking, community-oriented and structural, and include unconditional apologies, deterrence and compliance orders, audit orders, general and special damages and declaratory orders, among others. Since implementation of the Act, some gaps in the legislation have been amended through six Acts and amendment Acts.

Summary of challenges that have been identified with the Act itself: One of the most significant problems identified with the Act is that the date of the commencement of Sections 25 – 28 and 29(2) of the Act have never been proclaimed. These sections place a duty on the state and private parties to promote equality. In terms of the Act, these equality plans were to be submitted to the SAHRC within two years of the commencement of the Act. Although Regulations have been published that deal with these provisions, because a commencement date for these sections has not yet been proclaimed, the Regulations relating to these sections are not operational (Portfolio Committee on Justice and Constitutional Development, 2006).

The Freedom of Expression Institute (2016) drew attention in its submission to the inconsistencies between the definition of hate speech in PEPUDA and in the Constitution (1996). The Constitution in Section 16(2)(c) stipulates that the right to freedom of expression does not extend to, among others, advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm. By contrast, PEPUDA (Section 10(1)) stipulates that no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to: (a) be hurtful; (b) be harmful or to incite harm; (c) promote or propagate hatred. According to the Institute, the PEPUDA definition has further implications for the interpretation of proposed hate speech legislation and all other legislation referencing hate speech. This is based on the view that the limitation imposed on freedom of expression in the PEPUDA definition is too broad.

The deteriorating state of operation of the Equality Review Committee (ERC) is another serious challenge. The ERC was conceived as an important statutory body for monitoring the implementation of PEPUDA. The Department of Justice and Constitutional Development has not established a dedicated and adequately resourced unit to provide administration/support to the ERC as required by PEPUDA. Equally problematic is the appointment of serving judges as members of the ERC. Court schedules make it difficult for judicial officers to dedicate sufficient time to serve on the ERC, let alone to attend its meetings. Similar problems were identified at the level of Members of Parliament. The Members representing Parliament in the ERC change frequently, impacting significantly on the efficacy of the ERC.



Recommendation 4.5a

Parliament should use its powers to introduce the following legislative changes to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 to strengthen the Act by:

- i. promulgating certain outstanding sections of the Act, such as the requirement that each department develop equality plans, or alternatively, put 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;
- ii. strengthening the hate speech section of the Act and ensuring 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 over-broad and does not unconstitutionally limit the rights to freedom of expression); and
- iii. leading to the transfer of the tasks currently placed on the Equality Review Committee to Chapter 9 institutions, along with the funding required to fulfil this responsibility effectively.

Problem statement

Several challenges have been identified with the implementation of the Act, including the underutilisation of Equality Courts by members of the public, the need for training of magistrates and clerks, lack of resources at Equality Courts, a general lack of knowledge about proceedings in the Equality Courts, considerable delays in the promulgation of promotional aspects of the Act, in particular Chapters 5 and 6, and the deteriorating state of operation of the Equality Review Committee (ERC) (South African Human Rights Commission, 2016b).

Recommendation 4.5b

Parliament should ensure the following steps are taken to improve implementation of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000:

- i. Parliament, together with the Chapter 9 institutions, should ensure that the promotional mandates contained in PEPUDA are implemented; and
- ii. Parliament should consider having annual dedicated meetings with the relevant department and Chapter 9 institutions (South African Human Rights Commission, Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities and Commission for Gender Equality) to obtain feedback on the implementation of the Act, such as the promotion of the Act, the number of cases before the Equality Courts, and training of court officials.

Problem statement

There is an urgent need to pass the hate crimes legislation to deal with the rising scourge of such crimes against vulnerable groups by removing that component of the Combating of Hate Crimes and Hate Speech Bill that deals with hate speech, and placing it in PEPUDA.

Recommendation 4.6

Parliament should use its powers to urgently table the proposed Prevention and Combating of Hate Crimes and Hate Speech Bill and should consider possible additional measures to address the root causes of hate crimes and racism.



Women

Overview of policy goals informing legislation

The project of social cohesion and nation-building would not be complete without the inclusion of women, and the promotion of a more equitable and just society. The building of institutional machinery for gender in South Africa began in 1997, with the establishment of the Office on the Status of Women (OSW) in the Presidency. Its mandate was to develop a national gender policy framework and later to oversee and co-ordinate policy development on women at the national level. Subsequently, offices were also established in the offices of the provincial premiers to implement and co-ordinate policies at provincial level. In 1997, Parliament passed legislation to establish the Commission for Gender Equality (CGE) as one of the Chapter 9 institutions outlined in the Constitution to promote respect for, and to protect, develop and attain gender equality (The Presidency, 2014).

South Africa's National Policy Framework for Women's Empowerment and Gender Equality establishes guidelines for South Africa as a nation to take action to remedy the historical legacy of gender inequality by defining new terms of reference for interacting with each other in both the private and public spheres, and by proposing and recommending an institutional framework that facilitates equal access to goods and services for both women and men. Since 1994, extensive legislation promoting gender equality and women's empowerment in terms of labour, sexual and reproductive health, violence and marriage and divorce has been passed. Members of Parliament have the responsibility to ensure that any new legislation is progressive, and that amendments to legislation are in line with gender equality. The Policy Framework identified legislation that has the potential to empower women and promote gender equality.

Overview of trends since 1994: Insights from diagnostic report, submissions, commissioned papers and roundtables

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. Despite the absence of official statistics, South African women experience high levels of GBV. In 2012, a study conducted by Gender Links found that 77% of women in Limpopo, 51% in Gauteng, 45% in the Western Cape and 36% in KwaZulu-Natal had experienced some form of GBV (Gender Links, 2012). Another study surveying 1,306 women in three South African provinces found that 27% in the Eastern Cape, 28% in Mpumalanga and 19% in Limpopo had been physically abused in their lifetime by a current or ex-partner. The same study investigated the prevalence of emotional and financial abuse experienced by women in the year prior to the study and found that 51% of women in the Eastern Cape, 50% in Mpumalanga and 40% in Limpopo were subjected to these types of abuse (Abrahams et al., 1999).

A study involving a random selection of women in South Africa concluded that 24.6% have experienced some kind of physical assault from their current partners (Jewkes et al., 2002). In 1999, 8.8 per 100,000 of the female population aged 14 years and older died at the hands of their partners – the highest rate ever reported in research anywhere in the world (Matthews et al., 2004). Of the seven women murdered (on average) every day between March 2010 and March 2011, at least half of these murders were perpetrated by intimate partners (Abrahams et al., 2013). The murder rate of 24.7 per 100,000 females is the highest rate that has been published (Abrahams et al., 2009). Twelve per cent of women in Gauteng, 6% in the Western Cape, 5% in Limpopo and 5% in KwaZulu-Natal reported having experienced non-partner rape in their lifetime. Of the 26 000 children who experienced sexual offences as reported in the 2010/11 statistics issued by the South African Police Service, an estimated 61% were under the age of 15 and 29% between the ages of 0 and 10 (Department of Social Development & Department of Women, Children and People with Disabilities, 2012). At the Limpopo roundtable, the Sex Workers' Movement focused on gender discrimination in the Sexual Offences Act. The following challenges were identified: the Sexual Offences Act works against prostitution by criminalising only 'sex workers'; the ability of 'sex workers' to access public services are hindered by prejudices; 'sex workers' fear laying criminal charges against those who violate their rights due to fear of stigmatisation; 'sex workers' are 18 times more likely to be murdered in their line of work; 'sex workers' are unlikely to report cases to the SAPS because police officers themselves are often perpetrators of crimes, including



rape, against 'sex workers'; 'sex workers' are continually persecuted by the police; 'sex workers' receive poor health services from health care workers due to prejudice and stigma; and the current legal framework is inconsistent with regional and international legal frameworks, and with the Constitution.

Overview of trends since 1994: Voices of the public

Sixelile Ngcobo, the Free State provincial manager for the Commission for Gender Equality, found 'various challenges relating to domestic violence, despite the existence of the Act'. Ntombi Mavis Hlombe from Rosedale, eMahlutshini stated at the KwaZulu-Natal public hearings:

'Since 2010 I've been harassed by the same person. I've been to Cape Town to seek assistance but to no avail. He is still harassing me and I don't even have a finger. He has taken my livestock. He hurls insults at me and chases me with his car if he finds me on the road. I requested a site from the chief and he has also seized it and allocated it to other people and said that I'm stubborn and don't listen to him. He is now chasing the children with his car and he says that he doesn't want me here and that I must leave the area.'

In their submission to the Panel, the Sex Workers Education and Advocacy Taskforce (SWEAT), Sisonke National Sex Worker Movement of SA, the Women's Legal Centre and Sonke Gender Justice (2016) point out the Sexual Offences Act 23 of 1957 makes prostitution, brothel-keeping, solicitation, indecent exposure, and knowingly living from the proceeds of prostitution illegal. This criminalisation of prostitution increases the vulnerability of 'sex workers' to violence, drives prostitution and 'sex workers' to the margins of society where they experience stigma, unfair discrimination, violence and exploitation, and deters 'sex workers' from carrying condoms because police see this as evidence of being a 'sex worker'. They contend that selling sex is a legitimate form of labour and to criminalise this activity violates the fundamental rights of 'sex workers'. They dispute the position that prostitution constitutes a sexual offence and that sex for reward between consenting adults is criminalised. They recommend that the decriminalisation of adult prostitution is the only feasible legal option for South Africa that would promote and fulfil 'sex workers' fundamental human rights.

Problem statement

High levels of gender-based violence persist despite legislative and programme interventions. While the South African Integrated Programme (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.

Recommendation 4.7

Parliament should recommend to the executive the development of a National Strategic Plan on Gender-Based Violence, which is multi-sectoral, co-ordinated and inclusive, with a strong monitoring and evaluation component to hold all to account and 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. Parliament should allocate funding for victim advocacy, criminal enforcement and local capacity to implement the Strategic Plan.

Analysis of legislation: The Domestic Violence Act 116 of 1998

Relationship to social cohesion: The Domestic Violence Act (DMV) aims to protect women against violence in their homes. It constitutes a substantial broadening of the limited scope of its predecessor, the Prevention of Family Violence Act of 1993. The Domestic Violence Act 116 of 1998 includes several provisions that lead to confusion, while there are no provisions for capacity-building of service providers or the inclusion of economic abuse as part of the definition of abuse, as well as the fact that domestic violence is not prima facie a criminal offence and there are several other limitations in the Act that impact on implementation.



Summary of challenges that have been identified with the Act itself: Key challenges include an inadequate understanding of the term ‘imminent harm’ and thus a lack of response to life-threatening situations (Thorpe, J, Nesbitt, Whittle & Mbadlanyana, 2014); non-compliance and a general lack of understanding of the obligations related to the Act by the South African Police Service (Thorpe, J, Nesbitt, Whittle & Mbadlanyana, 2014); the act of domestic violence itself is not prima facie a criminal offence (Dullah Omar Institute, 2016); no specific provision in Act for training of police officials (Gender Sonke Justice, 2016); no obligations on the DSD to provide victims access to shelters (Gender Sonke Justice, 2016); only magistrates and family courts have authority to enforce the Act – not traditional courts (Gender Sonke Justice, 2016); exclusion of economic abuse from the definition of abuse (Women and Democracy Initiative, and Mosaic Training, Service and Healing Centre for Women, 2016); and the failure by the National Police Commissioner to issue National Instructions to the SAPS reflecting the change in monitoring responsibility of the DVA from the former Independent Complaints Directorate (ICD) (now the Independent Police Investigative Directorate) to the Civilian Secretariat for Police (CSP) (Lawyers for Human Rights, 2016).



Recommendation 4.8a

Parliament should use its powers to introduce the following legislative changes to the Domestic Violence Act 116 of 1998:

- i. The term ‘imminent harm’ should be removed from the Act to avoid confusion, or the term should be clearly defined in the Act, including the circumstances that describe it;
- ii. the Act should be amended to put in place accountability mechanisms to ensure that police and court staff who fail to fulfil their legal duties (as stipulated by the Act) are held accountable (or alternatively implementation measures should be put in place to ensure penalties for non-compliance); and
- iii. the Act should be amended to achieve the following: recognition of domestic violence as a crime in its own right; to make application forms available in at least 5 of 11 languages; to provide mandatory training for police (biannually), magistrates and clerks; to include specific mandates for Health and Social Development sectors; to expand jurisdiction of the Act to traditional courts for protection orders; to include rehabilitative measures for offenders in addition to punitive sanctions; and to include economic abuse.

Problem statement

The prevalence of domestic violence is extremely and unacceptably high. Since the introduction of the Domestic Violence Act, a large number of recommendations have been made to improve implementation of the legislation, without success. There is an urgent need for Parliament and the public to consider the challenges arising in respect of implementation and to monitor progress in this regard.



Challenges with implementation: The Women and Democracy Initiative, and Mosaic Training, Service and Healing Centre for Women stipulated that there are several problems with implementation, including non-compliance of SAPS and DOJ officials with the provisions of the Act; negative attitudes towards victims by the police and court officials; non-compliance and negative attitudes persist despite training interventions; lack of accountability of SAPS and DOJ officials for non-compliance or poor service delivery to victims; and performance at services points remains inconsistent, pointing to a failure of management at service point level (Women and Democracy Initiative, and Mosaic Training, Service and Healing Centre for Women, 2016).

The Women's Legal Centre and the Legal Resource Centre stipulated that the implementation of the Act through various departments has been problematic from the onset, contributing to the failure of this piece of legislation to effect change in the lives of South African women. The Act mandates the National Police Commissioner to submit a report every six months to Parliament. The National Commissioner has failed to submit reports to the Portfolio Committee on Police since as far back as 2013, impeding the Committee's ability to hold the Department accountable in terms of accuracy, oversight and monitoring. The failure of SAPS to implement legislation means that it fails to recognise domestic violence as a social evil, which impacts on social cohesion and the substantive equality of women in South African society (Women's Legal Centre and the Legal Resource Centre, 2016).

Lawyers for Human Rights noted that the monitoring of SAPS implementation of the Act initially rested with the Independent Complaints Directorate (ICD). However, in 2012, the Independent Police Investigative Directorate Act 1 of 2011 became operational with the former ICD becoming the IPID. This also came with a shift in the monitoring responsibility of the DVA and, from 2012, the Civilian Secretariat for Police has assumed this responsibility. Since 2012 there has been a persistent failure by the National Police Commissioner to issue National Instructions to SAPS reflecting this change.

Sonke Gender Justice (2016) noted, among other things, that high levels of gender-based violence (GBV) point to the lack of a concerted effort by government to combat GBV. In 2013, the Department of Social Development developed the South African Integrated Programme (IPA) addressing Violence Against Women and Children. The IPA is yet to be officially launched or implemented. While the IPA

may be a step in the right direction, it is marred by the following key problems: the National Council Against GBV (NCGBV) is meant to oversee implementation but this Council has been disbanded since 2014 and thus there is currently no oversight body to oversee implementation; the process of development of the IPA was not consultative or inclusive; women and children are homogenised into two concrete categories and a large percentage of women are excluded due to age, sexuality, identity, disability, levels of income and HIV status; prostitutes and prison inmates are absent, and men who are victims of violence are also excluded. The IPA focuses solely on violence experienced by women and children at the hands of men and ignores same-sex violence, and the IPA has not been costed.

Recommendation 4.8b

Parliament should consider having regular annual mandatory dedicated intersectoral public hearings with the relevant departments, including the South African Police Service, the Department of Justice and Constitutional Development, the Department of Social Development and the Department of Health as well as other stakeholders to obtain feedback from departments and input from the public on progress with the implementation of the Domestic Violence Act 116 of 1998. A checklist of existing problems with implementation should be used to ensure effective monitoring of progress with addressing implementation problems.

Analysis of legislation: Firearms Control Act 60 of 2000

Problem statement

Guns are the second leading external cause of deaths in South Africa. While benefits in the reduction of gun deaths prevailed after the introduction of the Firearms Control Act, poor enforcement of the Act since 2011 has seen the number of people shot and killed escalating. Key measures (in addition to the legislative amendments) to increase enforcement would include an audit of all licenses, permits and certificates issued by the Central Firearms Registry since 2011 to verify



their integrity; and address fraud and corruption in the firearms control management chain to stop firearms leaking from South African Police Service stores (Gun Free South Africa, 2016). The high level of gender-based violence in South Africa makes women very vulnerable when there is widespread ownership of firearms.

Summary of challenges that have been identified with the Act itself: The Act fails to ensure that the principle of need is adhered to and to limit both the number and type of guns allowed under the Act, in particular with regard to handgun (revolver and pistol) ownership. The provisions related to barriers for a licence to possess a firearm do not inhibit widespread gun ownership. The Act does not place constraints on widespread ownership of guns by providing for more regular renewal of licences. Designated Firearm Officers have not been empowered to carry out their duties. Crime statistics are not disaggregated to enable the provision of detailed information on guns used in violent crime (type, legal status, and source) in SAPS quarterly and annual reports. Section 140 of the Act to declare certain categories of premises (including at least schools) as Firearm Free Zones has not been implemented (Gun Free South Africa, 2016).



Recommendation 4.9

Parliament should use its powers to introduce the following legislative changes to the Firearms Control Act 60 of 2000:

- i. Sections 12 to 21 of the Act should be strengthened to ensure that the principle of need is adhered to and that the limit on both the number and type of guns allowed under the Act is strengthened in particular with regard to handgun (revolver and pistol) ownership;
- ii. Sections 15, 16 and 17 should be reviewed and amended to strengthen the barrier for a license to possess a firearm;
- iii. the Act should be amended to provide for a uniform period of license renewals of three years;
- iv. the Act should be amended to empower Designated Firearm Officers to undertake their duties;
- v. the Act should be amended to allow for the disaggregation of crime statistics enabling the provision of detailed information on guns used in violent crime (type, legal status, source) in SAPS quarterly and annual reports;
- vi. The Minister should implement Section 140 of the Act to declare certain categories of premises (including at least schools) as Firearm Free Zones.

Analysis of legislation: The Criminal Law (Sexual Offences and Related Matters) Act 32 of 2007

Relationship to social cohesion: Before the Criminal Law (Sexual Offences and Related Matters) Act 32 of 2007 – the ‘Sexual Offences Act’) was passed, South African legislation included higher ages of consent for homosexual sexual activity. This was discriminatory. The Sexual Offences Act prescribed uniform ages of consent and repealed previous legislation that limited protections against sexual offences for homosexual individuals. It also expanded the definition of rape to prohibit rape within marriages.



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, 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.

Summary of challenges that have been identified with the Act itself: 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 of equality before the law). There are cases of poor health care services provided to prostitutes at 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 prostitutes in male cells (Sex Worker Education and Advocacy Taskforce (SWEAT), Sisonke National Sex Worker Movement of South Africa, Women’s Legal Centre and Sonke Gender Justice, 2016).

Embrace Dignity (2016) stated in its submission that the law does not protect those who sell sex. Prostitution as a system is inherently exploitative for those persons who enter the system and there is no choice or safety in prostitution for women and marginalised people (it can never be safe or decent work).

Sonke Gender Justice stipulated that the violence, violations and corruption that prostitutes are subjected to violate a number of constitutional rights and rejects ongoing criminalisation of prostitution.

Recommendation 4.10a

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:

- i. 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
- ii. 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.

Summary of challenges that have been identified with the Act itself: Data on sexual offences condense all listed sexual offences, such as rape, sexual assault, prostitution, incest, bestiality, and more into one figure, making it difficult to track and monitor different categories of sexual offences (Sonke Gender Justice, 2016). According to Rape Crisis, Section 55A of the Act authorises the Minister to delegate certain courts to exclusively hear sexual offence matters. This section has not yet been brought into operation. In addition, the final regulations have not yet been published (a draft for input was distributed in 2015) (Rape Crisis, 2016). Finally, one in three young people in South Africa have experienced some form of sexual abuse during their lives, with both boys and girls equally vulnerable to some form of sexual abuse (though the forms may vary by gender) over their lifetime (UBS Optimus Foundation, 2016).



Recommendation 4.10b

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 sexual offences:

- i. the Act should be amended to create guidelines to ensure that statistics are disaggregated and that each sexual offence is recorded within its own category in order to ensure better tracking of all sexual offences or, alternatively, measures should be put in place to ensure this disaggregation by the relevant departments;
- ii. the Act should be amended to provide for a standard and regulated framework for the reporting, referral and management of sexual offences for both state and non-governmental child protection service providers; and
- iii. designation of special sexual offence courts by the Minister of Justice and Correctional Services and the regulations on Section 55 of the Act governing the sexual offence courts should be gazetted for these courts to deal with cases of offenses against children as well.

Problem statement

Since the introduction of the Act, a large number of recommendations have been made to improve implementation of the legislation, without success. There is an urgent need for Parliament and the public to consider the challenges arising with implementation and to monitor progress in this regard. A recent amendment (Judicial Matters Amendment Act 24 of 2015) removes the requirement for the production of an intersectoral annual report. Instead, each relevant department must report on progress with implementation of the Act in its own annual report. Increased measures will thus need to be taken to ensure intersectoral oversight over progress. A checklist of existing problems with implementation should be used to ensure effective monitoring of progress with addressing implementation problems.

Challenges with implementation: Lawyers for Human Rights noted in its submission to the Panel that the main challenges relate to the content and availability of the Intersectoral Committee for the Management of Sexual Offences (ICMSO) reports, including the fact that these reports have not been consistently publicly available; they have not been made on an annual basis, as per the mandate; they do not follow a consistent format, and the same information is not reported year on year, making it difficult to compare and measure progress; and they are not sufficiently focused on the quality or impact of implementation with regard to survivors of sexual offences and tend to follow a tick-box approach (Lawyers for Human Rights, 2016). According to Rape Crisis (Cape Town Trust), amendments to the Act have not changed the low level of reporting.

Recommendation 4.10c

Parliament should consider having regular annual mandatory dedicated intersectoral public hearings with the relevant departments, including the South African Police Service, the Department of Justice and Constitutional Development and the Department of Social Development, and stakeholders to obtain feedback from departments and input from the public on progress with the implementation of the Criminal Law (Sexual Offences and Related Matters) Act 32 of 2007, including bringing into operation Section 55 of the Act, and the regulations that should accompany this. Parliament should also monitor the impact of the amendments to these laws – which will no longer require an intersectoral reporting mechanism – to assess its effect on intersectoral implementation as well as the monitoring of sexual offences.



Refugees and migrants

Overview of policy goals informing legislation

The South African government has undertaken an extended process of developing policy and legislation on international migration and refugees since 1994. This process began with the drafting of a Green Paper on International Migration in 1997, a White Paper on International Migration in 1999, the 2016 Green Paper on International Migration (published for comment), and the 2017 White Paper on International Migration (approved by the Cabinet on 29 March 2017, and which came to the attention of the High Level Panel only after various information-gathering exercises had been concluded).

The mandate of the Department of Home Affairs (DHA) is to maintain a secure and accurate register of the identity and status of all within the borders of the country, which is a critical enabler of all other functions of the state. It is also mandated to manage the immigration system, which impacts directly on national security, social cohesion and achievement of development goals.

South Africa's current policy on international migration is set out in the 1999 White Paper on International Migration and is supported by the Refugees Act 130 of 1998 (under review) and the Immigration Act 13 of 2002 (as amended by Act 19 of 2004; Act 3 of 2007 and Act 13 of 2011). In 2014, the South African government began reviewing the current immigration regime with the intention of crafting a new comprehensive migration policy able to synthesise development, security and international obligations. Following on from the 'Colloquium on a new International Migration paradigm for South Africa' Conference on 30 June 2015, the long-awaited Green Paper was released on 30 June 2016 for public comment. This process is envisaged to result in a White Paper and a comprehensive overhaul of South African migration legislation.

The Green Paper argues for a new migration policy that is underpinned by the Constitution and the NDP; contributes to national interests such as national security; is orientated towards Africa; contributes to nation-building and social cohesion by giving the country a competitive edge in a knowledge-based world economy; enables South Africans living abroad to contribute to national development priorities as valuable sources of skills, capital and connections; and actively

strengthens international efforts in building bilateral and multilateral partnerships to promote good practices and principles of shared and collective responsibility and co-operation (Department of Home Affairs, 2016).

A definition found in Article 1 (1) of the 1954 Convention relating to the Status of Stateless Persons is that ‘a stateless person is someone who is not considered a national by any state under the protection of its law’. An alarming statistic released by UNHCR in 2013 on stateless persons suggest that more than 12 million people worldwide are stateless. It is said that these stateless persons face endless and continuous violations of their fundamental rights because human rights are often unenforceable without nationality. Even though there are uncertainties around the number of stateless persons in South Africa, an estimated 10,000 stateless persons reside within the South African borders (Lawyers for Human Rights, 2013).

The legal instruments that make up provisions relating to stateless persons include the international legal framework, including the 1954 Convention relating to the Status of Stateless Persons, as well as various national human rights laws. South Africa is not a signatory to any of these legal instruments providing protection for stateless persons. However, nationally, the South African Citizenship Act and Amendment Acts provide some guidance on statelessness.

Overview of trends since 1994: Voices of the public

According to Lawyers for Human Rights (2016), many people still do not have access to the right to nationality in South Africa. Such people are called stateless. Statelessness disproportionately affects children in South Africa. Stateless children whose issues go unaddressed grow up to be stateless adults, who then give birth to children who will also be stateless, perpetuating the scourge of statelessness for generations, creating a marginalised group that is separated from society, the effects of which ultimately negate efforts toward social cohesion and nation-building. Despite its international and domestic obligations, South Africa’s legislative framework collectively creates and perpetuates childhood statelessness.

Attention is also drawn to the restrictive birth registration requirements of the Births and Deaths Registration Act (BDRA), 1992, which can lead to statelessness. In addition, the Immigration Act of



2004 also fails stateless unaccompanied migrant children who cannot be returned to their country of origin by not providing them with a legal immigration status. South Africa is also not a signatory to the 1954 UN Convention relating to the Status of Stateless Persons and the 1961 UN Convention on the Reduction of Statelessness. The consequences of statelessness are that such:

...people have difficulty accessing some of the most fundamental rights protected by the Constitution. These rights include (among others) the right of every child to a name and a nationality from birth (Section 28); as well as the rights that flow from nationality such as citizens' rights to political freedom, freedom of movement and residence, freedom of trade and occupation and right to gain access to land (Sections 19, 21, 22, 25); the right of every citizen not to be deprived of his citizenship (Section 20); and the fundamental rights to equality, human dignity, freedom and security of the person, and fair labour practices of all persons in the territory (Sections 9, 10, 11, 12, 23) (Lawyers for Human Rights, 2016b).

Analysis of legislation: Immigration Act 13 of 2002; Refugees Act 130 of 1998; South African Citizenship Act 88 of 1995; and Births and Deaths Registration Act 51 of 1992.

Since the introduction of legislation dealing with refugees, migrants and stateless persons, a large number of recommendations have been made to improve implementation of the legislation, without success. There is an urgent need for Parliament and the public to consider the challenges arising in relation to implementation and to monitor progress in this regard in order to be able to proactively address problems before they deteriorate into violence.

Challenges with implementation: The Scalabrini Centre of Cape Town noted the key implementation challenges with some of these Acts, among others identified below, to be systemic challenges in refugee status determination processes resulting in adjudication times measured in years; an imbalance with the Immigration Act and implementation of the refugee system, which leads to the conflation of 'illegal immigration' with asylum seekers and refugees; the administration of the refugee system fosters conditions for development of extra-legal networks and corruption; access/administration difficulties that equate to a large number of undocumented asylum seekers

and refugees; and lack of awareness among citizens and government officials on rights of asylum seekers / refugees and processes (Scalabrini Centre of Cape Town, 2016).

Lawyers for Human Rights found that there are no regulations to guide and monitor Section 2(2) of the South African Citizenship Act. A 2014 High Court Order ordered the Department of Home Affairs to implement a regulation to facilitate applications for nationality under Section 2(2) of the Act but, to date, the Department has failed to implement this order (Lawyers for Human Rights, 2016a).

Recommendation 4.11

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 Refugees Act 130 of 1998, the South African Citizenship Act 88 of 1995, and the Births and Deaths Registration Act 51 of 1992.

Analysis of legislation: Immigration Act 13 of 2002

Relationship to social cohesion: 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.

On 26 May 2014, the Immigration Amendment Act 3 of 2007, the Immigration Amendment Act 13 of 2011 and the Immigration Regulations, 2014 (Immigration Regulations) that replaced the 2005 immigration regulations, came into effect and effectively overhauled South African immigration law. The result was changes to visa types, visa processing requirements and travel requirements; new application forms and application fees; and stricter penalties for non-compliance.



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.

Summary of challenges that have been identified with the Act itself: 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. In addition, according to Lawyers for Human Rights, the Immigration Act 13 of 2002 does not make provision for unaccompanied and separated migrant children, which means that such a child can never regularise her/his status in South Africa or be naturalised. In addition, the exemption application in terms of Section 31(2)(b) of the Immigration Act is costly (R1 350) and not known by social workers.

Recommendation 4.12a

Parliament should ensure that the rights of refugees, immigrants and stateless persons, especially children, are better protected by using its powers to implement the following amendments to the Immigration Act 13 of 2002 in the following areas:

- i. by providing a legal immigration status to unaccompanied migrant children placed in the care system; and
- ii. by providing legal immigration status to stateless persons.

Problem statement

Xenophobia and physical attacks on foreign nationals have surged in recent years, and implementation of the (amended) Immigration Act should be regarded as one of the measures to deal with this scourge.

Challenges with implementation: The Special Reference Group on Migration and Community Integration in KwaZulu-Natal, which was established to undertake a comprehensive assessment of the cause of the xenophobic attacks, found that gaps in implementation of the Immigration Act and Refugees Act leaves foreign nationals feeling vulnerable and fuels fear and mistrust; and that demographic and migration trends may mean increased migration in the future.

Recommendation 4.12b

Parliament should follow up on the implementation of recommendations in all key reports on xenophobia and ensure that the following steps are taken to improve implementation of the Immigration Act 13 of 2002:

- i. by considering the need to strategically manage migration at all levels to promote national and regional development;
- ii. by considering the need to balance concerns regarding migration with human rights and the rule of law.

Analysis of legislation: South African Citizenship Act 88 of 1995

Relationship to social cohesion: Section 3 of the Constitution states that there is a common South African citizenship; that all citizens are equally entitled to the rights, privileges and benefits of citizenship; are equally subject to the duties and responsibilities of citizenship; and that national legislation must provide for the acquisition, loss and restoration of citizenship. The acquisition of South African citizenship is governed by the Act, the principal law, and its subsequent amendments (the South African Citizenship Amendment Act 69 of 1997; South African Citizenship Amendment Act 17 of 2004; the South African Citizenship Amendment Act 17 of 2010); and the Citizenship Regulations. The principal Act and its subsidiary legislation relate to social cohesion and nation-building by defining who is/is not included as a citizen, and who no longer holds citizenship status. It also allows for the naturalisation of foreign nationals, enabling access to rights.



Summary of challenges that have been identified with the Act itself: According to Lawyers for Human Rights, Sections 2(2), 2(3) and 3 of the Citizenship Act (in contrast to Section 2(1)) are discriminatory in terms of the application of the prerequisite of birth registration. In the first place, vulnerable and marginalized parents who are stateless or at risk of statelessness are less likely to register births than those that have documented evidence of South African citizenship. This provision is disproportionate, discriminatory and undermines the right to nationality. Section 2(3) stipulates that children born in the territory to parents who are not citizens can only acquire citizenship after they turn 18. This provision is at odds with the Constitution, which provides citizenship at birth. Section 3 treats adopted children differently to biological children of South African parents by requiring birth registration to acquire citizenship. In addition, it arbitrarily distinguishes between adopted and biological children by naming adopted children citizens by ‘descent’ rather than citizens by ‘birth’ (which is the case with biological children). This provision is not in line with Section 242(3) of the Children’s Act, is discriminatory and undermines the right to nationality. In addition, Section 4(3) of the Citizenship Act provides for citizenship by naturalisation at the age of 18 for children born in SA to irregular or undocumented migrants or those on a visa that does not lead to permanent residence status. There are no regulations to guide and monitor implementation of Section 4(3) (Lawyers for Human Rights, 2016a).

Recommendation 4.13

Parliament should use its powers to introduce legislative changes to the South African Citizenship Act 88 of 1995 to ensure that children of foreign nationals are not discriminated against, including amending the Act by deleting the requirement of birth registration as a prerequisite for acquiring nationality for children based on discriminatory grounds.

Analysis of legislation: Births & Deaths Registration Act 51 of 1992

Relationship to social cohesion: The purpose of the Act (BDRA) is to regulate the registration of births and deaths. This provides access to identification documents, which in turn allows access to citizenship and public services. Enabling documents are the cornerstone of the realisation of the right of every child to a name and a nationality from birth, in accordance with Section 28(1)(a) of the Constitution. In addition, enabling documents are essential in order to benefit from most of the programmes that have been developed and implemented by government to realise the socioeconomic rights guaranteed by the Constitution, whether for vulnerable children, their adult family members or foreign nationals who are legally residing in South Africa. Children of refugees are entitled to certain rights, such as attending school, provided they are able to prove their lawful presence in the country, which is proved by producing related documents. Enabling documents are required, however, not only to access social assistance (grants), but also health care, subsidised early childhood development (ECD), schooling, housing, free basic services such as water and electricity, and other services and benefits.

Summary of challenges that have been identified with the Act itself: The inability of undocumented parent(s) to register the child's birth effectively functions as a form of migration control or a punitive measure towards the parent but has profound negative impacts on the child. Without a birth certificate, the child has no documentary link to the parent, and therefore an eventual claim to the nationality of the parent (Scalabrini Institute of Cape Town, 2016).

Regulation 3(3) of the BDRA requires legally valid documentation confirming legal status in order to register a birth. Thus undocumented parents and those that have overstayed their visas cannot register their children's births. This means that both the registration of children and the safeguard against statelessness are contingent on the status of the parents. This is contrary to Section 28(1) of the Constitution, Article 7 of the Convention on the Rights of the Child and undermines Section 2(2) of the Citizenship Act. This requirement particularly disadvantages children born to parents that have overstayed their visas as they cannot register the child but also cannot leave the country (in terms of regulation 6(12) of the Immigration Act they cannot travel without an unabridged birth certificate) (Lawyers for Human Rights, 2016a).



The BDRA requires that all births must be registered within 30 days. The births of children of non-permanent residents (including children of irregular/undocumented and/or stateless migrants) cannot be registered after the 30-day period. It is discriminatory and also limits the scope of Section 2(2) of the Citizenship Act, which serves as a safeguard against statelessness (Lawyers for Human Rights, 2016a).

Provision is made in the BDRA for a prescribed person to register the birth of a child where the parents are dead, but this does not apply to legal guardians or family members who need to register the birth of a child where the parent/s are alive but unable to register their births. This provision thus excludes a significant number of children from having their births registered (Lawyers for Human Rights, 2016a).

For children born outside a health care institution, Regulation 3(3) of the BDRA (for children born in SA) and Regulation 11 (for children of South Africans born abroad) requires an affidavit from a South African citizen present at the time of the birth. This provision excludes children born under these conditions in the absence of a South African citizen (Lawyers for Human Rights, 2016a).

The new regulations of the BDRA aim to exclude perceived foreigners. It states that if a foundling or orphan is clearly a foreigner he or she must be registered as a foreigner. This bars a child from accessing South African citizenship indirectly (Lawyers for Human Rights, 2016a).

Recommendation 4.14

Parliament should use its powers to introduce legislative changes to the Births and Deaths Registration Act 51 of 1992 to ensure that children of foreign nationals are not discriminated against.

Analysis of legislation: South African Schools Act 84 of 1996

Relationship to social cohesion: Section 29(10) of the Constitution expressly guarantees the right to education for everyone. To give effect to this right, the South African Schools Act regulates the education sector and ensures that all learners are able to access public schools. Section 5(1) of the Schools Act requires public schools to admit learners without discrimination of any kind.

Challenges with implementation: Section 29(10) of the Constitution expressly guarantees the right to education for everyone. To give effect to this right, the South African Schools Act regulates the education sector and ensures that all learners are able to access public schools. Section 5(1) of the Schools Act requires public schools to admit learners without discrimination of any kind. Section 27(g) of the Refugees Act also expressly provides that a refugee is entitled to access to basic education. Also, Section 7 of the Admissions Policy for Ordinary Schools mandates the admission policies of public schools to be consistent with the Constitution and the Schools Act, while Section 9 of the Admissions Policy protects an applicant against unfair discrimination by an admission policy of a public school. However, the Admissions Policy sets out requirements for non-citizens that contradict the general legal framework as outlined above. For example, according to Section 15 of the Admissions Policy, all learners must have a birth certificate, while Section 19 specifically requires parents who are migrants to be in possession of a temporary or permanent residence permit. Also, Section 21 requires 'illegal aliens' to show evidence of having applied to the Department of Home Affairs to legalise their stay. Therefore, when non-citizens and their children (or unaccompanied children) are unable to produce the status documentation as required under the Admissions Policy, the children are denied admission to public schools. This is a breach of the Constitutional guarantee to the right to education, the principle of the best interests of the child, and South Africa's international obligations under the Convention on the Rights of the Child and the Protocol Relating to the Status of Refugees (Centre for Human Rights, 2016).



Recommendation 4.15

Parliament should ensure the following steps are taken to improve implementation of the South African Schools Act 84 of 1996:

- i. review the South African Schools Act to expressly include child asylum seekers or unaccompanied minors in South Africa;
- ii. review the Admissions Policy to comply with Sections 28(2) and 29 of the Constitution and relevant regional and international instruments that South Africa has ratified, by expressly providing for child asylum seekers and unaccompanied migrants; and
- iii. provide constitutional level guarantees for the education of minors irregularly resident in the country.

The lesbian, gay, bisexual, transgender and intersex (LGBTIQ+) community

Overview of policy goals informing legislation

South Africa is one of the first countries in the world to explicitly enshrine in law the rights of people who identify as gay, lesbian or bisexual, or who practice same-sex sexuality. These rights were extended in 1998 when the Parliament of South Africa passed the Employment Equity Act, protecting citizens against labour discrimination on the basis of sexual orientation. In the same year, the Constitutional Court ruled that the law prohibiting homosexual conduct between consenting adults in private was unconstitutional (see above). The PEPUA further extended rights to public accommodation and services. In 2006, the Parliament of South Africa passed legislation that allows same-sex civil marriages, as well as civil unions for unmarried opposite-sex and same-sex couples. All discriminatory provisions have since been formally repealed, resulting in an equalisation of the age of consent to sex at sixteen and gender-neutral definitions of all sexual offences (South African Human Rights Commission, 2012).

Overview of trends since 1994: Insights from diagnostic report, submissions, commissioned papers and roundtables

Lesbian, gay, bisexual, transgender and intersex (LGBTIQ+) persons have historically faced and continue to face discrimination and violence around the world. South African LGBTIQ+ youth face homophobia in their daily lives. Cultural norms and mores strongly influenced by conservative traditionalism and male patriarchy are a particular challenge that African LGBTIQ+ youth have to face. Traditional beliefs combined with homophobic stereotypes have resulted in traumatic experiences for lesbian and gay youth in South Africa. Young lesbians have been raped by males claiming to be ‘teaching’ them to be real women or ‘curing’ them of lesbianism. Several have been murdered. Young gay men are beaten by other males to make them ‘real men’. Isolation is thus a key issue confronting many LGBTIQ+ youth, resulting in mental health ramifications such as internalised homophobia, suicidal ideation, and lowered self-esteem. LGBTIQ+ youth experience deeply entrenched homophobia within their school contexts. Curriculum content also does not explicitly address LGBTIQ+ issues or the particular needs of queer youth. Literature written by and for black LGBTIQ+ youth in the black languages of South Africa does not exist (Butler and Astbury, 2005).

Analysis of legislation: The Alteration of Sex Description and Sex Status Act 49 of 2003

Relationship to social cohesion: This Act provides legislative recognition of the separation between biological sex, gender identity, and sexual orientation. The Act allows for application to the DHA for a change of sex description on birth records. The following people are able to make this application:

- People who have undergone surgical or medical sex reassignment;
- People whose sexual characteristics have evolved naturally;
- Intersex people.

Between the passing of the Act and May 2013, 95 applications for alteration of sex had been received and granted since the Act was passed. This Act contributes to social cohesion and nation-building by enhancing the right to self-determination for all South Africans, and by promoting equality.



Summary of challenges that have been identified with the Act itself: According to the Legal Resources Centre and Gender Dynamix, there are no regulations in the Act or any of the three marriage Acts pertaining to altering the sex description of spouses on marriage certificates. Couples must therefore either apply for a divorce, or apply for a divorce and a civil union. As a result, some couples have been forced to divorce following a sex description change. In addition, it is unclear whether the Act applies only to South African citizens or to asylum seekers and refugees. This may lead to a mismatch between the applicant’s sex description on the asylum seeker permit and the applicant’s gender identity. Furthermore, the Act does not make provision for any person who does not wish to be identified as male or female. This may mean that people are forced to pursue sex description reassignment to a gender they do not relate to (Legal Resources Centre and Gender Dynamix, 2016).

Recommendation 4.16a

Parliament should use its powers to introduce legislative changes to the Alteration of Sex Description and Sex Status Act 49 of 2003 to remove any discrimination against any individual who has undergone a sex change and wants to change their sex on their identity documents, to bring clarity on the application of the Act to asylum seekers and refugees, and either to include a section in the Act specifying regulations to direct implementation of the Act, or ensure the development and public availability of directives and standard operating procedures.

Problem statement

Since the introduction of the Act, a number of recommendations have been made to improve implementation of the legislation. Officials at the Department of Home Affairs and the Department of Health require training (as well as the guidance that will be provided through regulations or directives) to reduce stigma and ensure standardised application of the Act. There is an urgent

need for Parliament and the public to consider the challenges arising in relation to implementation, and to monitor progress in this regard.

Challenges with implementation: Some of the key implementation challenges according to the Legal Resources Centre and Gender Dynamix are that some applications for alteration of gender have been rejected by the Department of Home Affairs without reasons provided for this rejection; applicants do not regularly receive written communication from the Department of Home Affairs, making it difficult to check the status of their application; the Department of Home Affairs has, in some instances, refused to process simultaneous name change and sex description change applications, forcing those applicants who wish to change both their sex description and their name to pursue two processes, delaying their ability to access relevant documentation; no regulations have as yet been introduced in relation to the consideration of an application, which makes it difficult for lawyers to assist in cases of rejected applications, and can result in stigma when applicants submit the relevant forms to the Department of Home Affairs; and the lack of training of Home Affairs officials leads to stigmatisation of transgender people, directly negatively impacting social cohesion and nation-building (Legal Resources Centre and Gender Dynamix, 2016).

The Legal Resources Centre stated in its submission to the Panel that officials at the Department of Home Affairs have been implementing the Act in a far more limiting and discriminatory manner than the intended purpose of the legislation. Backlogs, time delays, administrative inefficiency, and misinterpretation of the Act have resulted in a mere 14% of applications being successfully processed and 40% of applicants advised to undergo surgery. The Centre had been denied access to information about policies, directives and standard operating procedures in terms of which officials implement the Act. Without having access to directives and SOPs (and receiving all the complaints around implementation of the Act), implementation of the Act appears ad hoc (at best), and highly discriminatory. The Centre concludes that this failure of the DHA to correctly interpret this Act has been highly discriminatory, and has even gone so far as to commit gross human rights violations through requiring people to undergo intrusive medical surgery, which they may not have wanted to subject themselves to (Legal Resources Centre, 2016).



Recommendation 4.16b

Parliament should consider having a once-off public hearing with the relevant departments and stakeholders to obtain feedback from departments and input from the public on progress with the implementation of the Alteration of Sex Description and Sex Status Act 49 of 2003.

Youth and children

Overview of policy goals informing legislation

The NDP refers to 'Building a Future for South Africa's Youth' and it sets out key proposals for the youth and children (the National Planning Commission, 2011b). These commitments espouse the vision for South Africa's growth and development, and make specific reference to the needs of youth and children, and the challenges they face. It takes note of the fact that South Africa's youthful population presents certain opportunities in terms of boosting economic growth, increasing employment, and reducing poverty.

The MTSF provides further medium-term targets aimed at improving the lives of the youth in line with the vision of the NDP. Most of the targets aimed at youth and children are similar to the commitments outlined in the NDP. The MTSF targets include the social cohesion index. The aim is to increase the index from 80.4% in 2011 to 90% in 2019. It is, however, unclear how the implementation of strategies to achieve this index measure is being monitored.

The National Youth Policy (NYP) 2015 – 2020 is aimed at rectifying the injustices of the past and addressing the specific challenges of the country's youth. The NYP builds on South Africa's first NYP, which covered the period 2009 – 2014. It improves upon and updates the previous policy by speaking to the new challenges that South Africa's youth face, while reflecting on previous challenges that are ongoing. The NYP has specific proposals relating to nation-building and social cohesion (The National Planning Commission, 2011b). Child Justice Act 75 of 2008

Relationship to social cohesion: Similar to the Children’s Act, the Child Justice Act seeks to promote social cohesion through child protection and through promoting the best interests of the child. The Child Justice Act is intended to apply to children who come into conflict with the law, as a particularly vulnerable social group. The Child Justice Act 75 of 2008 establishes a criminal justice system for child accused separate from the criminal justice system, which applies to adult accused in South Africa. The Act aims to keep children out of detention and away from the formal criminal justice system, mainly through diversion. When these interventions are inadequate or unsuccessful, the Act provides for child offenders to be tried and sentenced in child justice courts (Terblanche, 2012).

Summary of challenges that have been identified with the Act itself: The Child Justice Act provides for age of criminal capacity of 10 years and a rebuttable presumption of criminal incapacity between the ages of 10 to 14. Section 8 of the Act provides for a five-year review of the age of criminal capacity with a deadline for April 2015 (Joint Meeting of the Select Committee on Security and Justice and the Portfolio Committee on Justice and Correctional Services, 2016). An additional concern is the reluctance of the South African Police Service to arrest youth who have committed crimes and refer them to the organisations that deal with the support and preventative services that they need (NICRO, 2016).





Recommendation 4.17a

Parliament should use its powers to introduce the following legislative changes to the Child Justice Act 75 of 2008:

- i. the Act should be amended to raise the minimum age of criminal capacity to 12 years with the retention of the rebuttable presumption for children 12 years or older but under the age of 14 years, applicable to children referred to the child justice court for plea and trial;
- ii. the Act should be amended to remove the requirement of establishing the criminal capacity of children 12 years or older but under 14 years for purposes of diversion such that the prosecutor and magistrate will consider and be satisfied that the child's educational and maturity levels are such that he or she will understand and benefit from diversion before the child is diverted;
- iii. Section 8 of the Act should be amended and retained in the Act to provide for another review of the minimum age of criminal capacity within ten years; and
- iv. increase measures to ensure that the police arrest and refer youth that have committed crimes to ensure that they get the support that they need in the form a legislative amendment or through National Instructions.

Problem statement

There is an urgent need for Parliament and the public to consider the challenges arising from the implementation of the Child Justice Act 75 of 2008 and to monitor progress in this regard. A recent amendment now no longer requires the production of an intersectoral annual report. Instead, each relevant department must report on progress with implementation of the Act in its own annual report. Increased measures will thus need to be taken to ensure intersectoral oversight over progress. A checklist of existing problems flowing from implementation should be used to ensure effective monitoring of progress while addressing implementation problems.

Recommendation 4.17b

Parliament should consider having regular annual mandatory dedicated intersectoral public hearings with the relevant departments, including the South African Police Service, the Department of Justice and Constitutional Development, the Department of Correctional Services and the Department of Social Development as well as stakeholders to obtain feedback from departments and input from the public on progress with the implementation of the Child Justice Act 75 of 2008.

Older persons

Overview of policy goals informing legislation

Although the Constitution does not make particular reference to older persons, various sectors contained in the Bill of Rights apply directly or indirectly to elderly persons. These include Section 9(3), which states that the state may not unfairly discriminate directly or indirectly against anyone on the basis of age, as well as those sections that deal with the right to have dignity respected and protected, the right to have access to adequate housing, the right to have access to health care services, sufficient food and water, and security if they are unable to support themselves and their dependents; and the right to a basic education, including a basic adult education.

Among the key policies that have informed legislation on older persons is the White Paper for Social Welfare, 1997, and the South African Policy for Older Persons, 2005. The White Paper was developed to guide the transformation of the social sector from welfare to social development services that sought to improve the quality of life of all South Africans. Several key issues relating to older persons were raised in the White Paper:

- the percentage of persons aged 80 years and above was increasing, and this age group was particularly vulnerable;
- the 'unrealistic emphasis' on institutional care for older persons among the white population, as well as the high cost of this service, making it unaffordable if expanded to all parts of the population;



- racial and geographic (urban-rural) disparities in respect of provision of services for older people, especially in respect of institutional care and service centres;
- the lack of affordable housing in ‘developing and underdeveloped communities’;
- the disintegration of social support systems for the care of black older people in some communities as a result, among others, of violence and displacement;
- the unavailability, inadequacy or unaffordability of recreational services in disadvantaged communities;
- the vulnerability of older people – and particularly those over 80 years of age – who were often nutritionally vulnerable;
- the ‘unfavourable’ economic conditions, and limited job opportunities available; and
- the difficulty that those employed informally, at low wages, or were unemployed had in saving for their retirement, while many of those in formal employment had inadequate or no provision (Department of Social Development, 2015).

A South African Plan of Action on Ageing was developed soon after the passage of the Older Persons Act in 2006. It was noted that:

- Older persons and development: Older persons were previously marginalised, as ageing is perceived as a problem rather than a natural process. This has resulted in older persons having very little status. There is also no recognition for the worthy contribution that they make and continue to make as caregivers and in other roles (volunteerism) that they fulfil.
- Older persons and work: Most older persons are engaged in informal employment, either as hawkers, childminders and domestic workers. They also volunteer as caregivers for frail older persons and other persons suffering from chronic diseases. However, there is little or no recognition for their contribution, and neither is such effort recognised as work. No financial equivalent is placed on the work that they do.
- Rural and urban development: Most older persons live in rural areas without basic services, thus increasing their vulnerability. Most of these older persons are women. Agricultural pursuits appear to be the only opportunity that they engage in. No information or resources are available to older person to increase their access to a host of other opportunities.

- Empowerment: The majority of older persons experience a sense of dis-empowerment. They feel isolated, discarded, and not useful to society. This is because of the manner in which ageing is perceived in the country. The worth of the older person is measured on an economic basis, and once they retire, it appears as though they are worthless citizens.
- Access to knowledge, education and training: The majority of older persons did not have the opportunity to be educated, which increases their vulnerability as they have to rely on others for information. Educational programmes have been put in place to ensure that basic education as a right is made available to all those who need it. However, there is still a challenge for older persons to access such programmes.
- Eradication of poverty: The majority of older persons did not have the opportunity to be educated, which increases their vulnerability as they have to rely on others for information. Educational programmes have been put in place to ensure that basic education as a right is made available to all those who need it. However, it is still a challenge for older persons to access such programmes.

Overview of trends since 1994: Insights from diagnostic report, submissions, commissioned papers and roundtables

By 2014, the population aged 65 years and above was estimated to account for 5,3% of South Africa's population, or just under 3,0 million people. Those aged 80 years and above numbered 54,000, 0,8% of the total population. Women increasingly outnumber men in each older age group. In 2011, only 1% of African older people were living in institutional care, against 5% of white older people. Expressed differently, there were 1,3 white older people in institutions for every African older person, while for the population of this age group as a whole, there were only 0,3 white people for every African older person (Department of Social Development, 2015). A total of 79% of the residential facilities are found in metropolitan formal areas or small urban formal areas, with only 5% in informal settlements and 16% in rural areas (Department of Social Development, 2015).



Overview of trends since 1994: Voices of the public

An anonymous employee at a service centre stated the following at a public hearing in the Western Cape: ‘Homes for the aged are very expensive, because when it is being paid [for] from the pensions or grants, no money is left. Many homes for the aged also want some contribution from the family members.’

According to a resident of the Seoposengwe Old Age Home in Syferskuil, North West province:

‘I have a group of old people who exercise by playing football without the encouragement of the leadership. I used to send reports to...the Department of Sports. His response was that the money allocated to sports is always sent back as it was said there are no sports activities. I am a disabled lady and want to realise my dream before I die as there is no one else who can do it.’

Selinah Mohoje of the Lesedi Old Age Club, Kroonstad, stated in a submission to public hearings of the Panel that ‘there is need for financial assistance, equipment, soccer kit and soccer boots for soccer team established to keep older persons healthy and active.’

Analysis of legislation: Older Persons Act 13 of 2006

Relationship to social cohesion: The Older Persons Act is a response to the plight of older persons by establishing a framework aimed at the empowerment and protection of older persons, and at the promotion and maintenance of their status, rights, wellbeing, safety and security. Older persons are often vulnerable to various forms of abuse, including financial, emotional, mental, physical and sexual abuse. This Act aims to ensure that the wellbeing of older persons is promoted, their safety is guaranteed, and their human rights are upheld, thereby also promoting social cohesion and nation-building.

Problem statement

The Older Persons Act 13 of 2006 defines older persons in terms of frailty, and older persons are also often lumped together with people with disabilities. However, most old people are not frail,

and many do not have access to institutional care. In addition, there is an increase in the number of older people as a proportion of the population. There is also a challenge arising from policies. For example, the housing policies at national and provincial levels place emphasis on younger people, which makes older people dependent on their children, particularly since there is no provision for a funding model for shared housing for older people that are not frail.

Recommendation 4.18a

Parliament should urge the Executive to review the policy governing older persons and to use its powers to introduce the following legislative changes to the Older Persons Act 13 of 2006:

- to review the Act as a whole to ensure that it is developed through an intersectoral lens that takes cognisance of other relevant sectors beyond Social Development, including Health, Transport, Human Settlements, Homes Affairs, Justice and Police, in line with a conceptualisation of older persons as ‘actively ageing’ with a whole range of needs beyond frail care;
- to include a policy and funding model for shared housing; and
- to amend the Act to include a provision for compulsory reporting of suspected abuse of older persons similar to the one for compulsory reporting of child abuse found in the Children’s Act.

Problem statement

The aged are a vulnerable group of South African society that face numerous challenges brought about by the perpetuation of apartheid-era racial inequalities, poverty and unemployment, the effects of the HIV and AIDS pandemic, and the predatory activities of relatives and criminals, among others. There is also growing concern about violence against older persons, including sexual violence.



Challenges with implementation: The following problems have been identified in a meeting between the Portfolio Committee on Social Development and South African Older Persons Forum (SAOPF): most of the home-based care services are rendered by non-governmental organisation (NGOs), faith-based organisations (FBOs) and community-based organisations (CBOs), and most of them are inadequately funded (Parliamentary Monitoring Group, 2010); NGOs tend to be frustrated by delays in payment of subsidies, delays in transfers of funding that has already been allocated, and the lack of consultation by the DSD. All of these problems in some instances cause disruptions in service delivery (Parliamentary Monitoring Group, 2010); currently there is no single standard for implementing frail care, resulting in substantial differences in the costing models in the different provinces (Parliamentary Monitoring Group, 2010); budget allocated to care and services to older persons, both at national and provincial levels, is inadequate to ensure the implementation of the OPA, rollout of services and effective advocacy; there are concerns that there are many domestic workers who have no place to go once they retire, other than informal settlements; and there are still funding constraints that impact on the capacity and operations of the old age homes (Parliamentary Monitoring Group, 2010).



Recommendation 4.18b

Parliament should ensure the following steps are taken to improve implementation of the Older Persons Act 13 of 2006 to:

- i. ensure that there are adequate care centres for the aged members of the black communities in the townships and rural areas;
- ii. ensure adequate funding for NGO service providers of home-based care;
- iii. ensure timely payment of subsidies and transfers of funding that has already been allocated, and provide for consultation by the Department;
- iv. develop a single standard of implementing frail care;
- v. ensure adequate budgets are allocated to care and services for older persons, both at national and provincial levels;
- vi. develop a plan for domestic workers who have no place to go once they retire, other than informal settlements;
- vii. introduce measures to deal with funding constraints that impact on the capacity and operations of the institutional care centres for older persons;
- viii. ensure that the Department of Social Development indicates timeframes for implementation of the Older Persons Act Regulations;
- ix. create an intergovernmental co-ordinating entity dedicated solely to the interests of older persons with the mandate to implement all legislation, policies and programmes relevant to older persons;
- x. enforce interdepartmental collaboration to enhance capacity;
- xi. consider having regular annual mandatory dedicated intersectoral public hearings with the relevant departments, including the Department of Social Development, Department of Transport, Department of Human Settlements, Department of Health, and the South African Police Service, and stakeholders to obtain feedback from departments and input from the public on progress with the implementation of the Older Persons Act and the provision of services and support to older persons; and
- xii. work in partnership with civil society in order to achieve shared goals of social cohesion.



Persons with disabilities

Overview of policy goals informing legislation

In November 1997, the Presidency released a White Paper on Integrated National Disability Strategy to formulate government’s commitment to the development of people with disabilities and the promotion and protection of their rights. The White Paper noted that ‘[I]nvestigation has contributed to the social exclusion of people with disabilities. First, legislation fails to protect the rights of people with disabilities and, second, through legislation, barriers are created to prevent people with disabilities from accessing equal opportunities.’ Subsequently, in 2015, Cabinet approved the White Paper on the Rights of Persons with Disabilities (WPRPD), which seeks to accelerate transformation with regard to full inclusion, integration and equality for persons with disabilities.

Although South Africa has no overarching legislation that exclusively addresses the rights of persons with disabilities, a number of pieces of legislation try to address equal opportunity, and equal access for persons with disabilities. In addition to the Constitution, the following entrench the rights of persons with disabilities: the Employment Equity Act (No. 55 of 1998), the Employment Equity Amendment Act (No. 47 of 2013), the Code of Good Practice: Key Aspects on the Employment of People with Disabilities (2002), the National Land Transport Act (No. 5 of 2009), PEPUA, the South African Schools Act (No. 84 of 1996) and White Paper 6: Special Needs Education.

As an illustration, the South African Schools Act of 1996 requires government to ‘take all reasonable measures to ensure that the physical facilities at public schools are accessible to disabled persons.’ The Education White Paper 6 of 2001 went further than this, arguing that ideally all public schools should be equipped to accommodate disabled learners. The Employment Equity Act includes people with disabilities with black people in what is termed ‘designated groups’, and requires the setting of employment equity targets and affirmative action to redress the balance of previous exclusion.

Overview of trends since 1994: Voices of the public

The Lethabong Disability Organisation from the North-West province stated the following in its submission to the public hearings in the North West province:

'By considering [people with] disabilities and taking them very serious[ly] it can make a difference [for] this community] because disabilities programmes create jobs for people. Here the challenges for people living with disabilities [include] project sites, disability centres, funding, stipends, community works programmes and the private sector. There is a huge lack of information that doesn't come to disabilities centres, e.g. internships and learnerships. [The Department of] Social Development normally brings them 2 days before [the] closing date. Social Development, CWP and other sectors don't recognise disabilities centres. They discourage, discriminate and [are] shutting them down instead of advising and helping them to grow big/sustain themselves. Although there is nothing for [people with] disabilities in the municipality, in the Special Project Office government should create [a] budget/funding specific for disability projects and programmes.'

Michael September's submission to the public hearings in the Western Cape draws attention to the plight of disabled people. He states that: 'Every disabled person does not enjoy the privilege, which nowadays is a basic human right, to attend school and be educated. Some disabled people were educated, but did not complete their school career. Yet they are really capable of offering their services and skills...'

Bethabile Zulu, of Disabled People South Africa, told the public hearings in KwaZulu-Natal that: 'As people living with disabilities we request that the COIDA [Compensation for Occupational Injuries and Diseases Act] be checked because it affects ... those who had accidents while working in the mines. COIDA is a problem which must be amended.'

Mansie L. Tibane from Matsulu in Mpumalanga had the following to say at the public hearings in that province:

'We are suffering a lot here in the rural areas. We have children that are educated and they have been to training colleges but they are unemployed. They submit their CVs every day but they are not employed and are being told that they do not have experience. ... There are farm workers who are being exploited and abused by their employers. When a farm worker is sick and he comes back with a medical certificate, the employer does not consider it and he deducts money from his very little salary. We are suffering here in rural areas and request the government to intervene and help us. According to the law, we must all be treated equally and fairly.'



Lasita Martha Tong from Taung Local Municipality in the North West province expressed the following concerns at the provincial public hearings: ‘We have a disability organisation of 32 disabled children, and we are pleading with the government to help us with a building for us to be able to group these kids according to their special needs. Furthermore, we are also asking for relevant training that will benefit us as well as the children; to be assisted with finances and to pay volunteers like us; and for the government to include these organisations in their forums so that we can be able to represent our communities.’

Recommendation 4.19

Parliament should:

- i. include people with disabilities in all parliamentary public hearings on issues affecting them as a matter of principle; and
- ii. review the Compensation for Occupational Injuries and Diseases Act and the manner in which people with disabilities are negatively affected by this law.

Other: Substance abuse

Analysis of legislation: Prevention of and Treatment for Substance Abuse Act 70 of 2008

Relationship to social cohesion: A social cohesion strategy needs to tackle exclusion by means of both prevention and cure. As amended, the Act provides for the establishment of a Central Drug Authority, the establishment of programmes for the prevention and treatment of drug dependency, the establishment of treatment centres and hostels, the registration of institutions as treatment centres and hostels and the committal of persons to and their detention, treatment and training in treatment centres. In terms of nation-building and social cohesion, the Act promotes the development of comprehensive and integrated treatment systems that are able to deliver a continuum of care for drug users, and link services at municipal and national levels for every individual irrespective of his or her socioeconomic background or race.

Problem statement

Substance abuse is considered by most people to be a major problem facing communities, and legislation to deal with this challenge exists but has not yet been promulgated. This is one of the key issues impacting on social cohesion because of the links between youth unemployment, substance abuse and crime.

Recommendation 4.20a

Parliament should use its powers to introduce the following policy and legislative changes to the Prevention of and Treatment for Substance Abuse Act 70 of 2008:

- i. the Act should be amended, giving consideration to including provisions related to harm reduction as opposed to punitive measures; and
- ii. the Act should be amended to provide for protection against stigmatisation.

Problem statement

There have been several challenges with implementation of the Act, including a lack of capacity to deal with substance abuse at a community level, inaccessible and expensive treatment services for substance abuse and a lack of treatment centres in some (especially rural) provinces; the failure of government departments to integrate policies and implement programmes when addressing the correlated and complex nature of substance abuse with other issues including mental health, violence and crime; and the fact that services for treatment of substance abuse have previously been out of reach of poor citizens.



Recommendation 4.20b

Parliament should ensure the following steps are taken to improve implementation of the Prevention of and Treatment for Substance Abuse Act 70 of 2008:

- i. introduce diversion programmes in order to discourage youth from engaging in activities that lead to substance abuse;
- ii. increase the number of public service centres, especially for people in remote rural areas. There should be an increase in the roll out of in-patient, out-patient and aftercare programmes. The in-patient facilities should be adequately capacitated and monitored to ensure that they adhere to norms and standards;
- iii. change the hours of sale of alcohol at taverns and shebeens (through municipal by-laws), and restrict the number of outlets in communities, increase taxes on alcohol; and
- iv. substance abuse evaluation centres are rolled out to all provinces to enable the practitioners to assess and locate users to appropriate intervention programmes.



Building democracy through active citizenship and governance

Introduction

Democracy derives from two Greek words, Demos and Kratos, which invoke the rule of the people. The very essence of the “rule of the people” is the inherent right of all human beings to make political decisions. Indeed, the most renowned definition of democracy is often captured in the words of Abraham Lincoln: “a government of the people, by the people, for the people”. In deconstructing this definition of democracy, the Panel notes three essential elements: representation, active citizenship and responsive governance. It implies a form of a social contract between those who govern and the governed. This social contract is built on the foundation that those who govern act on behalf of, are accountable, and must be responsive to the needs of the governed.

Active citizenship entails moving beyond notions of voting, participation in local governance, and user involvement in basic services, but also generating civic duty and responsible citizenship for the advancement of the ‘good society’.

Constitutional mandate

The Constitution’s founding provisions include a set of ‘values’, qualitative characteristics of and objectives to be achieved by South Africa’s democratic system, viz. ‘accountability, responsiveness and openness’ – Section 1(d). Not only did it determine that the South African society and its economic system were to be transformed, but the nature of the political system was also to be entirely distinct from the limited form of democracy under apartheid. It was, instead, intended to result in a leadership accountable to the newly-inclusive electorate, responsive to the needs of all whose human dignity must guide leaders’ actions, and ‘open’ – that is, inclusive, welcoming and tolerant of the views, dreams and priorities of its diverse people.

These initial indications are elaborated on elsewhere in the Constitution. A few main points are highlighted here. Firstly, the right of access to information held by the state in Section 32 is widely phrased in order to support citizens’ right to ‘any information held by the state’, although this right is subject to the provisions of enabling legislation in the form of the Promotion of Access



to Information Act 2 of 2000 (PAIA). Secondly, the right to administrative action by the state that is ‘lawful, reasonable and procedurally fair’. ‘Just’ administrative action in Section 33 is intended to ensure that citizens have the right to know what government plans to do and the reasons for administrative actions by the state that may impinge on citizens’ other rights, as well as the right to participate in the decision-making process. The enabling legislation in this instance is the Promotion of Administrative Justice Act, 3 of 2000 (PAJA). Thirdly, Section 59 ‘Public access to and involvement in National Assembly’ (like Section 72 ‘Public access to and involvement in National Council [of Provinces]’) provides that these law-making and oversight bodies at the national level must facilitate public involvement in the legislative and other processes of these plenary forums and their working committees. There is also a general right for the public and the media to observe and report on proceedings of these forums. Similar provisions are applicable in respect of provincial legislatures (Section 118).

Moreover, the provisions of Section 195 of the Constitution dealing with ‘Basic values and principles governing public administration’ provide significant additional insights into the qualitative nature of the South African democracy applicable to administration in every sphere of government, and to all organs of state and public enterprises (Section 195(2)).

Access to information is an important requirement for a democracy that enables active citizenship and governance. Section 32 of the South African Constitution of 1996 states:

- (1) Everyone has the right of access to –
 - (a) any information held by the state, and;
 - (b) any information that is held by another person and that is required for the exercise or protection of any rights;
- (2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

The Promotion of Administrative Justice Act, 3 of 2000 (PAJA), is the overarching legislation that implements the right to just administrative action. The Preamble to PAJA states that it is enacted to –

- promote an efficient administration and good governance; and

- create a culture of accountability, openness and transparency in the public administration or in the exercise of a public power or the performance of a public function, by giving effect to the right to just administrative action.

Participation in policy-making is a prerequisite for public administration to be developmental in nature and effect. Moreover, participation can be meaningful only if adequate, relevant and timely information is provided by the state concerning its proposals, and if public administration is responsive and accountable. Section 156 of the Constitution requires that municipal 'by-laws must be accessible to the public'. Section 160 of the Constitution states 'Internal procedures' requires in (4) that no by-law may be passed by a Municipal Council unless 'the proposed by-law has been published for public comment'. Echoing provisions concerning national and provincial legislatures, Subsection (7) stipulates that municipal councils must conduct their business 'in an open manner, and may close its sittings, or those of its committees, only when it is reasonable to do so having regard to the nature of the business being transacted'. Chapter 4 of the Municipal Systems Act is dedicated to 'Community participation'. It includes a range of provisions that clearly envision the developmental role of participation.





Corruption

Overview of policy goals informing legislation

Corruption is the abuse of entrusted power or authority for private and group or partisan gain. It is thus an important barometer of good governance. Work towards a National Anti-Corruption Strategy began in September 2015 when the government initiated this process that takes into account all existing institutional structures and efforts to fight corruption. A framework for the development of the National Anti-Corruption Strategy was endorsed by the Anti-Corruption Inter-ministerial Committee. In January 2016 an interdepartmental National Anti-Corruption Strategy Steering Committee comprised of a number of government departments and the South African Local Government Association was established. The process as proposed in the roadmap was divided into three phases:

- **Phase 1:** Research, benchmarking and initial consultations were conducted to support the process and to obtain critical perspectives and advice on the suitability for, and recommendations on engagements with all sectors of the South African society (2016), (completed)
- **Phase 2:** Public Consultation to obtain input and to foster ownership of the process and the resulting National Anti-Corruption Strategy by all the sectors (2016 – 2017), and
- **Phase 3:** Writing and finalisation of the NACS (2017).

A consultation document and roadmap for the NACS was developed to initiate the work towards achieving a whole of government and society approach in the fight against corruption. This document was released for public consultation in 2017. The approach and work to date was benchmarked against international best practice such as the United Nations guideline: National Anti-Corruption Strategies: A Practical Guide for Development and Implementation.

NDP and NACS vision

- Ethical and accountable state, business and civil society sectors in which all those in positions of power and authority act with integrity;
- Citizens that respect the rule of law and are empowered to hold those in power to account; and
- A country with zero tolerance of corruption in any sphere of activity and with substantially reduced levels of corruption.

The proposed pillars for the NACS

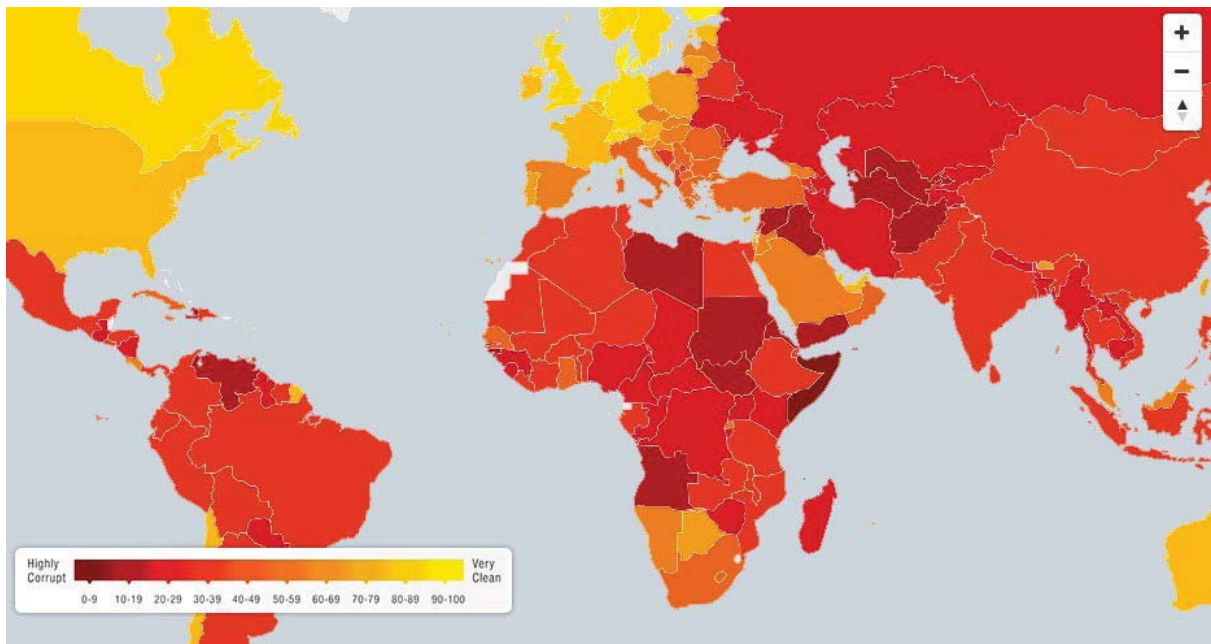
1. Support citizen empowerment in the fight against corruption, including increased support for whistle-blowers.
2. Develop sustainable partnerships with stakeholders to reduce corruption and improve integrity management.
3. Improve transparency by government, business and civil society sectors.
4. Improve the integrity of the public procurement system to ensure fair, effective and efficient use of public resources.
5. Support the professionalisation of employees.
6. Improve adherence to integrity management and anti-corruption mechanisms and improve consequence management for non-compliance of these across government, business and civil society sectors.
7. Strengthen oversight and governance mechanisms in the government sector.
8. Strengthen the resourcing, co-operation and independence of dedicated anti-corruption agencies.
9. Build specific programmes to reduce corruption and improve integrity in sectors particularly vulnerable to corruption (vulnerable sector management), with an initial focus on the Justice, Crime Prevention and Security Cluster.



Overview of trends since 1994: Insights from diagnostic report, commissioned papers and roundtables

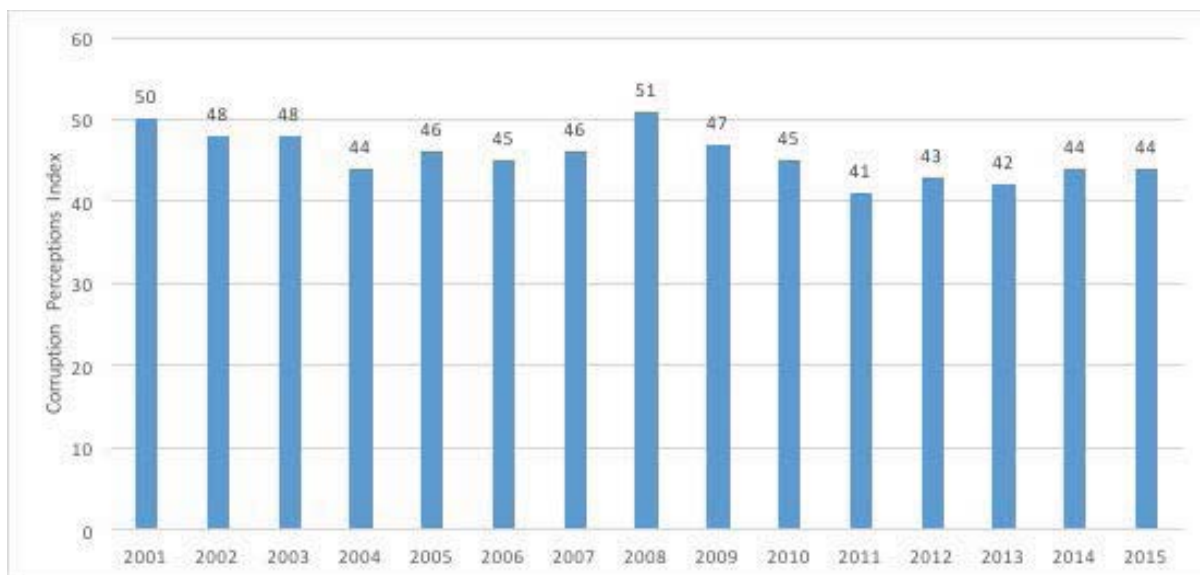
It is in the nature of corruption that it is done in secret, and all manner of subterfuge and diversionary tactics, including the use and misuse of language, serves to render it extremely difficult to give an accurate assessment of the scale of corruption in any country. Corruption is thus often measured in terms of perceptions. Transparency International’s global Corruption Perception Index (CPI) shows that in 2001 South Africa was in 38th position out of 91 countries assessed (Transparency International, 2001), while the country is currently ranked number 64 out of 176 countries assessed (Transparency International, 2016). The country’s score has been trending downwards from 51 in 2008 to 44 in 2015 (the lower the score, the higher the perception of corruption by respondents).

Figure 4.4: Transparency International’s Corruption Perceptions Index: South Africa ranks 67 out of 175 countries



Source: www.transparency.org/cpi2015

Figure 4.5: Transparency International's Corruption Perceptions Index Score for South Africa, years 2001 to 2015



Source: Transparency International: www.transparency.org/research/cpi/

For purposes of space, only a few examples are given to illustrate the prevalence of corruption in South Africa. The Financial Disclosure Framework (the Framework) in the South African Public Service is regarded as a necessary step to safeguard the confidence that the public bestows on the Public Service. Through this Framework, all members of the Senior Management Service (SMS) in the Public Service are required to disclose all their registrable interests annually to their executive authorities (EAs). The EAs, in turn, are required to submit copies of the financial disclosure forms to the Public Service Commission (PSC) by 31 May of each year. Key findings included:

- There are SMS members who were found to be involved in registrable interests that could be construed as potential conflicts of interest.
- There are SMS members who did not fully comply with the Framework in that not all their registrable interests were disclosed. This includes SMS members on the level of Director-General (DG) and Head of Department (HoD).
- There are SMS members who are involved in remunerative work outside the public service (RWOPS) and are generating large incomes while also occupying positions of trust in the Public Service.



- There are SMS members who received gifts and/or sponsorships that are above the threshold as determined by Regulation 13 (h) of the Public Sector Regulations, 2016.
- There are Executive Authorities (EAs, e.g. directors-general) who did not comply with the requirement to provide feedback to the PSC on actions taken, emanating from the findings of the scrutiny process (Public Service Commission 2017).

The Auditor-General's report for 2017 indicated serious challenges at local government level, in particular that irregular expenditure increased by more than 50% compared to the previous year, which is the equivalent of almost R17bn (Auditor-General, 2017). Non-compliance with legislated requirements amount to maladministration, and when combined with a lack of transparency or accountability can allow for corruption, especially regarding the awarding of contracts and irregular expenditure. As a result, the AG recommends that 'consequence management systems' should be implemented for transgressors, including officials, as these irregularities and malpractices have serious financial implications (Auditor-General, 2017).

But corruption is not simply carried out by government officials only. It is for this reason that the NDP noted that: 'Consideration must be given to establishing a structure to which private sector non-compliance with the law can be reported', and consideration of requirements for businesses to include corruption cases in their annual reports (National Planning Commission, 2012). At the multi-stakeholder National Anti-Corruption Forum (NACF), the business sector proposed developing integrity pacts to be used in public contracting. The pact is an agreement between government and bidders 'for a public contract that stipulates that neither side will pay, offer, demand or accept bribes, collude with competitors to obtain the contract, or engage in such abuses while executing the contract' (NPC, 2012). The NDP has encouraged this kind of initiative.

The Constitutional Court in a landmark decision in *Glenister* (*Glenister v President of the Republic of South Africa and Others*, 2011) set out in very clear terms the devastating impact that the scourge of corruption has on South Africa's constitutional democracy, and the necessity, in terms of existing constitutional and international obligations, for the state to take clear and effective action to combat it. The Court recognised that:

‘Corruption has become a scourge in our country and it poses a real danger to our developing democracy. It undermines the ability of the government to meet its commitment to fight poverty and to deliver on other social and economic rights guaranteed in our Bill of Rights’.

The Court added:

‘Perhaps the fullest recital of the insidious scourge of corruption on society and the need to prevent and eliminate it is to be found in our own domestic legislation. The preamble to the Prevention and Combating of Corrupt Activities Act (PRECCA) records that corruption and related corrupt activities undermine rights; the credibility of governments; the institutions and values of democracy; and ethical values and morality; and jeopardises the rule of law. It endangers the stability and security of societies; jeopardises sustainable development; and provides a breeding ground for organised crime’.

The Court drew attention to: ‘The state’s obligation to respect, protect, promote and fulfil the rights in the Bill of Rights thus inevitably, in the modern state, creates a duty to create efficient anti-corruption mechanisms’.

In its subsequent decision in *Helen Suzman Foundation v President of the Republic of South Africa and Others*; *Glenister v President of the Republic of South Africa and Others*, the Constitutional Court, in a strong judgment by Chief Justice Mogoeng, warned that ‘urgent action’ is needed against corruption and that ‘stringent measures are required to contain this malady before it graduates into something terminal’.

Overview of trends since 1994: Voices of the public

A significant number of the written submissions made by the public at public hearings organised by the Panel raise concerns about corruption: of ward councillors in general; in the appointment of school principals; in the processing of asylum seekers; in processes assisting disaster-affected communities; in the issuing of drivers’ licences; at police stations; by traditional leaders; and in the implementation of land reform, among others.

Michael Shabalala stated in his submission to the KwaZulu-Natal public hearings that ‘Ladysmith was hit by a hail storm in 2012 but not everyone received food vouchers since it was found that



social workers were corrupt. The community was told it will be investigated but till now nothing has happened.'

Headwoman Georgina Matau stated that: 'The murder cases do not get to court. The Police Station in Steenberg is in cahoots with gangsterism. Murder dockets disappear. Gangsters pay huge sums in order for the dockets to disappear.'

Robert Davel of Mpumalanga Agriculture, an affiliate of AgriSA, stated:

'The implementation of the [land reform] legislation is, in our view, the bigger problem for the bad results of millions spent on land reform since the start of the land reform process. In our view, there were numerous cases of corruption and irregularities in the way the available budget was spent.'

Themba Mzimela stated at the Panel session in KwaZulu-Natal on 20 October 2017:

'The current government land restitution programmes are marred by corruption, where you find corrupt government fighting over small patches of land that are supposed to be handed over to communities. Some community members who lodged complaints are kept in the dark by government officials who fraudulently alter the names and numbers of people on the beneficiary lists. Some people who are supposed to be listed in court proceedings are deliberately and fraudulently left outside the process in order to dilute their claims or in order for corrupt government officials to personally benefit from the land claims.'

Daniel Mohapi of the North West recommended that ward councillors serve only a single five-year term because of corruption. An anonymous person made a submission at the North West public hearings that consideration should be given to developing 'electronic systems for quotations in all government departments to reduce potential for corruption/nepotism'.

Jabulani Lekhuleni and Joseph Mkhabela of the Contractors and Allied Trades Forum recommend that: 'Accounts of public representatives should be monitored by banks and state to combat fraud and corruption'. They add that the Minister of Finance should establish 'national and provincial

public-private councils responsible for monitoring and evaluation of all tenders from provincial and local municipalities to combat fraud and corruption.’

Problem statement

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 (IPIID), National Prosecuting Authority (NPA), Asset Forfeiture Unit (AFU), Specialised Commercial Crime Courts, and 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 in relation to 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.

This concern with the prevalence of state corruption lies at the heart of one of the major challenges to the achievement of a capable and developmental state in South Africa. The NDP envisages a developmental state to be one that intervenes ‘to support and guide development so that benefits accrue across society (especially to the poor)’, and builds ‘consensus so that long-term national interest trumps short-term, sectional concerns’ (National Planning Commission, 2011b). Corruption results in the denial of benefits accruing across society, and the poor are the primary victims of the corrupt activities of state officials. It is also argued in the NDP that a developmental state in South Africa must be a capable one, which ‘requires leadership, sound policies, skilled managers and workers, clear lines of accountability, appropriate systems, and consistent and fair application of rules’ (National Planning Commission, 2011b). One of the key components of a capable state is a civil service that is led by professional, independent and accountable leaders.



Recommendation 4.21

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

Overview of trends since 1994: Insights from diagnostic report, submissions, commissioned papers and roundtables

Despite the explicit constitutional right to access to information and the provisions of the Promotion of Access to Information Act, it has been concluded that there have 'been problems in the implementation of the Act and its use has been limited' (Kandji, 2005). Kaitira Kandji of the Media Institute of Southern Africa (MISA) drew attention to surveys conducted by the Open Democracy Advice Centre in 2002 and 2003, which found, 'on the whole, that PAIA has not been properly or consistently implemented, not only because of the newness of the Act, but because of low levels of awareness and information of the requirements set out in the Act. Where implementation has taken place it has been partial and inconsistent' (Kandji, 2005). Memeza (n.d.: 12) identified the following weaknesses in South Africa's access to information legislation:

- The lack of a cheap, accessible, quick and effective mechanism for resolving disputes under the Act without having to go to court.
- Record keeping and voluntary disclosure of information, which leads to situations where the requester knows that the information exists, and the official struggles to get hold of it, leaving, in the eyes of the requester, not only a refusal to furnish the requested information, but also creates a perception in the public mind that public officials are not committed to a culture of openness and accountability.

- Time limits, in particular the requirement that the information requested be provided within 30 days, are rarely met in practice.
- Relief from fees, which is only available for requests made personally.
- Scope of exemption from PAIA, for instance, so-called third party information exemptions that are often invoked in an attempt to conceal the nature of contractual undertakings between state organs such as municipalities and service providers.
- Circumstances under which public interest dictates that a request should be refused in a situation where the circumstances under which information from public and private bodies can be released in the public interest are currently so narrow as to raise doubt that these provisions do give effect to the constitutional right to access to information.

The civil society Access to Information Network (ATIN) found that, of their members' 369 PAIA requests submitted during the period 1 August 2015 to 31 July 2016:

- Forty-six per cent of information requests to public bodies were denied in full, either actively or as a result of the request being ignored ('deemed refusal').
- Only 34 per cent of information requests to public bodies were granted in full.
- Ten of the 15 requests for information submitted to private bodies were denied in full.

ATIN concluded that '[i]t is clear from these statistics that accessing information through PAIA can be challenging. However, significant progress has been made in the extent to which certain public bodies make records available automatically – i.e. without the need to submit a PAIA request. The appointment of the Information Regulator on 1 December 2016 also bodes well for improved compliance with PAIA and increased transparency and openness' (Access to Information Network, 2016). The Information Regulator is appointed in accordance with the provisions of the Protection of Personal Information Act, 4 of 2013.



The Open Society Foundation for South Africa found that:

The practice of proactive disclosure of information is yet to be fully embraced in South Africa and regulatory controls are still needed to compel disclosure of information by government and private institutions, notwithstanding that certain categories of information are becoming easier to access.’ The Foundation adds that: ‘Since the passage of PAIA, public institutions have failed to comply with their minimum obligations in terms of the law, such as: designating a deputy information officer; developing a manual that lists the records held by public bodies and explains the means of access; and submitting reports that track the handling of requests in public institutions (Adeleke and Humby, 2016).

The Foundation also reviewed several recent studies that have assessed patterns of the PAIA implementation on the part of public and private information providers. These studies reveal a loss of public trust in the utility of the PAIA and indeed in the exercise of the right to information; less than 29% of PAIA requests resulted in records being released during the reporting period; out of 41 national departments, only six institutions were meeting the minimum statutory requirements in relation to PAIA; and only two in every ten private institutions had ‘incorporated PAIA implementation within their organisational strategic planning processes by building into these strategic plans, components/activities that related to PAIA implementation’.

Overview of trends since 1994: Voices of the public

One of the major challenges with the Promotion of Access to Information Act identified in submissions made to the Panel is the difficulty citizens face in getting public institutions to comply with requests for access to information. This is indicated in the following excerpt from a submission made by Adv Anthony Brink.

'...I've fought tooth and nail to disgorge duly requested records from a major public entity, Legal Aid South Africa ('LASA'). ...In my pursuit of LASA's records, I've experienced the repeated and consistent failure of our constitutional guardians the Public Protector and the South African Human Rights Commission ('SAHRC') to achieve LASA's compliance with the Act, despite being vested with specific statutory powers to assist individuals like me trying to exercise their pivotal fundamental right to information, necessary for the exercise of other rights. Fortunately for me, however, as these Chapter 9 institutions have repeatedly failed me, I've been able to draw on my professional expertise and resources to bring several applications to court for orders compelling LASA's compliance with my PAIA requests, and to do so at significant financial cost (I've five pending court applications and I'm slowly winning). I can therefore only pity my powerless lay countrymen who lack the privilege and benefit of my legal background when, for instance, their requests for records proving high-level corruption at their expense are illegally denied, and the said constitution[al] watchdogs aren't up to helping them exercise their basic civil right to information either.'

Analysis of legislation: Promotion of Access to Information Act 2 of 2000

Relationship to social cohesion: The Act acknowledges that control of information and enforced secrecy was at the heart of the anti-democratic character of the apartheid system and that the system of government in South Africa before 27 April 1994 resulted in a secretive and unresponsive culture in both public and private bodies that often led to an abuse of power and human rights violations (Truth and Reconciliation Committee of South Africa, 1998). In response to this history of unaccountable and unresponsive abuse of power, PAIA was intended to 'actively promote a society in which the people of South Africa have effective access to information to enable them to fully exercise and protect all of their rights.' Access to information is a unique enabling right that is fundamental to the realisation of all other rights as well as giving practical expression to the key constitutional values of transparency and accountability.



Significantly, PAIA is one of the few pieces of access to information legislation in the world to apply to both public and private bodies as well as to records, regardless of when the record came into existence. The Act has a role to play in sustaining a healthy participatory democracy as it empowers individuals/communities to make informed decisions, engage with government and participate in public debate. PAIA can also be used to hold government to account; to gather information that individuals can use for exercising rights and as an advocacy tool to fight discrimination on the basis of race, gender, etc. by public or private bodies.

Since the Act's implementation, some gaps in the legislation have been addressed through eight Amendments Acts and other original Acts.

Summary of challenges that have been identified with the Act itself: Section 18(3) (a) of PAIA makes specific provision that a requester who is illiterate or has a disability may make oral presentations to the DIO of a public body. Section 18(3) (b) further requires the DIO to transcribe the oral presentations onto the prescribed form and make a copy available to the requester. Furthermore, Section 19 places an obligation on DIOs of public bodies to provide reasonable assistance to requesters to ensure they comply with the requirements of Section 18(1). The requirement for DIOs of private bodies is different. Section 53 makes no provision for requesters who are illiterate or who may have a disability. There is no specific section similar to Section 19 that places obligations on DIOs of private bodies to assist requesters lodge requests for information (South African Human Rights Commission Annual PAIA Reports 2012, 2013 and 2014).

The South African Human Rights Commission (SAHRC) maintains that imposing fees (Section 22 of PAIA) on information held by government departments compromises the right to access information. In terms of PAIA, a DIO has 30 days within which to make a decision on a request submitted. Section 22 of PAIA provides that a record must only be made available once a requester has paid the applicable fees. However, DIOs are using Section 22(5) of PAIA to exceed the 30-day timeframe by not informing requesters of the need to pay an access fee, thus extending the period to handle the request until such time as a requester has paid fees. This practice is contrary to the objectives of PAIA, which provide the dissemination of information in a swift and inexpensive manner (South African Human Rights Commission Annual PAIA Reports 2012, 2013 and 2014).

Section 32 of PAIA places an obligation on public bodies to submit annual reports to the SAHRC on requests received. While the Section 32 reports are useful in assessing the implementation of PAIA, they are limited for the following reasons: (i) Public bodies are not required to provide information on the specific exemptions relied on, meaning there is no clear indication of whether exemption provisions are interpreted and applied in a manner that warrant the refusal. (ii) The Section 32 report only provides statistical information on formal requests received in terms of PAIA and not on the nature of requests received, which prevents the SAHRC from conducting a contextual analysis of the usage of PAIA. (iii) Although reports must be submitted to the SAHRC annually, the Act does not specify dates for submission. The absence of a specific submission period leads to inaccurate reporting. (iv) In terms of compliance with Section 32 and PAIA as a whole, local government remains at the bottom of the compliance ranking (South African Human Rights Commission Annual PAIA Reports 2012, 2013 and 2014).

Section 46 of PAIA sets onerous three-step criteria that must be satisfied before a record can be released in terms of the public interest and places an undue burden on a requester (South African Human Rights Commission Annual PAIA Reports 2012, 2013 and 2014).

Sections 36 and 68 of PAIA, which set out grounds for refusal, are too vague and are relied on when they should not be. Sections 46 and 70 of PAIA are not used and, read with the definition of 'public safety and environmental risk', are too narrowly framed. These sections and the definition are unconstitutional in terms of sections 32(1)(a), 24(a) and 24(b), founding principles in 1(d) and Section 195 of the Constitution. Disclosure of all authorisations, approvals, permits and licences should be mandatory and always in the public domain. At present some companies provide full access to licences, for example, while others do not. There is no uniformity and much uncertainty. Information is seldom provided in fewer than 30 days. It is usually provided on or close to the 30th day, on the 60th day (after an extension) or well after 60 days – without any regard to timeframes contained in PAIA. This has unacceptable consequences in urgent matters. On many occasions access is granted but the information is not received. Actually getting the information can take months, and frequently never happens at all. The Exemption Regulations exempt 'single persons' and 'married persons' that earn less than a certain amount from payment of access fees. This has been interpreted as applicable to natural persons only, to the exclusion of juristic non-profit organisations (The Centre for Environmental Rights, 2016a).



Recommendation 4.22a

Parliament should use its powers to introduce the following legislative changes to the Promotion of Access to Information Act 2 of 2000:

- i. the Act should be amended to align the duties of Deputy Information Officers (DIOs) in the private sector with the duties of DIOs in the public sector in order to prevent undue and unfair discrimination against persons with disabilities in the face of their right to access information from a private body;
- ii. the Act should be amended to remove the fee requirement for information requested by government departments;
- iii. the Act should be amended to ensure that the 30-day timeframe is complied with at all times;
- iv. the Act should be amended to align it with the African Union Model Law on Access to Information passed by the African Commission in 2013 to reduce the timeframe to twenty-one (21) days for ordinary requests and forty-eight (48) hours for urgent requests pertaining to safeguarding the liberty and life of persons;
- v. Section 32(d) of the Act should be amended to include a requirement that public bodies must specify the exemptions relied on when refusing a request for access to a record;
- vi. the Act should be amended to reduce the burden on the requester on the grounds of public interest;
- vii. the Act should be amended to make Sections 36 and 68 in their application to grounds for refusal less vague;
- viii. Sections 22 and 54 of the Act should be amended to clarify the counting of days to ensure that 30 days is calculated from receipt of an application;
- ix. the definition of the term 'public safety and environment risk' and the provisions relating to the 'public interest override' (Sections 46 and 70) should be amended so as to broaden the scope of this override;

- x. the Act should be amended by inserting provisions requiring the mandatory disclosure of all authorisations, approvals, permits and licences required to be obtained from the State in order to lawfully conduct the activities requiring approval at the site of activity, to anyone on request and on the website of the authorisation holder;
- xi. the Act should be amended by inserting a provision for urgent access to information under certain circumstances and that the extension provisions (Sections 26 and 57) should not be available for use in urgent matters;
- xii. the Act should be amended by the insertion of a remedy in situations where access to information has been granted, but not provided to the requester;
- xiii. the Act should be amended to include a provision stipulating that access fees must be calculated and set out in the decision letter and that the records must be provided within 5 days of payment of access fees;
- xiv. the Exemption Regulations published in terms of the Act should be amended to provide for exemption of payment of access fees for registered non-profit organisations; and
- xv. the Act should be amended to penalise bodies that fail to comply or implement the Act.

One of the most significant obstacles to access to information by the public is the lack of compliance by public and private institutions to legislative obligations. In addition, the newly established office of the Information Regulator and the transfer of responsibilities from the South African Human Rights Commission to the Information Regular (through the Protection of Personal Information Act 2013) require regular and consistent oversight.

Challenges with implementation: Section 91A of the PAIA requires that magistrates must be designated and trained before they can hear PAIA applications. In 2011 Parliament was informed that despite the Rules allowing magistrate courts to hear PAIA cases having come into operation, there are no magistrates designated to hear such matters because a lack of training as required



by the Act has prevented these courts from being used to adjudicate PAIA matters. There is a lack of awareness within institutions of who the Deputy Information Officers (DIOs) are or about the PAIA procedures. Receptionists, access control personnel, etc. in most institutions do not know who their DIOs are, nor are they aware of their institution's PAIA procedures. Many institutions have not formally designated their DIOs. Only a few institutions have incorporated PAIA implementation in their organisational strategic planning processes. Few institutions have specifically budgeted for PAIA implementation and compliance requirements. A small number have established internal protocols for dealing with requests for information (Report on Budgetary Review and Recommendation Report of the Portfolio Committee on Justice and Constitutional Development, 26 October 2011).

Recommendation 4.22b

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.

Administrative Justice

Analysis of legislation: Promotion of Administrative Justice Act 3 of 2000

Relationship to social cohesion: The Promotion of Administrative Justice Act (PAJA) gives effect to the right to just administration enshrined in Section 33 in the Bill of Rights. Any decision the administration takes that affects people's rights is an administrative action. Included here are decisions government departments take to build public infrastructure, license potentially harmful activities, or when a person applies for a birth certificate, Identity Document, disability grant, old age pension, housing subsidy, work permit, refugee status, etc. These decisions have significant impacts on people's

lives. Administrators charged with making such decisions are required to follow fair procedures when making decisions, allow people to have a say when making decisions that might negatively affect their lives, clearly explain their decisions, notify the affected person(s) about the internal appeal process within their department, notify the affected person(s) that they can resort to the courts to review the decision if there is no internal appeal process or the internal review is unsuccessful, and inform the affected person(s) that a request can be made for written reasons for the decision. It thus allows for citizens to hold the government accountable for administrative actions.

Summary of challenges that have been identified with the Act itself: Although internal appeal processes allow for departments to rectify irregularities before ‘aggrieved parties resort to litigation’, the Centre states that the ‘design is frequently frustrated by failures of appeal authorities to decide internal (or administrative) appeals timeously, within a reasonable time, or at all’. In addition, in most cases when an aggrieved party turns to the courts to review a failure to take a decision, the courts are loath to grant review relief in these circumstances, preferring to limit relief to an order compelling the appeal authority to make a decision. This necessitates a two-stage court process for an appellant, which is unfairly burdensome, both in terms of the costs of such litigation and the time it takes for an appellant to ‘exhaust her/his internal remedies’ (Centre for Environmental Rights, 2016b).

Recommendation 4.23

Parliament should use its powers to introduce the following legislative changes to the Promotion of Administrative Justice Act 3 of 2000:

- i. the Act should be amended to include a provision that a failure by an appeal authority to take a decision on an internal appeal within a specified timeframe is deemed a dismissal of such appeal similar to Section 27 of the Promotion of Access to Information Act, which provides that ‘[i]f an information officer fails to give the decision on a request for access to the requester concerned within the period contemplated in Section 25 (1) [of PAIA], the information officer is, for the purposes of [PAIA], regarded as having refused the request’.



Public and community participation

Overview of policy goals informing legislation

In South Africa, public participation is generally facilitated by means of, among others, ward committees in local government, public meetings, public comment following press notices and integrated development planning in a range of different laws and policies (du Plessis, 2008). The Constitution (1996) prioritises process values that support informed participation. The constitutional vision for governance supports a ‘substantive’ approach to public engagement—a belief that participation will deliver better outcomes for the citizens of South Africa. The erstwhile Department of Provincial and Local Government (DPLG, now the Department of Co-operative Governance and Traditional Affairs, CoGTA) developed a draft National Policy Framework for Public Participation in 2006 (Department of Provincial and Local Government, 2006). The explicit goal of the Policy Framework is ‘to deepen democracy, promoting a vibrant and engaged citizenry, active in planning and managing their own development, claiming their rights but also exercising their responsibilities as (co-)creators of development in their communities’ (Department of Provincial and Local Government, 2006).

The Policy Framework defines public participation as ‘an open, accountable process through which individuals and groups within selected communities can exchange views and influence decision-making’ and ‘a democratic process of engaging people, deciding, planning, and playing an active part in the development and operation of services that affect their lives’ (Department of Provincial and Local Government, 2006). The Policy Framework identifies a set of principles to guide participation.

- **Inclusivity:** To embrace all views and opinions in the process of community participation.
- **Diversity:** In a community participation process, it is important to understand the differences associated with race, gender, religion, ethnicity, language, age, economic status and sexual orientation. These differences should be allowed to emerge and, where appropriate, ways should be sought to develop a consensus position. Planning processes must build on this diversity.

- **Building community participation:** Capacity-building is the active empowerment of role-players so that they clearly and fully understand the objective of public participation and may in turn take such actions or conduct themselves in ways that are calculated to achieve or lead to the delivery of the objectives.
- **Transparency:** Promoting openness, sincerity and honesty among all the role-players in a participation process.
- **Flexibility:** The ability to make room for change in order to benefit the participatory process. Flexibility is often required in respect of timing and methodology. If built into the participatory processes upfront, this principle allows for adequate public involvement, realistic management of costs, and the ability to better manage the quality of the output.
- **Accessibility:** On both mental and physical levels, it is collectively aimed at ensuring that participants in a public participation scenario fully process and clearly understand the aims, objectives, issues and methodologies of the process, and are empowered to participate effectively. Accessibility ensures not only that the role-players can relate to the process and the issues at hand, but also that they are, at the practical level, able to make their input into the process.
- **Accountability:** The assumption by all the participants in a participatory process of full responsibility for their individual actions and conduct, as well as a willingness and commitment to implement, abide by and communicate as necessary all measures and decisions in the course of the process.
- **Trust, commitment and respect:** Above all, trust is required in a public participatory process. Invariably, however, trust is used to refer to faith and confidence in the integrity, sincerity, honesty and ability of the process and those facilitating the process. Going about participation in a rushed manner without adequate resource allocations will undoubtedly be seen as a public relations exercise and would be likely to diminish the trust and respect of the community in whoever is conducting the process in the long term.
- **Integration:** Public participation processes should be integrated into mainstream policies and services, such as the policy development process, service planning, and so forth.



Another principle should be added to this list:

- **Sustainability:** Participation is not a once-off exercise. It takes time to build trust, commitment and respect; to develop flexible approaches and learn from them, to ensure diversity and inclusivity and to understand what it really means to be accountable in each context. Policy processes vary in length, but it is important that a participatory approach is sustained over their full duration or stakeholders may become sceptical about its true purpose.

Overview of trends since 1994: Insights from diagnostic report, commissioned papers and roundtables

A World Bank (2011) study of accountability in South Africa opens with the observation that the country's sectoral legal and policy frameworks place a high priority on public participation in public administration and service provision – a view enshrined in the Constitution. However, the study finds that public participation is often missing in delivery. It cites a report by the Public Service Commission (PSC), which found that:

...part of the implementation weaknesses are the non-involvement of beneficiary communities in the planning and implementation of programmes ... departments generally do not adopt project management approaches that allow for effective beneficiary participation and alignment of projects with local development plans (Public Service Commission, 2008).

The World Bank study states that the main reasons for failure to implement public participatory approaches are:

- The government developed ambitious delivery targets to overcome the backlog in services and provided ample financial resources to meet these targets, but national, provincial, and local institutions for service delivery were still weak, along with technical and managerial capacity.

- Many sectors stressed community and user participation initially, but participation systems were time-consuming and hard to scale; policy-makers feared this would slow implementation. Consequently, the sectors relied on centralised mechanisms focused on outputs, rather than on more participatory approaches focused on outcomes.
- The sector programmes invariably became ‘silos’ – supply-driven and focused on the delivery of sector outputs – and in the process took power from citizens (The World Bank, 2011).

The study concludes that intense delivery pressures and a focus on quantitative output and input targets were therefore partly, albeit inadvertently, responsible for undermining the intentions of the Constitution, the Batho Pele principles, and the original sector strategies and policies. Participation is often confined to consultations with citizens, including in preparing Integrated Development Plans, intended to be a main instrument for participatory development planning and budgeting at municipal level (The World Bank, 2011). Actual participation, however, from ward committees to the Integrated Development Plan process to workplace forums, has been limited mainly to special interest groups or hindered by short-term self-interest (Public Service Commission, 2003).

The study found, for example, that ward committees are failing to enhance participatory local governance. Among the main reasons for this failure is that:

- Communities sometimes perceive that ward committees are ‘owned’ by the ward councillor.
- Animosity among political parties often hampers participation, and civil society is often deliberately excluded from governance.
- The functioning of ward committees is affected by the lack of capacity of elected members.
- The communication links among the councillor, the ward committee, and the community are insufficient.
- Greater public understanding of ward councillor roles and responsibilities is a critical missing link in this public accountability mechanism (The World Bank, 2011).



Overview of trends since 1994: Voices of the public

Ikamva Community Empowerment submitted written comments to the public hearings in the Western Cape and proposed that:

'...communities [must] not only be involved in [special] planning for their areas but that they have final say in which developments take place. More often than not large sums of money are spent on developments that the communities neither want nor need and as a result it becomes a wasteful expenditure for government. This can be avoided if the local communities and not only those involved with the municipality are consulted and involved.'

Concern about the limited opportunities for public participation between elections is evident in the submission made by Adv Jacques Wolmarans, Chief State Law Adviser in the KwaZulu-Natal Office of the Premier, who suggested amendments to the legislation applicable to local government:

'The proposed Clause set out in the Schedule below envisages giving residents of a municipality the power to decide matters at a public meeting and for their decisions to be referred to the municipal council for consideration. The municipal council must consider the decision and may confirm, vary, amend or set aside, a decision. Where the municipal council varies, amends or sets aside any such decision, it must give reasons. Where it confirms a decision the municipal council must, within a reasonable time, carry out and give effect to that decision as if it were a resolution taken by the municipal council.'

Analysis of legislation: National Environmental Management Act 107 of 1998; National Environmental Management: Biodiversity Act of 2004; National Water Act 36 of 1990; Mineral and Petroleum Resources Development Act 28 of 2002; Constitution Act 108 of 1996; Local Government: Municipal Systems Act 32 of 2000; and Local Government: Municipal Structures Act 117 of 1997.

Summary of challenges that have been identified with the various laws:

The National Environmental Management Act 107 of 1998 (NEMA) and its regulations do not provide for easy access to environmental authorisations issued in terms of NEMA. This is hampering public participation in environmental governance in South Africa and leading to significant mistrust between government and citizens and between big polluting industries, such as mines and Eskom coal-fired power stations, and affected communities. The Environmental Impact Assessment Regulations provide for a 30-day timeframe for public participation in environmental authorisations, which can be extended by a further 30 days. This period is too short due to voluminous and complex documents that need to be perused; difficulties for illiterate, potentially affected, communities to participate; and customary consultation and negotiation processes in traditional communities (Centre for Environmental Rights, 2016c).

The National Environmental Management: Biodiversity Act of 2004 (NEMBA) prohibits activities in relation to threatened or protected species without a permit (Sections 56 – 58). The permitting procedure is prescribed but it does not include a public participation process (Sections 87 – 97B). Thus most permit applications processes are not subject to public participation processes (Centre for Environmental Rights, 2016). The National Water Act (NWA) does not contain a provision for compulsory public participation processes. In terms of the Act, a relevant authority ‘may’ require a public participation process in relation to a water use licence (WUL) application. The Mineral and Petroleum Resources Development Act 28 of 2002 does not adequately provide for public participation (Centre for Environmental Rights, 2016d).

The original conceptual framework for citizen participation in local government is limiting and robs local government of the opportunity to tap into the capacity, the energy and resources that rests within citizens to drive change. There is a need to rethink the role of active citizens in local governance as co-drivers of change. The existing framework for citizen participation only enables the public to participate as invited guests in local government processes as opposed to partners and co-creators. This argument is derived from the emphasis on the term to ‘encourage and to consult’ in Section 152 (1) of the Constitution, in Sections 1 and 4 of the Municipal Systems Act, and in Section 19 of the Municipal Structures Act (Afesis-Corplan and Democracy Development Programme, 2016).



Recommendation 4.24

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



Nation-building

Introduction

South Africa has historically been a divided country, and from the initial penetration of the Cape by the Dutch in the seventeenth century, to the final days of apartheid in the first half of the 1990s, the white rulers of South Africa forged their own distinct notion of the 'nation' based on racial exclusivity and cultural distinctiveness. This aspect of 'nationhood' reached its apogee during the apartheid era from 1948 to 1994.

The liberation struggle led to the development of concepts of the 'nation' by the liberation movements distinct from that of the Afrikaner nationalists. For the ANC, from the time of its formation in 1912, African nationalism in South Africa was seen as all political actions and ideological elements to improve the status, the rights and position of Africans in the emerging society imposed by white domination. One of the first objectives was to unite all the African people, and, at the all-African Convention in Bloemfontein in March 1909, one of the main speakers at the Convention, Pixley Ka Isaka Seme, said: 'we are one people, ...these [tribal] divisions, these jealousies, are the cause of all our woes and of all our backwardness and ignorance today'. The concept of nationhood derived from this brand of African nationalism, as it developed during the course of the struggle, was one based on territory, as opposed to race or ethnicity.

Given these opposing concepts of the nation, the democratic government embarked, from its very beginning, on a nation-building exercise. The NDP defines nation-building to be a process:

...whereby a society of people with diverse origins, histories, languages, cultures and religions come together within the boundaries of a sovereign state with a unified constitutional and legal dispensation, a national public education system, an integrated national economy, shared symbols and values...to work towards eradicating the divisions and injustices of the past; to foster unity; and promote a countrywide conscious sense of being proudly South African.



The NDP set out five long-term nation-building goals for South Africa. These goals are the following: Knowledge of the Constitution and fostering Constitutional values; equalising opportunities, promoting inclusion and redress; promoting social cohesion across society through increased interaction across race and class; promoting active citizenry and broad-based leadership; and achieving a social compact that will lay the basis for equity, inclusion and prosperity for all. Some of these goals are dealt with in other sections of this chapter.

Constitutional mandate

There is no particular legislative framework that specifically speaks to social cohesion and nation-building. However, the Constitution of the country has a direct bearing on social cohesion and nation-building:

- The Preamble declares that ‘South Africa belongs to all who live in it, united in our diversity’. As underlined by the Constitutional Court and the South African Human Rights Commission, this embraces every inhabitant of the country, both citizen and non-citizen.
- It further stresses the indivisible unity, under the Constitution, of the country’s diverse people. It sets as one of its aims ‘to improve the quality of life of all citizens and free the potential of each person’.
- Section 1 of the Constitution affirms ‘non-racialism and non-sexism’ as foundational values and principles.
- A further founding provision defining the new nation is found in Section 3(1), which declares that ‘[t]here is a common South African citizenship’, and the nation’s diverse languages all receive recognition and equal status in Section 6.
- In light of this, Section 9(1) declares that ‘everyone is equal before the law and has the right to equal protection and benefit of the law’. Accordingly, Section 9 (3) stipulates: ‘The state may not unfairly discriminate against anyone on one or more grounds, including race’.

- Section 10 enjoins: ‘Everyone has inherent dignity and has the right to have their dignity respected and protected’. These provisions, together with the Bill of Rights and other constitutional provisions, form the basis of laws and constitute the legal foundation of a united democratic South Africa required to proactively correct divisions and injustices of the past.

Overview of policy goals informing legislation

South Africa’s nation-building policies are numerous, and include education and language policies, among others. With regards to education policy, the first significant area in which nation-building was tackled was through curriculum reform. The first reform, following the 1994 elections, was to rationalise and consolidate the syllabi of the hitherto existing 19 racially segregated education departments and to remove overtly racist, sexist and offensive language. These changes were an interim measure while a new national curriculum, which came to be known as Curriculum 2005, was being constructed. C2005 was launched in March 1997 and implemented in phases from the beginning of 1998. Both the content and the teaching of the existing curriculum were overhauled and brought into line with the values of the Constitution. It was stipulated that:

The curriculum will begin to integrate education and training – incorporating a view of learning that rejects rigid divisions between academic and applied knowledge, theory and practice, and knowledge and skills. It will foster learning, which encompasses a culture of human rights, multilingualism and multiculturalism and a sensitivity to the values of reconciliation and nation-building (Department of Education, 1997).

In the introduction to the Language Policy for Higher Education, it is stated that: ‘The role of all our languages “working together” to build a common sense of nationhood is consistent with the values of “democracy, social justice and fundamental rights”, which are enshrined in the Constitution’ (Ministry of Education, 2002). This captured the spirit of the words of then President Thabo Mbeki in the same introduction:



...the building blocks of this nation are all our languages working together, our unique idiomatic expressions that reveal the inner meanings of our experiences. These are the foundations on which our common dream of nationhood should be built...The nurturing of this reality depends on our willingness to learn the languages of others, so that we in practice accord all our languages the same respect. In sharing one's language with another, one does not lose possession of one's words, but agrees to share these words so as to enrich the lives of others. For it is when the borderline between one language and another is erased, when the social barriers between the speaker of one language and another are broken, that a bridge is built, connecting what were previously two separate sites into one big space for human interaction, and, out of this, a new world emerges and a new nation is born (President Thabo Mbeki, 27 August 1999) (Cited in Ministry of Education, 2002).

With regards to language policy, as noted above, the Constitution, with the objective of ensuring inter-ethnic peace, declared eleven official state languages. It declared that language policy must recognise 'the historically diminished use and status of the indigenous languages of [the South African] people, the state must take practical and positive measures to elevate the status and advance the use of these languages'. It also states that 'all official languages must enjoy parity of esteem and be treated equitably'. The Constitution also ensures against unfair discrimination on the basis of language and guarantees the right to receive education in the official language of one's choice 'where reasonably practicable'.

A National Language Service (NLS) was set up in the Department of Arts, Culture, Science and Technology (DACST) in order to promote 'the linguistic empowerment of all South Africa's people', and a Pan South African Language Board (PANSALB), announced in Section 6(5) of the Constitution, was established to provide for the recognition of multilingualism and the development of the country's official languages. The policy of multilingualism was adopted with the intention of promoting a common, nonracial, fully inclusive South African identity (Orman, 2007). In the foreword to the government's National Language Policy Framework (2002) document, the then Minister of Arts, Culture, Science and Technology, B S Ngubane, wrote that:

the policy...is fundamental to the management of our diverse language resources and the achievement of the government's goal to promote democracy, justice, equity and national unity. It is in this spirit that the promotion of all 11 official languages of our country, as provided for in the Constitution, takes centre stage in the policy (Cited in Orman, 2007).

This policy explicitly recognises the multicultural nature of South African society, and affirms the equality of all cultures and languages in an attempt to forge national unity. Indeed, in the preamble to the Language In Education Policy in terms of Section 3(4)(m) of the National Education Policy Act 27 of 1996 it is stated that:

This paradigm [i.e. multilingualism]...presupposes a more fluid relationship between languages and culture than is generally understood in the Eurocentric model which we have inherited in South Africa. It accepts a priori that there is no contradiction in a multicultural society between a core of common cultural traits, beliefs, practices etc., and particular sectional or communal cultures. Indeed, the relationship between the two can and should be mutually reinforcing and, if properly managed, should give rise to and sustain genuine respect for the variability of the communities that constitute our emerging nation (Cited in Orman, 2007).

Social cohesion and nation-building

Overview of trends since 1994: Insights from diagnostic report, commissioned papers and roundtables

A wave of attacks on foreign nationals in May 2008 led to the deaths of more than 60 people and the displacement of thousands of foreign migrants in various parts of the country. During the course of the attacks, shops owned by foreign nationals, mainly Africans from other countries, were looted and many of their homes, properties and businesses destroyed. The reason given for these attacks was xenophobia on the part of South African nationals (Hadland, 2008). This was followed by another wave of xenophobic violence in 2011, and almost every year thereafter there has been some incident in which large groups have attacked foreign nationals. There is no reliable estimate



of the number of foreign migrants in South Africa, because many are in the country illegally and are therefore undocumented. Whatever the reason for the violence, which range from xenophobia based on dislike of African migrants, to competition between local residents and foreigners in the margins of formal society, the violence against foreign nationals is a serious threat to social cohesion in South Africa. It also undermines nation-building, because many South Africans are disturbed by the perceptions of the country that emerge from this additional dimension of violence and intolerance.

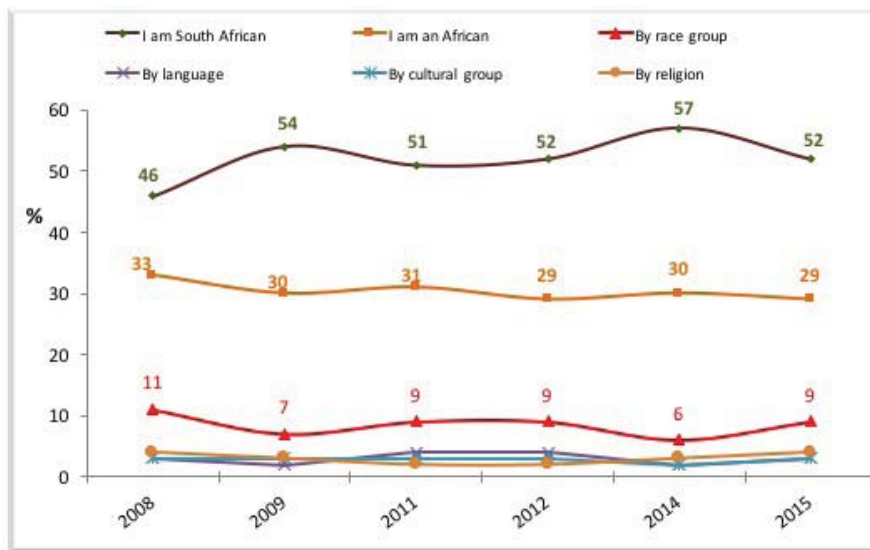
Social fragmentation is also taking place at the local level, with members of coloured and Indian communities resisting changes in schools in their residential areas, members of communities in the townships and informal settlements competing for access to government-subsidised houses, and entire communities engaging in social protest due to poor service delivery and other issues. Other danger signs that could lead to greater social fragmentation are the recent calls by some politicians for landless South Africans to illegally occupy land belonging to white farmers (Kloppers and Pienaar, 2014).

In the last decade there has been increasing reference to a range of perceived threats that potentially impede social cohesion. These include:

- Racism: sharp increase in expressions and acts of racism in recent years;
- Class divisions: increasing inequality;
- Social fragmentation: perpetuation of ethnic divisions, high levels of xenophobia and/or competition for resources with foreign migrants, etc.;
- Language: 11 languages associated with different race and ethnic groupings;
- Exclusion: growth in vulnerable and marginalised communities;
- Gender inequality: women continue to be extremely marginalised;
- Unemployment: persistent high levels of unemployment creating an explosive situation;
- Poverty: extremely high levels of poverty lead to the marginalisation of large numbers of South Africans; and
- Unequal experiences of law: members of vulnerable and marginalised communities and members of wealthy communities experience the law differently.

The Department of Monitoring and Evaluation presented survey data at a roundtable organised by the Panel that indicate some positive trends in social cohesion and nation-building (Department of Monitoring and Evaluation, 2016). Unlike in the era of apartheid, since 1994, a growing number of South Africans describe themselves as South Africans first before any other form of identity. A unifying factor is their sense of belonging to South Africa, with 52.8% of the population describing themselves as South African first in 2015. However, as indicated in Figure 4.6 below, 20% of South Africans still describe themselves first by race, language, cultural group or by their religion.

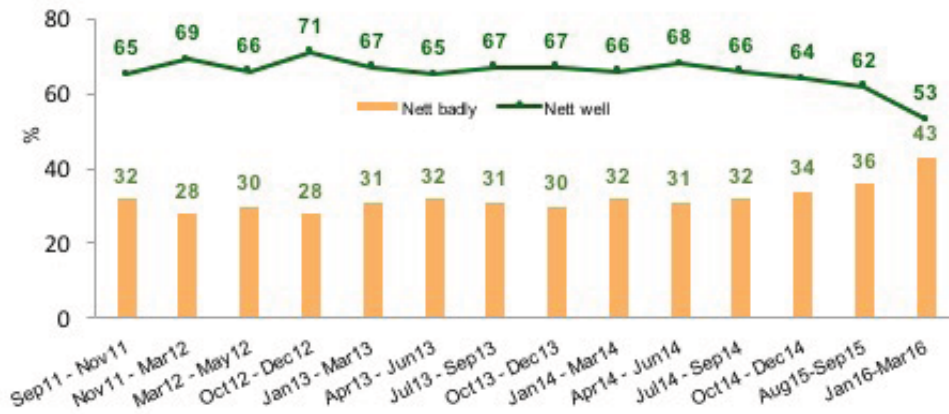
Figure 4.6: How South Africans describe themselves (self-description), 2008 – 2015



However, most of the data presented by the Department indicated negative trends. Among others, it was found that 53% of South Africans acknowledge that the government is doing well with initiatives aimed at uniting South Africans into one nation. However, as indicated in Figure 4.7 below, the trend in this perception has been declining since September – November 2011, when about 65% of South Africans felt this way.

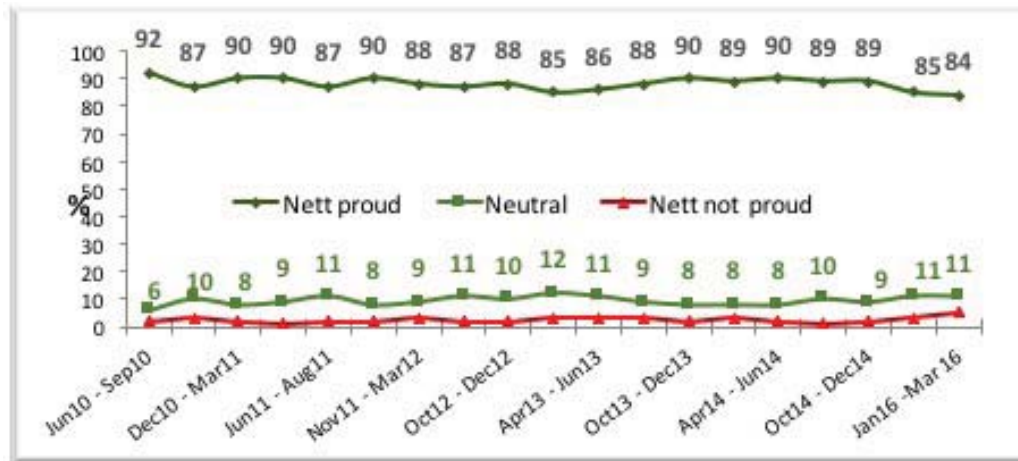


Figure 4.7: Uniting all South Africans into one nation



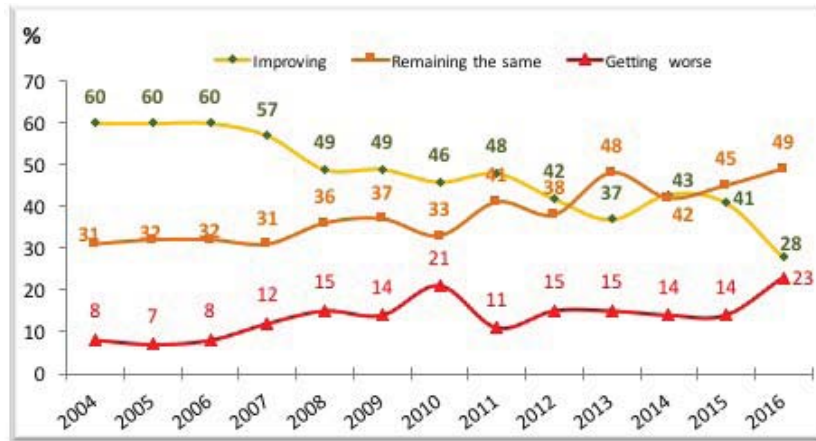
Another negative trend was that in 2016, 86% of those surveyed expressed pride in being South African, as indicated in Figures 4.8 below, this is a decline in this perception from 92% in June 2010.

Figure 4.8: Level of pride among South Africans, 2010 – 2016



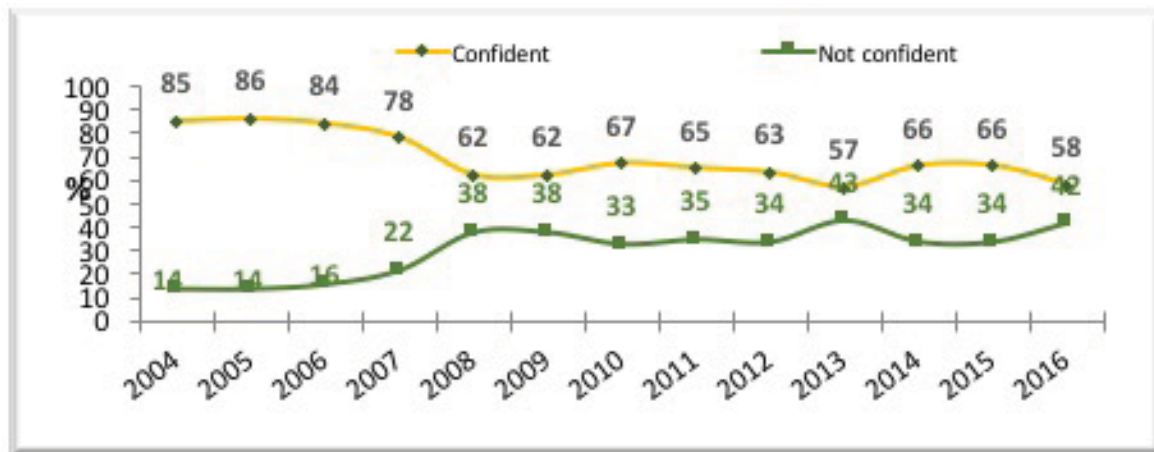
As illustrated in Figures 4.9 below, only an estimated 28% of the population in 2016 believed that race relations were improving compared to 60% in 2004. By contrast, while 8% believed that race relations were getting worse in 2004, 23% believed this was the case in 2016.

Figure 4.9: Relationship between races: Improving/getting worse, 2004 – 2016



Similarly, while 85% of South Africans were confident in a happy future for all race groups in 2004, only 58% believed that this was the case in 2016. The data in Figure 4.10 also indicates a growth in the percentage of South Africans who were not confident of a happy future for all races from 14% in 2004 to 42% in 2016.

Figure 4.10: Confident of a happy future for all races, 2004 – 2016



In its presentation to the Panel on the 14 September 2016, the South African Human Rights Commission noted that one of the challenges that South Africa faces in actualising the objective of nation-building and social cohesion is the lack of targeted policies aimed at dealing with this issue.



The delay in the finalisation of the National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Other Related Intolerance has also, according to the Commission, meant that South Africa has not had a targeted plan and programme of action to deal with the issue of inequality, nation-building and social cohesion. The result of these delays has been the continued unravelling of the rainbow nation utopia and rising tensions between nationals and non-nationals (South African Human Rights Commission, 2016).

Overview of trends since 1994: Voices of the public

According to Sixolile Ngcobo (2016), the Free State provincial manager of the Commission for Gender Equality, with regard to xenophobia: ‘Refugee and migrant women ... continue to be vulnerable and unsafe, with Government adopting a crisis-management approach whenever issues of xenophobia flare up’.

The South African Institute of Race Relations (2016) stipulated in its submission to the Panel: ‘That race relations are generally good is a tribute to ordinary South Africans. 85% of black respondents think that the different races need each other for progress as do 86% of white respondents; and 83% of blacks (and 82% of whites) say that with better education and more jobs the differences between the races will steadily disappear. Black and white South Africans share a dislike of racial targets in employment and sport. However, if the economy continues to falter, and the “ANC uses this to drive more polarising racial rhetoric and race based legislation, current social trust could be eroded”.’

Benedict Dube (2016) of the Xubera Institute stipulated at the KwaZulu-Natal roundtable that:

‘South Africa does not have a creed on which to base its mandate. Rather, we have had a myriad of policies and legislation, such as the Reconstruction and Development Programme (RDP); Accelerated and Shared Growth Initiative for South Africa (ASGISA); and Growth, Employment and Redistribution (GEAR) that have not managed to foster a common cause, because South Africa does not have a decree. In Russia, for instance, during and after the Russian Revolution, the country’s decree was ‘peace, bread, land’, underpinning the themes of political stability, economic prosperity for all, and ownership by and access to land for all. Consequently, without a decree, the oppressed will remain fragmented.’

Problem statement

South Africa continues to be a deeply divided society characterised by the absence of a common vision of the future and entrenched lines of fracture based on race, ethnicity, class, sex, geographical location, political views, etc.

Recommendation 4.25

Parliament should consider institutional measures to enable it to play a more active role and to more effectively oversee and monitor implementation of key legislation, and this could include:

- enabling Parliament to promote a common vision and take lead of the process of nation-building by holding annual public hearings on social cohesion and nation-building.

Analysis of legislation: Promotion of National Unity and Reconciliation Act 34 of 1994

Relationship to social cohesion: The Promotion of National Unity and Reconciliation Act provided for a form of transitional justice and symbolised a fundamental first step in building the bridge between the past of a deeply divided society and a future founded on the recognition of human rights, democracy and peaceful coexistence for all South Africans, irrespective of colour, race, class, belief or sex. The Act acknowledged, among other things, that: ‘The pursuit of national unity, the wellbeing of all South African citizens and peace requires reconciliation between the people of South Africa and the reconstruction of society.’

The Act established the Truth and Reconciliation Commission (TRC), which consisted of three different committees: (i) the Human Rights Violation Committee (ii) the Reparation and Rehabilitation Committee, and (iii) the Amnesty Committee. The TRC Committee on Reparations had made extensive recommendations to government regarding reparations. In the process of consideration of the final Report of the TRC, Parliament approved only 4 recommendations made



by the President: the individual, one-off reparations of R30,000 for victims of apartheid; 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.

Challenges with implementation: The Department of Justice and Constitutional Development was mandated to monitor the implementation of these programmes, and report to Cabinet on an ongoing basis. A Unit to oversee the implementation of these recommendations was established in the Department in 2005. The key problems identified by Parliament concern the slow implementation of the following reparation measures: the finalisation of Draft Regulations in respect of medical benefits for victims and their relatives and dependants, which can only take place once the Department of Health has amended the National Health Act, 2003 (Department of Justice and Constitutional Development, 2015); the finalisation of Draft Regulations relating to housing assistance, which can only take place once a policy on housing assistance for victims has been prepared and used to finalise the draft Regulations (Department of Justice and Constitutional Development, 2015); and the finalisation of Draft Regulations on community rehabilitation, which need to be reviewed in conjunction with the relevant stakeholders and finalised.

Two further matters emanating from the work of the TRC concern the issues of prosecutions and the decision by the government to introduce a special dispensation process for pardons. On completion of its work, the TRC's Amnesty Committee handed over about 300 cases for prosecution to the NPA (Bizos, 2015). It has been reported, however, that there have been fewer than five prosecutions for apartheid-era political crimes in the 20 years after the TRC wrapped up its work (Rabkin, 2016). The Special Dispensation for Presidential Pardon for Alleged Political Offences is designed to deal with pardon applications from people convicted of crimes alleged to be politically motivated and committed before 16 June 1999, and who had not participated in the TRC. More than 2 000 prisoners applied for a pardon. The South African Coalition for Transitional Justice (SACTJ) went to the Constitutional Court to challenge the Special Dispensation on the grounds that it failed to meet the requirement for victim participation and consultation, or for full disclosure of the truth by the

offenders as prerequisites for ensuring the legitimacy of the process. In 2010 the Constitutional Court declared the Special Dispensation ‘illegal, invalid and unconstitutional’ and granted an interim interdict. The judgment stated that the President should allow the victims and/or their families and interested parties to be heard prior to releasing any prisoner. The judgment also said that until the matter is heard again, the President cannot issue pardons and he would have to supply the civil society groups with a list of names of the applicants who had been recommended for pardons by the reference group (Powell, 2012).

Recommendation 4.26

Parliament should consider having a dedicated intersectoral public hearings with the relevant departments, including the Department of Justice and Constitutional Development and the National Prosecuting Authority, Department of Basic Education, Department of Higher Education; Department of Social Development, Department of Human Settlements, 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 discussion 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 above-mentioned issues.

Language

Overview of trends since 1994: Insights from diagnostic report, commissioned papers and roundtables

Social cohesion and nation-building have both been encouraged by the constitutional recognition of 11 official languages (Section 6(1)), by constitutional protection of the right to use the language of one’s choice (Section 13), by additional languages receiving constitutional ‘protection’ in terms of Section 6(5)(b), as well as policy and legislation, for example, in terms of the Constitution’s



provision for the establishment by legislation of the Pan South African Language Board to promote and develop these languages to ensure that people are able to communicate in their language of choice (The Presidency, 2014a). This approach to language is premised on the recognition of the linguistic and cultural diversity of the country, and that equality extends to giving equal recognition to the languages and culture of all.

However, the language of instruction has become a major issue at several South African universities, particular former Afrikaans-medium universities such as Stellenbosch University and the University of Free State. At Stellenbosch University, for instance, the launching of the Open Stellenbosch movement in 2015 added impetus to the simmering debate about the language of instruction at the university. Language can be both a means of exclusion and inclusion. Those arguing for the introduction of English as a language of instruction stipulated that the exclusive use of Afrikaans excluded the increasing number of African, Indian and coloured students. Introducing English would be inclusive, it was argued. Those opposing this position argued that this would lead to the increasing marginalisation of Afrikaans. At the school level, the main challenges lie in the partial compliance with legislation in force and the need for appropriate measures to guarantee language diversity in education. English is increasingly becoming the main language of instruction, to the detriment of African languages and Afrikaans (Rio, n.d.). The African languages are further marginalised when it comes to the area of knowledge production, which is carried out exclusively in either English or Afrikaans (Prah, 2007).

Even in government departments, there is a tendency to undermine the other languages. The language policy of the Government Communication and Information System (GCIS), the government body responsible for the dissemination of government information and messages, stipulates the languages to be used when communicating with the public using different media and for different purposes. For instance, in cases of oral communication, including official proceedings, announcements, public speeches, conferences, etc., the GCIS will use English interchangeably with any of the official languages, depending on the purpose or the platform. However, all GCIS forms and annual reports and other strategic documents are published in English only (Government Communication and Information System, n.d.). This undermines the goal of establishing social cohesion through recognition of the country's diversity.

Overview of trends since 1994: Voices of the public

According to Sixolile Ngcobo, the Free State provincial manager for the Commission for Gender Equality, ‘people living with disabilities generally feel that they are excluded and marginalised. For example, it is challenging for them to access education, as Braille is expensive and inaccessible. Also, efforts to have sign language introduced as a 12th language are slow.’

The Deaf Federation of South Africa (DeafSA) stipulated in its submission to the Panel that the recognition of South African Sign Language (SASL) as a national official language would be in the spirit of recognising, protecting and promoting SASL and the linguistic rights of its users who are South African. SASL is only given recognition and special status under Section 6(5), and this not sufficient to enable deaf people to enjoy all constitutional rights. SASL needs mainstreaming as this is key to a deaf person as a means of accessing communication, information and other forms of human experiences. DeafSA has recommended that Section 6(1) of the Constitution be amended to include SASL as one of the national official languages listed in the section.

The Khilovedu language submission to the Panel requests official national language recognition under Section 6(1) of the Constitution, for furtherance of the historical, cultural and traditional languages of the tribes and communities currently residing in the Lowveld Mopani District, Limpopo province, Republic of South Africa, particularly KheTsanene or KheTswapo (of the BaTsanene tribes). This language is spoken and used in the areas of Duiwelskloof and Tzaneen.

According to Matimba Jushua Maluleke:

‘In all provinces, more than four languages are spoken. However, the Use of Official Languages Act states that ‘at least three official languages’ need to be identified. In compliance with this, most structures identify only the minimum of 3 languages for communication purposes. This discriminates against those that speak other languages in the province. It often leads to segregation of people based on prestige and the number of speakers of the concerned language – the Act can thus be seen as an instrument of segregation and thus unconstitutional. Also, in order to comply with the Act, government entities wrongly configure languages in their language units (by configuring languages within each group highlighted below into one language). There are linguistically four groups: Nguni (isiZulu, isiXhosa, siSwati, isiNdebele); Sesotho (Setswana, Southern Sotho, Sepedi); Xitsonga; and Tshivenda.



The Sesotho Sa Leboa versus Sepedi Language submissions to the Panel contend that Sepedi was incorrectly designated as an official language in the Final Constitution and that the correct designation of the language in question should be Sesotho sa Leboa. Hence a constitutional amendment should be effected to rectify the error.

The Constitutional Review Commission based its opinion with regard to amending the Constitution to include various languages based on case law, namely The Constitutional Court In re: Certification of the Constitution of RSA, 1996 (10) BCLR 1253 (CC) at par 209. When considering the final text of Section 6, the court admitted that 'language is a sensitive issue in South Africa'. The court reasoned that the focus of Section 6 was the protection of linguistic diversity, 'not the status of any particular language or languages'. The Court therefore left the responsibility to the Constitutional Assembly to decide on the granting of official status to languages and, by implication, that responsibility has now been passed on to Parliament.

Analysis of legislation: Use of Official Languages Act 12 of 2012

Relationship to nation-building and social cohesion: The Constitution recognises language as an important requirement for the empowerment of South Africans to access services and opportunities provided by government. The Founding Provisions of the Constitution provide for the promotion, the development and respect for multilingualism.

Summary of challenges that have been identified with the Act itself: Concerns have been raised that the inability to access information in one's spoken language leads to segregation and discrimination. The Use of Official Languages Act 12 of 2012 requires that, at a minimum, at least three official languages need to be identified and used for government communication purposes. However, often more than three languages are spoken in various provinces. In addition, not all government departments have adopted a language policy governing their use of official languages for government purposes.

Recommendation 4.27

Parliament should, as far as possible, ensure that the implementation of the Use of Official Languages Act 12 of 2012 meets the needs of relevant public entities, such as departments setting up language units. Parliament should also consider setting up a public hearing with relevant government departments such as Arts and Culture, the Department of Basic Education, and the Department of Higher Education, as well as the Pan South African Language Board, including stakeholders/members of the public, to discuss current language policy and how this is effecting the ability of all South Africans to participate meaningfully, the status of, and barriers to implementation of the Act and possible amendments required to the Act.

Analysis of legislation: Constitution Act 108 of 1996

In recognition of the linguistic and cultural diversity of the country, and that equality extends to giving equal recognition to the languages and culture of all, the Constitution Act 108 of 1996 gives equal recognition to 11 official languages. In consequence, any language that is widely used or has cultural significance for any particular group that is not included is a matter of concern.

Recommendation 4.28

Parliament should use its powers to amend the Constitution to include sign language as an official language and to ensure that, where such services are required, e.g. hospitals, government departments should have sign language interpreters available.



Traditional leadership

Constitutional mandate and key policies and legislation

Section 211 of the Constitution of the Republic of South Africa, 1996, states that:

The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution. A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs. The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that deals with customary law.

The national framework, norms and standards that define the role and place of the institution of traditional leadership within the South African system of democratic governance are set out in the White Paper on Traditional Leadership and Governance of 2003. The White Paper adopts proposals that are consistent with the Constitution, and recognises the positive contribution that both elected structures and traditional authorities can make in the overall development of traditional communities.

The Traditional Leadership and Governance Framework Act, hereinafter referred to as the Framework Act, was the culmination of a significant phase in a long process to find accommodation for traditional leadership within South Africa's present system of democratic governance. In this regard, one of the key provisions introduced by the Act was the transformation of the composition of traditional councils to provide for elements of democracy (40% of members to be elected) and gender representation (at least one third of members to be women).

The National House of Traditional Leaders Act, hereinafter referred to as the National House Act, provides for national legislation to establish the National House of Traditional Leaders (NHTL). In addition to determining the powers, duties, and responsibilities of the House, the National House Act also provides for national government to provide support to the House. The National House Act is in the process of being repealed.

The Framework Act, in combination with Section 81 of the Local Government: Municipal Structures Act 117 of 1997, places traditional leadership in a position to participate in municipal councils. The Remuneration of Public Office Bearers Act 20 of 1998 provides for a framework determining the salaries and allowances of, among others, traditional leaders, members of provincial Houses of Traditional Leaders, and members of the Council of Traditional Leaders. The Independent Commission for the Remuneration of Public Office Bearers Act 92 of 1997 provides the legislative framework within which the Remuneration Commission is to make recommendations in respect of the salaries, allowances and benefits of, among others, traditional leaders, members of provincial Houses of Traditional Leaders and members of the Council of Traditional Leaders. The Traditional and Khoi-San Leadership Bill of 2015 (TKLB) is a measure that seeks to protect traditional councils from the consequences of their failure to comply with the election and gender composition requirements set out in the Framework Act. It also seeks to empower traditional leaders to sign agreements with third parties without consultation, and to enable government to delegate powers to them. It involves a repeal of these Acts, while retaining the key principles they contain. The Bill also provides for the statutory recognition of the Khoi and San community and traditional leaders.

However, Section 212(1) of the Constitution states that: ‘National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.’ Thus, any role that traditional leaders currently have at this level can be amended by legislation.

Overview of trends since 1994: Insights from diagnostic report, commissioned papers and roundtables

In its presentation to the Panel on 6 September 2016, the Department of Traditional Affairs (DTA) stipulated that it had conducted an assessment of the state of governance of traditional affairs in eight provinces with recognised institutions of traditional leadership. The assessment sought to establish the state of traditional affairs on eight elements of good governance. The assessment is dealt with in the cross-cutting chapter on Spatial Inequality.

There are a number of challenges for people living in areas under traditional leadership. For instance, Section 25(6) of the Constitution provides that a person or community whose tenure



of land is legally insecure as a result of past racially discriminatory laws or practices is entitled to tenure that is legally secure or to comparable redress. Section 25(9) provides that Parliament must enact the legislation referred to in Section 25(6). However, legislation to secure the tenure rights of the 18 million South Africans living in the former Bantustans who bore the brunt of forced removals and the Land Acts of 1913 and 1936 is not yet in place. Moreover, the TKLB seeks to replace the Traditional Leadership and Governance Framework Act of 2003, which connects communal land with traditional courts by superimposing apartheid tribal identities on those living in former homeland areas.

The Bill retains the boundaries established by the Framework Act – i.e. the tribal authority boundaries that made up the Bantustans under apartheid – to define the area where the Bill will operate. This means that, in effect, except for the provisions about Khoi and San groups and leaders, this Bill applies only to people who live in the former Bantustans. It thus proposes a separate legal system for those living within the boundaries of the Bantustans (Land and Accountability Research Centre, 2016). This is contrary to any nation-building ambitions the state may have.

The entrenchment of ‘geographical tribal boundaries’ by the provisions of the Bill denies people living under traditional authorities certain constitutional rights, such as the right to define their own customary identities or affiliate with the leaders of their choice. The Bill has confirmed the official recognition of chiefs appointed during apartheid and the ‘tribes’ created for them. The TKLB adopts many of the categories created under apartheid to define African people. This approach ignores the reality that tribes and tribal authorities were created under apartheid through forced removals, land dispossession, and the imposition of compliant traditional leaders and governance structures (Land and Accountability Research Centre, 2016).

An assessment of the Bill, arrived at after a workshop on it in Rustenburg attended by communities from around the North West, stated that:

'The bill makes chiefs accountable to the government for their actions and decisions rather than to their people. This goes against the values of free and fair public participation that are enshrined in both the Constitution of the country and in the living customary law honoured by millions of South Africans. As it stands, the bill excludes ordinary people from consultation on any decisions that will affect them, including about which groups or sub-groups of people should be recognised. It does not provide for ordinary people living in traditional communities even to be notified, let alone consulted, about critical decisions that will affect them. Elites such as traditional leaders, royal families and traditional councils are given prominence over communities. The bill denies a voice to people living in traditional communities simply because they live within the inherited boundaries of traditional areas that apartheid called 'homelands'. It closes the space for community participation and undermines democratic principles.' (Sowetan Live, 6 January 2016)

The main justification put forward for the TKLB is that it will finally provide recognition to Khoi and San communities, leaders and councils – since this recognition has been absent until now. However, the Bill is controversial among many Khoi and San leaders because it does not recognise land rights and because it treats Khoi and San and 'traditional' leaders and communities differently from one another. Submissions by Khoi and San groups have argued that they are also traditional leaders, and no less African than the traditional leaders who were recognised during apartheid. The key challenges with the Bill in so far as they affect the Khoi and San community are that:

- The TKLB makes an important distinction between Khoi and San leadership structures and other 'traditional' leadership structures. For the former Bantustans, the TKLB puts in place a hierarchy of traditional communities that occupy a geographical area over which traditional councils have jurisdiction and that are headed by traditional leaders. In other words, leaders and councils in the former Bantustans will have authority that is connected to a particular piece of land and whoever lives on it. On the other hand, Khoi and San leaders and councils do not have authority that is connected to a particular piece of land – instead, their jurisdiction extends only over people who consider themselves to be part of the Khoi and San community. Khoi and San leaders and councils will have



administrative seats based in one central location, not expanded areas of authority that go beyond an office. In contrast, in the former Bantustans, traditional leaders and councils do not only have authority at the traditional council office, but the authority extends to all those living on the land included within the geographical jurisdictional boundaries derived from apartheid.

- The TKLB establishes a system of affiliation for Khoi and San communities, where membership is based on self-identification that requires Khoi and San community members to put their names, identity numbers and contact details on a list when applying for recognition as a community. This list needs to be updated annually, which puts a major administrative burden on Khoi and San people to prove and maintain their affiliation with Khoi and San councils.

The most significant difference, however, relates to the terms of recognition. Khoi and San communities qualify for recognition only if they can show 'a proven history of coherent existence' stretching back in time, and that their current identity is 'unique' and 'distinct' from other identities with a 'distinctive' customary law and cultural heritage. African communities who were recognised as tribes during the apartheid era, on the other hand, are automatically recognised on the basis of their previous status.

It is internationally recognised that culture and tradition is dynamic and stays alive by constantly changing. It is anachronistic for the Bill to require unbroken and coherent existence as the basis of recognition, especially in the context of the devastation waged against the Khoi and the San historically. It is particularly cynical to require proof of distinct identity and culture in the context of the mixed heritage of so-called 'coloured' South Africans whose history combines slave, black, Khoi, San and white antecedents. To justify the draconian elements in the TKLB on the basis of including the Khoi and the San is an affront to many Khoi and San activists, as the Panel heard during the public hearings.

Overview of trends since 1994: Voices of the public

Beauty Mkhize from Mpumalanga had the following to say about traditional leadership at the public hearings in that province: 'It pains me that we have been saying the same thing over and over again. Yes, there are kings in certain areas, but residents of those areas should also have rights. They shouldn't live under oppression. As for us at Saul Mkhize Village (Driefontein), P. Seme gave us white people's privilege. We have tittle deeds. We are like the whites from the farms. No one can tell us anything about our land, and we don't have kings in our area. ...You do everything for the kings.'

Mr S Malangwane informed the Mpumalanga public hearings that: 'Chiefs are compelling us to pay for stands as well as annual fees yet the government gives them a budget. That money does not help us as residents. That is an old law and government must repeal it because it is a burden for us.'

Xolani Kamanga of Mpumalanga stated the following in the submission he made at the public hearings: 'We request traditional leadership to consider us when they cut up stands. They should look if there are roads, electricity and water so that there may be no strikes in the community.'

Dikeledi Emily Mogale of Mmantserre village in the North West made the following submission at the provincial public hearings:

The chief controls who gets hired at the mines. He told the management of the mines not to hire people who are opposing his administration. No chief has ever bought the land but they control the finances and the property and share them with their families. The mine built a hall and it is hired by the people but its money goes to the chief. Remove the chiefs from controlling the community's assets. The land belongs to the community and they are not benefiting from it. DMR gives investors to the mine on the land belonging to the community without the community's knowledge. We have not seen a financial report since 2003.



A submission made by a representative of 14 rural Eastern Cape organisations stated that:

'We all know the homelands, and we are still squeezed in within them where whites forcibly moved us to and there is no noticeable change when it comes to land reform. [...] That Act [TLGFA] has caused the boundaries that we thought we erased in 1994 to resurface. [...] These boundaries are taking us back to the old maps of the homelands. We thought that we are free but now we have Acts that are bringing back the tribal authority as they were before. [...] Just remember, Mr President, that these places that are called homelands are the same areas that do not have a strong economic base. ...We people from Qoboqobo, Cofimvaba, Lusikisik,; as black as we are, we are ruled under false pretences, saying that we are traditional people at the government's mercy. When you compare this ruling with the people in urban areas, like Grahamstown, Port Elizabeth, East London, be it black or white, they are ruled using democratic rules, development but we are ruled under false pretences...'

Dr William Ralph Joey Langeveldt of the Korana Cultural Heritage Arts Council in the North West province made the following submission at the public hearings in that province:

'I make this submission on behalf of] the Korana nation in Bokone Bophirima, of whom I am the undisputed leader and of most of the organisations of the Korana, Nama, San, Griqua and Cape Khoi Africans throughout South Africa. After 22 years of democracy, in spite of progressive policies and an appropriate legal environment, South Africa is constantly confronted with challenges surrounding social cohesion and nation-building as a result of the discriminatory exclusion and exploitation of our traumatised Khoi and San Africans, outside the parameters of the Constitution and the Budget. ...South Africa still does not understand the crucial importance of our Khoi and San's deep feeling of indigenusness and deep attachment to our ancestors' land and resources, our original ethnic identities, cultures, languages and NOW this quasi-constitutional democracy's inhumane oppression of us as "inferior, traditional communities", denying us as indigenous people.'

The Cobuqua Community identified the following weaknesses in the Bill in its submission to the Panel:

- The Bill seems to recast traditional leadership as a state organ to which state power is delegated without providing a legislative basis for the delegation, distribution, and delineation of its power. The separation of powers remains ambiguous. The Bill is highly problematic as it doesn't seem to consider the complications that accompany the reconciling of two separate governance structures, while ascribing powers too broadly and failing to delineate the powers of the state.
- The short-term focus on integrating the Khoi and San community into the provisions of the TAB (previous name of the TKLB) fails to provide for serious engagement and investment in mechanisms for ensuring recognition of indigenous communities. The Bill fails to recognise the entrenched and prolonged marginalisation of the country's indigenous populations in addition to the impact of the apartheid past.
- The Bill seeks to assimilate the Khoi and San into traditional communities in South Africa, perpetuating discrimination and marginalisation.
- While encouraging accountability forums between the state and traditional leaders, it limits the ambit of traditional leaders and councils while still recognising their power over their jurisdictions in accordance with customary law.

Problem statement

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.

Development initiatives in rural areas are often thwarted and held back by conflicts over the role and status of traditional leaders relative to that of local government. This is further exacerbated by confusion about the status of land rights in former homeland areas. In the main, most land in



the former homelands is held in trust by, and registered in the name of, the Government of the Republic of South Africa. In some instances, however, land-buying syndicates who bought land before 1913 and Communal Property Associations who acquired land after 1994 have title deeds to the land.

Recommendation 4.29

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.

Analysis of legislation: Traditional and Khoi-San Leadership Bill; and Traditional Leadership and Governance Framework Act 41 of 2003

Several recommendations on legislation related to traditional leadership have been made in earlier chapters.

Problem statement

The absence of statutory recognition and affirmation of the Khoi and San communities and leaders in the Traditional Leadership and Governance Framework Act was seen to potentially pose a threat to social cohesion and nation-building in the country. The TKLB was introduced in the National Assembly in September 2015. The Bill's stated aims are to incorporate statutory recognition processes for Khoi and San communities, councils and leaders for the first time in South African history; replace the Traditional Leadership and Governance Framework Amendment Bill 8 of 2017 (TLGFA) and National House of Traditional Leaders Act of 2009 by collating them into a single law

on traditional governance; and amend the laws governing the remuneration of traditional leaders and the role of traditional leaders on municipal councils. The Bill provides, among others, for:

- The statutory recognition of the Khoi and San. To ensure that only legitimate Khoi and San communities and leaders are recognised, specific criteria have been developed, based on the customs and customary law applicable to the Khoi and San.
- The integration of recognised Khoi and San leaders into existing houses of traditional leadership. There will therefore be no separate structures of this nature for the Khoi and San. However, such houses will in future be known as houses of Traditional and Khoi and San Leaders.

The recognition provisions contained in the Bill do not elevate the Khoi and San communities and leaders to a higher status than other traditional communities and leaders, nor does it grant any special status (such as first nation status) to them. Recognised Khoi and San traditional leaders will, in respect of their recognised communities, perform the same kind of functions as the currently recognised senior traditional leaders do in respect of their traditional communities.

The Portfolio Committee on Co-operative Governance and Traditional Affairs has held public hearings on the TKLB in all provinces and, as at the end of May 2017, was still processing comments on the Bill. However, members of the Khoi and San community have raised concerns about the Bill. In addition, several clauses of the Bill are unconstitutional because they discriminate against the Khoi and San community and leaders.

In the process of developing this Report, the Panel learned that the National Assembly passed the TLGFA Amendment Bill and referred it to the NCOP for concurrence on 22 August 2017. The Panel calls for an urgent review or reconsideration of current Bills about traditional leadership based on the public contributions received.

Recommendation 4.30

Parliament should withdraw the Traditional and Khoi-San Bill in its entirety or reconsider those provisions that may elicit Constitutional challenges and undermine social cohesion and nation-building; and replace it with inclusive legislation that recognises the Khoi and San.



Trust in institutions

Overview of trends since 1994: Insights from diagnostic report, commissioned papers and roundtables

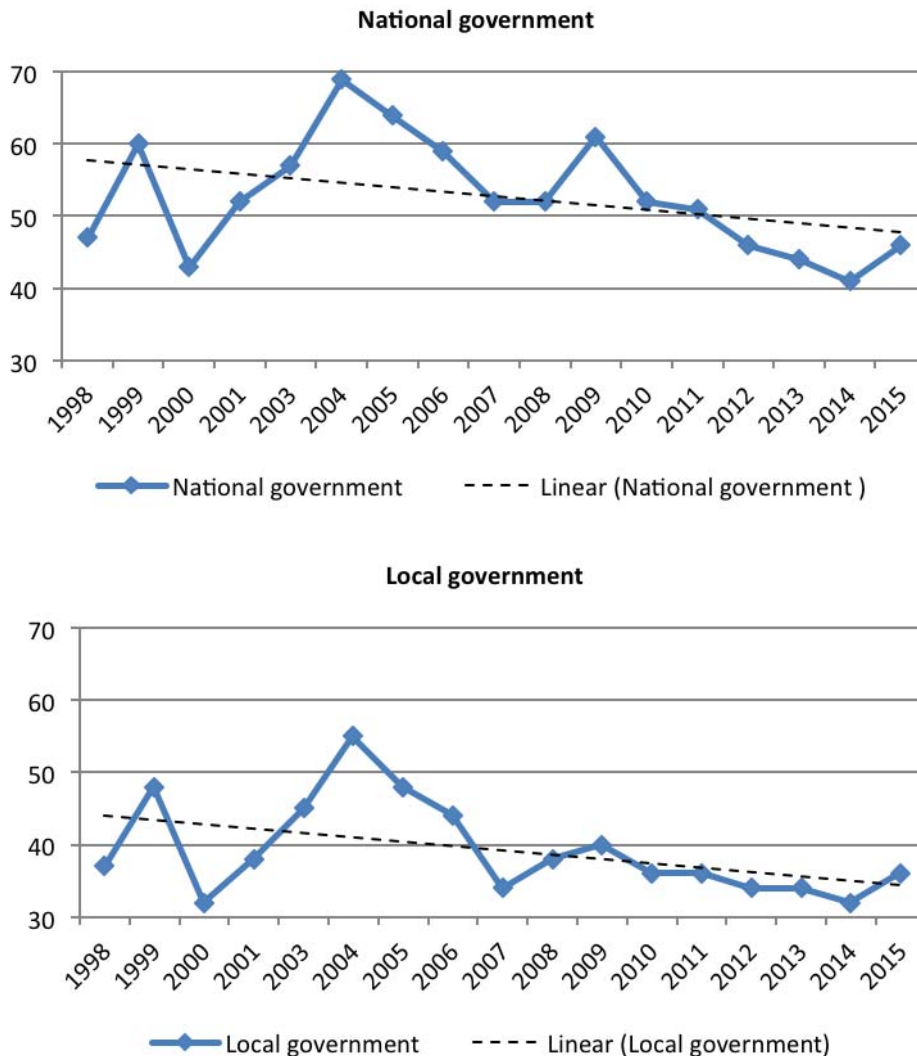
Over the last two decades, concern has emerged about an apparent erosion of civic cohesion in democratic South Africa. This ‘crisis of legitimacy’ perspective is indicated by diminishing public trust in government and the country in general. It is thus critical to examine attitudinal trends over time to better understand how the corrosion of social cohesion unfolds. This section will present public attitudes on civic or political cohesion in South Africa, to understand how individuals view the important political institutions that govern the country. The emphasis is on political legitimacy and illegitimacy, which is viewed primarily through the lens of public confidence in public and private institutions.

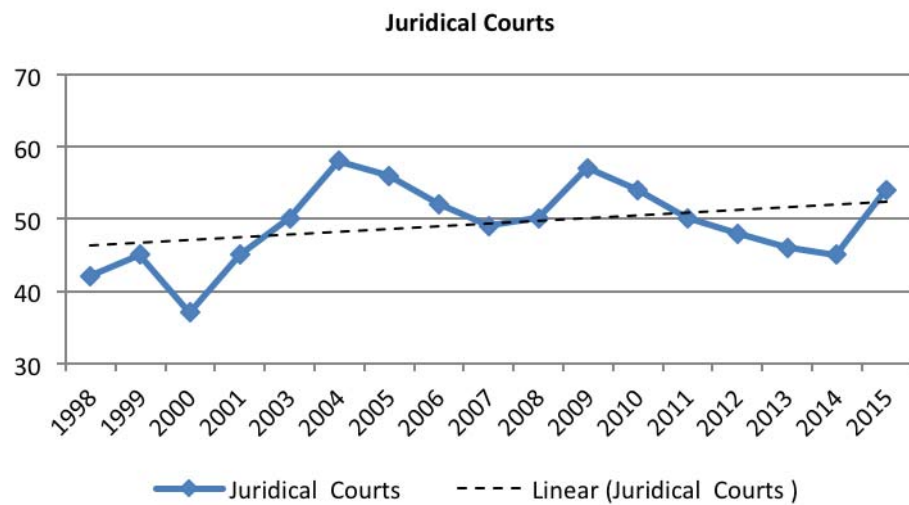
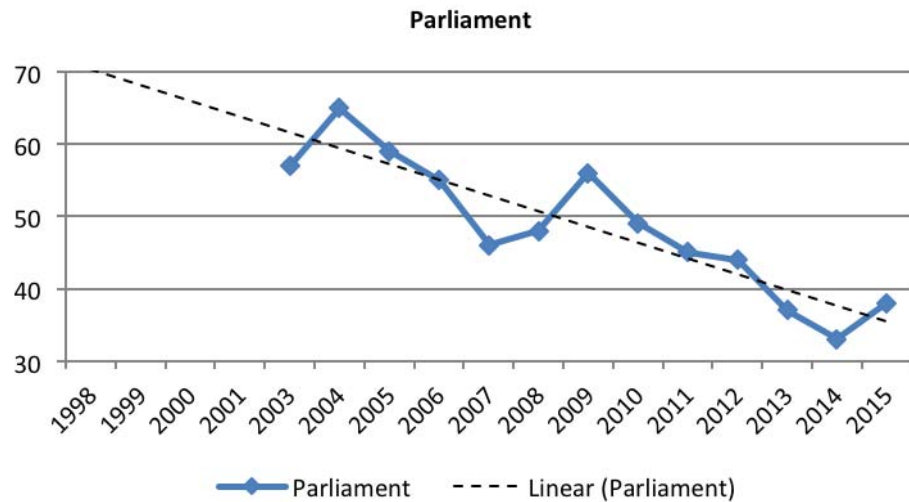
In Figure 4.11 the Panel draws on the HSRC research on social attitudes to look at public trust in four key political and judicial institutions in South Africa for the period 1998 – 2015. In the case of the national government the Panel notes a decline in public confidence over the period. Local governments are at the ‘coalface’ of democratic governance and the most immediate contact between citizens and representative government. It is, therefore, disturbing to observe that of all the institutions depicted in the figure, local government was trusted the least by the general public. In 2015, only 36% of the adult population trusted their local government, down from 55% in 2004. The overall decline in national and local government trust may reflect a general reaction to the government’s response to the macroeconomic situation. Failure to adequately respond to the financial crisis of 2008 could have led to declining levels of trust. The courts were the most trusted of the institutions under review in Figure 4.11. Although there was some decline in the public’s confidence in the courts, this drop was marginal compared with what was observed for other institutions.

In the case of Parliament, the decline observed in public trust in Figure 4.11 is notably steep. In 2004, 65% of the general public trusted Parliament compared with 38% in 2015. This level of attitudinal change can be better understood if attention is given to subgroup differences in the observed decline in trust. While in 2009 about 54% of men and 56% of women said that they either trusted or strongly trusted Parliament as a democratic institution, only 35% of men and 40% of women reported trusting Parliament in 2015. Similar levels of decline are observed in terms of

socioeconomic position. In 2009, 68% of the Low Living Standards Measure (LSM) group trusted Parliament compared to 57% of the Middle LSM and 45% of the High LSM group. This high level of trust can be contrasted unfavourably with what was observed in 2015 when only 42% of the Low, 43% of the Middle and 31% of the High LSM groups said that they trusted Parliament. It is particularly disturbing to note that the economically disadvantaged are losing faith in the ability of the South African Parliament to deliver for them.

Figure 4.11: Public trust in selected political and judicial institutions in South Africa, 1998 – 2015





Sources: HSRC South African Social Attitudes Survey (SASAS) 2003 – 2015

Overview of trends since 1994: Voices of the public

In its submission to the Panel, the African Policing Civilian Oversight Forum (2016), a network of state and civil society practitioners active in policing reform and civilian oversight of police in Africa, observed that:

‘Despite South Africa’s constitutional promise to transform the police at the dawn of its democracy, SAPS is one of the most distrusted organs of state. According to research conducted by the Human Sciences Research Council in 2011, 67% of the adult population in South Africa (people aged 16 years and older) identified SAPS as the most corrupt state institution, with corruption and bribery being endemic among personnel. In 2014, a survey conducted by FutureFact found that 75% of South African adults (people aged 18 years and older) believe that many police officers are criminal themselves, with one third admitting they were “scared of the police”. This is especially problematic given that, of all state institutions, the police have the most direct contact with the public at large.’

In addition, some key laws inhibit opportunities for certain sectors of society to be rehabilitated and reintegrated into the community, thus undermining trust in institutions. The National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) stated to the Panel that: ‘Criminal records are acting as a social reintegration barrier to offenders who wish to reintegrate back into society. Criminal records bar them from accessing opportunities such as education (via bursaries) and employment. Currently one can apply for expungement of a criminal record if 10 years have lapsed after the date of conviction for that offense’ (NICRO, 2016). Tommy van Koller drew attention to criminal records, ‘which remain for the rest of an individual’s life, deny the individual the opportunity to fully rehabilitate back into society as they are unable to find employment’.

Problem statement

Trust is an essential element of democratic legitimacy, and 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 result 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 are able to 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.

This innovation in appointment processes would be in accordance with the principles of participatory democracy recognised in the Public Participation Framework (PPF) adopted by the South African Legislative Sector (2013). The PPF recognises (SALS, 2013) that ‘[p]romoting public participation in the legislatures, according to [their] Constitutional mandate, is not only important to promote a people-centred democracy, it is also critical because it strengthens the functioning of the legislatures. Effective public participation can improve the capacity of legislatures to fulfil their role to build “a capable, accountable and responsive state that works effectively for its citizens” (National Planning Commission, Vision 2030). Accountability, responsiveness and openness are foundational values in the South African Constitution, which also specifies transparency and informed public participation among other values and principles governing public administration (section 195).

Recommendation 4.31

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

Analysis of legislation: Criminal Procedure Act No 51 of 1977

Summary of challenges that have been identified with the Act itself: Distrust in the South African Police Service is growing because the absence of a statutory definition for ‘arrest’ in the Criminal Procedure Act No 51 of 1977 is problematic from a rights-based perspective, as an individual only becomes entitled to the protections of Section 35(1) of the Constitution once he/she assumes the status of an arrested person. Accordingly, persons subject to temporary detention are often more vulnerable to abuse by SAPS officials because, unlike arrested persons, they do

not have access to the same procedural safeguards provided under Section 35. In addition, various provisions of the Act inhibit rehabilitation and integration of offenders into the community (African Policing Civilian Oversight Forum, 2016).

Recommendation 4.32

Parliament should use its powers to introduce the following legislative changes to the Criminal Procedure Act No 51 of 1977:

- i. the statutory framework relating to arrest (Section 39) should be reviewed and revised to include a definition that is consistent with international standards;
- ii. Section 49 (use of force) should be reviewed and amended to ensure consistency with international normative standards for the use of force; and
- iii. the current criminal records expungement process should be simplified and the length of 10 years should be reconsidered for all instances, possibly by including a provision that non-violent or minor criminal records should automatically expire after a reduced period provided that the offender has not been found guilty of any crime after his/her sentence has been completed, while making this expungement applicability broader than is currently the case.

Analysis of legislation: Regulation of Gatherings Act 205 of 1993

Summary of challenges that have been identified with the Act itself: The number of violent protests requiring policing is increasing. Distrust in the South African Police Service is growing because Section 9(2)(d) of the Regulation of Gathering Act, which permits the use of deadly force against any person participating in a gathering and/or demonstration who destroys, or attempts to destroy, property that is 'considered to be of value', is not only unconstitutional, but wholly inconsistent with international norms and standards regarding the use of force (African Policing Civilian Oversight Forum, 2016).



Recommendation 4.33

Parliament should use its powers to introduce the following legislative changes to the Regulation of Gatherings Act 205 of 1993:

- i. the statutory framework governing the use of force in public gatherings should be reviewed, and Section 9(2)(d) to be amended to ensure consistency with international norms and standards.

Analysis of legislation: Independent Police Investigative Directorate Act 1 of 2011

Summary of challenges that have been identified with the Act itself: Distrust in the Police is compounded by weakening in the oversight structure of the Independent Police Investigative Directorate (IPID). As a key institution overseeing police action, it is critical that this institution is sufficiently independent and resourced. Sections 6(3)(a) and 6(6) have been ruled constitutionally invalid on the grounds that they compromise the independence of the IPID by allowing the Minister of Police the power to remove the Executive Director (African Policing Civilian Oversight Forum, 2016).

Recommendation 4.34

Parliament should use its powers to introduce the following legislative changes to the Independent Police Investigative Directorate Act 1 of 2011:

- i. the statutory framework governing the appointment and approval of the Executive Director of the Independent Police Investigative Directorate be reviewed and amended to ensure the oversight body retains its independence.

Analysis of legislation: Correctional Services Act 12 of 2012

Summary of challenges that have been identified with the Act itself: The Department of Correctional Services has created the Judicial Inspectorate for Correctional Services under the control of an Inspecting Judge tasked with facilitating the inspection of prisons to report on possible ill-treatment of prisoners and conditions of unfair, corrupt or dishonest practices in prisons. Since 2011, these reports reveal an overall increase in the number of complaints regarding assault by officials against inmates; the failure to investigate reported incidents and the absence of effective sanctions (Lawyers for Human Rights, 2016). The independence of the Judicial Inspectorate for Correctional Services (JICS) currently faces two main challenges: lack of legal, operational, institutional and financial independence; and its limited and vaguely defined functions and powers, which limit its efficacy as an oversight body. In particular, the function and powers of the JICS are not clearly set out in the Correctional Services Act 111 of 1998 or Regulations. It has no defined power to investigate or enforce its findings, while the function of investigating corruption has been removed (Sonke Gender Justice, 2016).

Recommendation 4.35

Parliament should use its powers to introduce legislative changes to the Correctional Services Act to ensure the independent functioning of the Judicial Inspectorate for Correctional Services (JICS) and to strengthen the JICS mandate.



Conclusion

The Panel is gravely concerned that 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 are being undermined largely by the failure to implement the provisions of existing legislation. The main challenges include gaps in implementation of the provisions of some laws; failure to introduce regulations; non-compliance of officials with the provisions of legislation; lack of accountability of officials for non-compliance or poor service delivery; poor management; backlogs, time delays, administrative inefficiency, and misinterpretation of some laws, and lack of awareness of significant provisions in legislation among citizens and government officials.

South Africa has made significant progress in providing access to education, housing and health care to members of the previously disadvantaged race groups. However, alarming differences exist in both the quality and level of access to education, housing and health care for members of the different racial groups. The Panel found that, with a few minor exceptions, the legislation that aims at promoting equal life chances is appropriate. However, the challenge lies in implementing these policies and programmes that lead to the progressive realisation of socioeconomic rights for all.

Similarly, while progress has been made in ensuring that political and civil rights have been extended to all who live in South Africa, there exist major challenges with regards to the fair treatment of all. Discrimination on the basis of race, gender, LGBTIQ+ status, the urban-rural divide, status as a foreign national, asylum seeker or migrant, disability, and age is prevalent in the democratic era. The Panel found that, in part, the challenge lies with the existing legislation that deals with rights for various groups, as well as the implementation of policies and programmes arising from the relevant legislation.

South Africa has enacted several laws that are aimed at building democracy through active citizenship and governance. There are several measures that promote accountability, public participation and access to information that encourage good governance. However, the Panel found that there are high levels of corruption, maladministration and ineffective governance, while public participation is ineffective in providing citizens with a meaningful role in planning, budgeting, implementation

and evaluation and monitoring processes of governance. The result is that, over the last two decades, there has been an erosion of civic cohesion in democratic South Africa. This 'crisis of legitimacy' is indicated by diminishing public trust in government and the country in general. In part, the challenges arise from limitations in the existing legislation as well as implementation of the relevant laws.

The Panel found that, despite significant effort to promote the idea of the South African nation among South Africans – i.e. nation-building programmes – public 'opinions on race relations, pride in being South African, and identity based on self-description all show little improvement or a decline' (Presidency, 2014). Although levels of pride in being a South Africa have been consistently high (86% in 2016), just above half of South Africans identify themselves as South African first, with the rest giving their first self-identification as African or by race, language, culture or religion. Most importantly, there is a high level of mistrust between members of the different race groups.

There thus remain several challenges to achieving a socially cohesive society in South Africa, as well as success in nation-building endeavours. The Panel notes the need for Parliament, together with government departments and civil society, to ensure compliance with legislation and implementation of the policies and programmes arising from the relevant legislation. It must be acknowledged, however, that social cohesion and nation-building cannot be achieved through legislation. It is achievable only if there is commitment from all sectors of society.



CHAPTER 5

CHAPTER 5: SPATIAL INEQUALITY



Dr Olive Shisana



Abstract

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. Spatial inequality appears intractable despite the National Development Plan and the Spatial Planning and Land Management Act'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 makes recommendations to create a structure that can operate and craft solutions in an integrated fashion, while also recommending 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.

Introduction

One of the most visible manifestations of the legacy of South Africa's troubled past is a geography marked by segregation and deep inequities across space. The architects and executors of apartheid worked energetically to map a racial hierarchy onto the land. This created a dual economy that reserved land, economic opportunities, education and services for whites, while locking black people out of the central economy. The Panel has identified spatial inequality as a cross-cutting theme of its work, with implications for economic growth and development, equitable access to land and social cohesion. These spatial inequities divide the country not only along racial lines, but there is a deep divide between rural areas and urban areas, former Bantustans and commercial farmlands and even, within cities, between the core and the periphery.

This chapter addresses the manifestations of spatial inequality in rural and urban settings. The relative lack of development in the rural areas, particularly the former homelands, is compounded by modes of governance that maintain a distorted view of customary law, in a manner which imperils poor people's security of tenure and isolates them from decision-making with regards to the land they occupy and use. In urban areas, the disjuncture between population density and economic activity, and the treatment of informal enterprise in both the centre and in townships, traps people into poverty.

The legacy of apartheid as a spatial construct creates a further challenge to social cohesion and the emergence of a shared South African identity. Ironically, the creation of spatially and racially segregated towns created parochial, or what Putnam has called 'bonding' forms of social cohesion across class lines in racially segregated communities.

Apartheid-constructed urban communities were aimed, among other things, at bringing together seemingly homogenous individuals based on apartheid-defined racial classifications into 'Group' residential areas. Individuals and families from diverse backgrounds and experiences were forced together into urban townships or suburbs where they lived, and were educated and socialised to forge an identity as a distinct community, the primary distinction being that they were different from people defined to be unlike them by the apartheid system. The result was the construction of racial enclaves, the forging of racial identities, the entrenchment of racially-defined educational and economic/job opportunities, and the growth of peculiar social problems. This has given rise to the misunderstanding of the racial 'other' that is prevalent in racial stereotypes, which is evidence of a lack of knowledge of the racial 'other'. In such circumstances, it becomes difficult to forge unity among a people who view themselves as different, and who have no knowledge of other communities constituting the South African 'nation'.

Just more than two decades after the transition to democratic rule, the geography of apartheid is largely unchanged for the poorest and most vulnerable South Africans. It is true that black people have gained political power and middle-class black people have moved into cities and into powerful positions in the core economy, but the geography of apartheid cities is largely intact, and the map of deepest poverty coincides with the former Bantustans. As the table below shows, in



terms of various measures of deprivation, the former homeland areas exhibit levels of deprivation that are deeper than the national average.

Table 5.1: Deprivation in the former homelands in 2011

	Province containing greater part of former homeland	Material Deprivation %	Employment Deprivation %	Education Deprivation %	Living Environment Deprivation %
Former Bophuthatswana	North West	38.1	46.8	26.0	67.0
Former Ciskei	Eastern Cape	41.5	56.2	24.3	50.5
Former Gazankulu	Limpopo	36.9	58.3	28.9	77.6
Former KaNgwane	Mpumalanga	33.7	47.2	29.1	71.4
Former KwaNdebele	Mpumalanga	29.0	45.9	27.6	65.0
Former KwaZulu	KwaZulu-Natal	48.7	54.5	27.0	67.4
Former Lebowa	Limpopo	38.7	57.2	23.3	81.9
Former Qwa Qwa	Free State	36.8	56.0	22.8	61.4
Former Transkei	Eastern Cape	69.0	58.4	37.2	87.8
Former Venda	Limpopo	36.9	54.5	24.0	77.0
All former homelands		46.4	53.8	28.0	73.7
Rest of South Africa		33.0	30.1	17.9	27.6
All South Africa		37.1	36.0	20.9	43.8

Source: Southern African Social Policy Research Institute (2014)

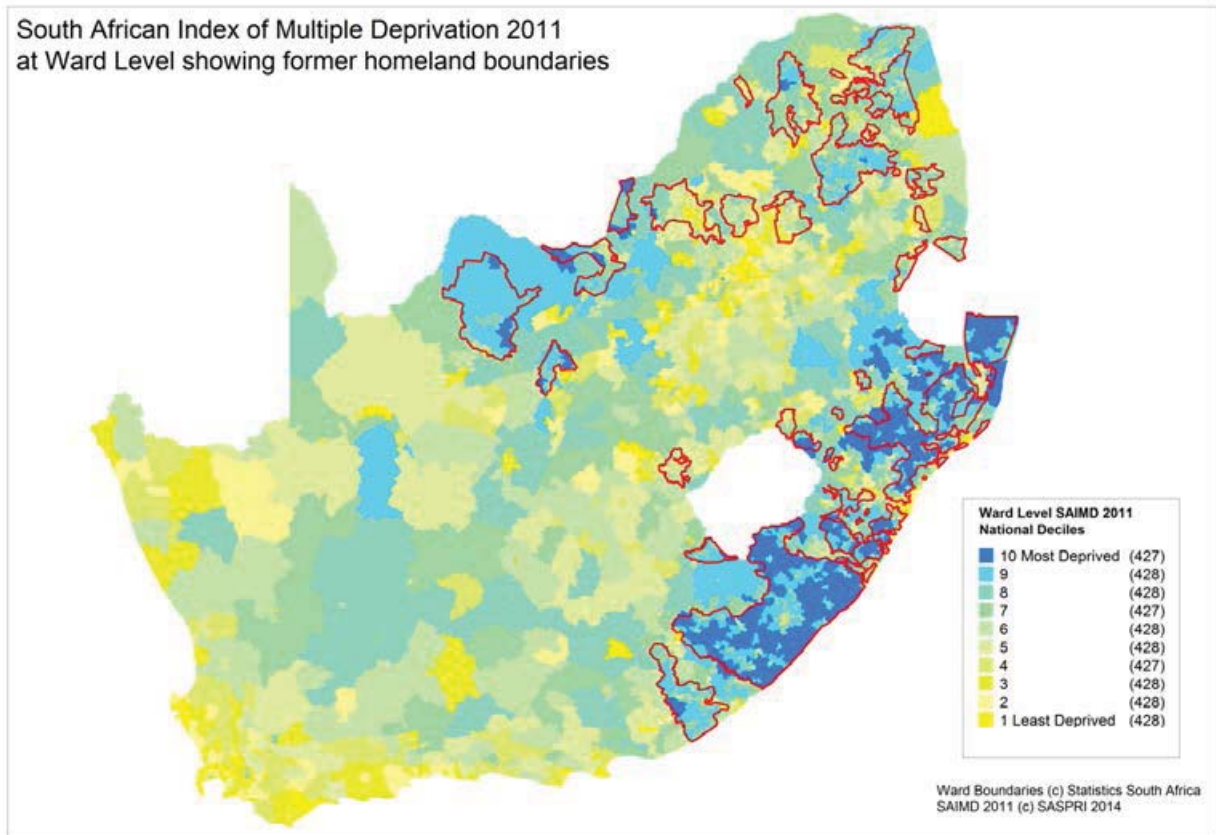
Spatial inequality is not just a photograph of the past, but also a predictor of poverty and inequality in the future. The Panel considers the enduring divide between former Bantustans and rest of South Africa. It finds that there are various laws and Bills, introduced since the 2000s, that entrench the divide and prop up patriarchal power relations. These include the Traditional Leadership and

Governance Framework Act of 2003, Communal Land Rights Act of 2004, Traditional Courts Bill, Traditional and Khoi-San Leadership Bill of 2015, Ingonyama Trust Act of 1994, and the Minerals and Petroleum Resources Development Act of 2002. The Traditional Leadership and Governance Framework Act (TLGFA) entrenches the tribal identities imposed by the Bantu Authorities Act of 1951. In combination with the TLGFA, and the manner in which it is interpreted and enforced, the other laws have been used to imply that traditional leaders have unilateral decision-making power over communal land, and the sole authority to call meetings in former Bantustan areas despite countervailing court judgments and laws such as the Interim Protection of Informal Land Rights Act. They perpetuate the segregation of land rights by asserting that customary land rights do not amount to ownership. They have attempted to deny people the right to opt out of traditional courts and failed to assert and protect equality for women in traditional communities, as will be discussed below.





Figure 5.1: South African Index of Multiple Deprivation in 2011 at ward level showing former homeland boundaries



Source: Statistics South Africa (2011), SASPRI (2014).

The Panel also considers why cities retain the features of apartheid despite billions spent on housing for the poor. The Panel finds that RDP housing entrenches spatial inequality because it is built on cheap land on the margins of cities. This locks people into poverty. There is very little upgrading of existing informal settlements, despite this being a policy priority.

Spatial inequality appears intractable despite the National Development Plan and the Spatial Planning and Land Use Management Act'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 makes recommendations to create a structure that can operate and craft solutions in an integrated fashion, while also recommending some specific urgent legislative interventions.

In summary, some of the factors that have contributed to enduring spatial inequality can be attributed to various forms of path dependency that benefit pre-existing interest groups with specific vested interests in retaining the status quo:

- An agrarian model of large commercial farms with little support for smallholder agriculture;
- Greenfield RDP housing developments built on the margins of cities rather than the upgrading of existing informal settlements and urban infill targeting well-situated land;
- Superimposed tribal identities retained and used to justify land transfers to traditional leaders, with ordinary people subjected once again to segregated forms of customary land rights that do not qualify as ownership; and
- State ownership and leasehold wherein land is a source of patronage that can be withdrawn and reallocated.

The elites that benefit from these ongoing processes of exclusion and marginalisation include commercial farmers, traditional leaders, urban property developers, mining capital and political elites who distribute houses and mining licences.

Policy and legislation need to shift focus to seeing people as families and individuals, acknowledging how they live in practice, how they farm in practice and the shape of their families. Otherwise we ignore the reality of women farmers, women as single parents, the contributions that poor people can and do make to the economy, and the specific constraints that need to be removed.

Urban spatial inequality

South Africa's spatial conundrum: geographical inequality of the past continues to be reproduced in



the post-apartheid era. Inherited apartheid spatial planning still defines much development, where those who were in the fringes of the core urban areas remain far removed from areas with high employment. A sizeable proportion of black people still live in former Bantustans, urban townships and informal settlements around the urban areas and still do not have formal and secure title to land and property. This situation reinforces inequality, poverty and high rates of unemployment. The poor areas tend to have fewer public services compared to urban centres, leaving a sizeable population deprived of their socioeconomic rights.

Key findings¹

One of the most arresting features of South Africa's spatial economy is the large concentration of wealth-generating activity in predominantly urban provinces, most notably Gauteng. Despite occupying a mere 2% of the national land mass, Gauteng produces more than a third of the country's economic output. The province's productivity has been attributed to its compact economic activity, which reduces the cost of transportation, enables face-to-face communication, enhances economies of scale, promotes specialisation and facilitates knowledge spillovers and learning. Research presented to the Panel shows that employment in Gauteng is clustered in the three metropolitan areas of Johannesburg, Tshwane (Pretoria) and Ekurhuleni (East Rand). With respect to the rest of the country, economic activity is concentrated in the Western Cape (Cape Town) and KwaZulu-Natal (eThekweni (Durban)), although these metros (including some secondary cities) lag behind Gauteng.

Outside the urban core, the population is distributed unevenly across the landscape, with an important difference between the former Bantustans or homelands and commercial farming areas. Under apartheid, the population density in the former homelands was exceedingly high as a result of forced removals and restrictions on 'out-migration' to the white core, while density in commercial

¹ This chapter draws heavily from research commissioned by the Panel and presented in: *Reducing Spatial Inequalities through Better Regulation: Report to the High Level Panel on the assessment of key legislation and the acceleration of fundamental change* by Professor Ivan Turok, Dr Andreas Scheba and Dr Justin Visagie of the Human Sciences Research Council delivered on 01 June 2017.

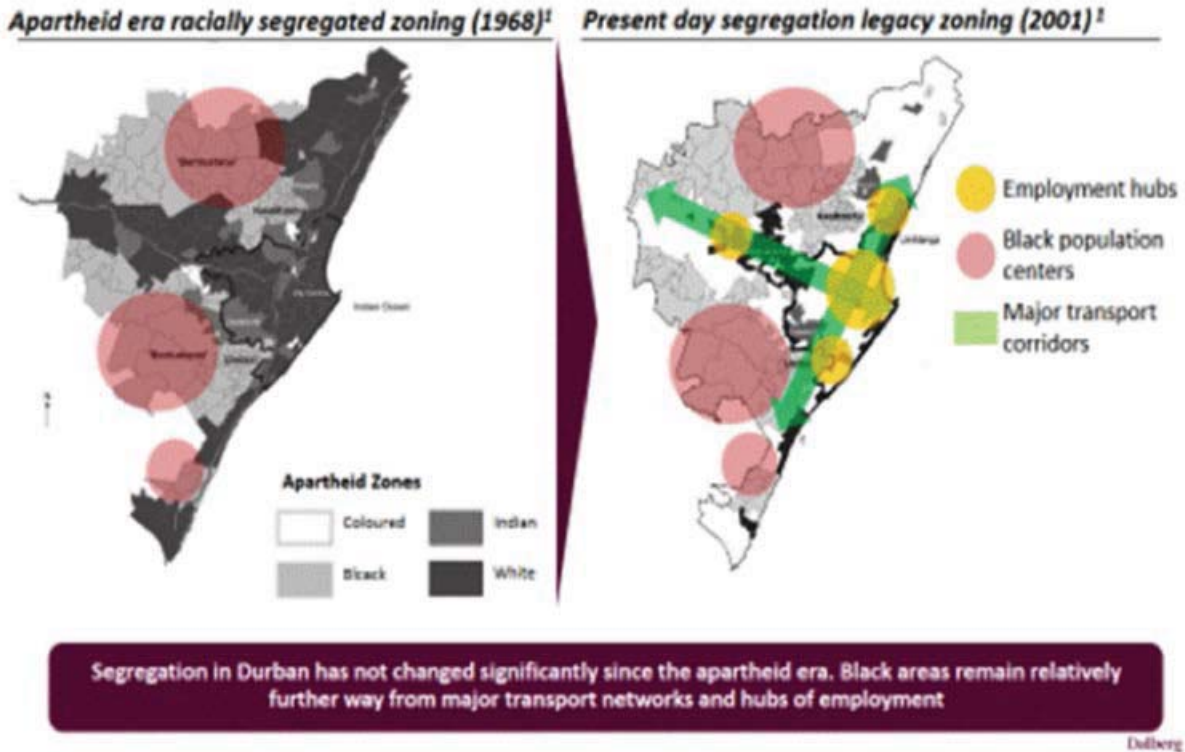
farming areas declined due to agricultural mechanisation and farm evictions. The historical spatial distinctions brought about by apartheid policy remain an important remnant of social and economic disparity to this day.

South Africa's highly concentrated spatial economy, which is vested in the urban core, is evident in the commensurate higher standard of living and available public services, as well as lower unemployment rates in these areas. In contrast, the weaknesses of the economies of the peripheral areas are embodied by high unemployment rates, low household incomes and relatively poor public services. Alarming, the disparity between income in Gauteng and the former Bantustans appears to have widened over time. Currently, about 17 million South Africans live in the former Bantustans, despite the meagre prospects of livelihood opportunities available. The population of former Bantustans has remained stable over the last 15 years, whereas the country's economic hub, Gauteng, has experienced high population growth. Growth has also been recorded in secondary cities and coastal metros, although to a lesser extent than Gauteng. Changes in South Africa's population distribution between 2001 and 2016 remained consistent with the distorted pattern of economic growth over the corresponding period. A growing population mirrors the relative dominance of the Gauteng economy, while the frailty of the rural economies is reflected through stagnant population growth in the former Bantustans and sluggish growth in commercial farming areas.

Under apartheid, administrative control and racial segregation were the mechanisms used to engineer racially motivated spatial division. After 1994, continued spatial divisions are the result of the manoeuvrings of economic forces through labour and land markets. Lower income households are unable to compete with more affluent households for well-located property, unless they settle for cramped and dilapidated urban spaces. Most poor black households continue to live in townships and informal settlements on the periphery, with poor quality services, long commuting distances to jobs and other facilities. Most of the historically black urban townships have not progressed beyond dormitory settlements devoid of formal economic activity, employment and diverse consumer services.



3 Spatial legacies of apartheid city planning are still visible today

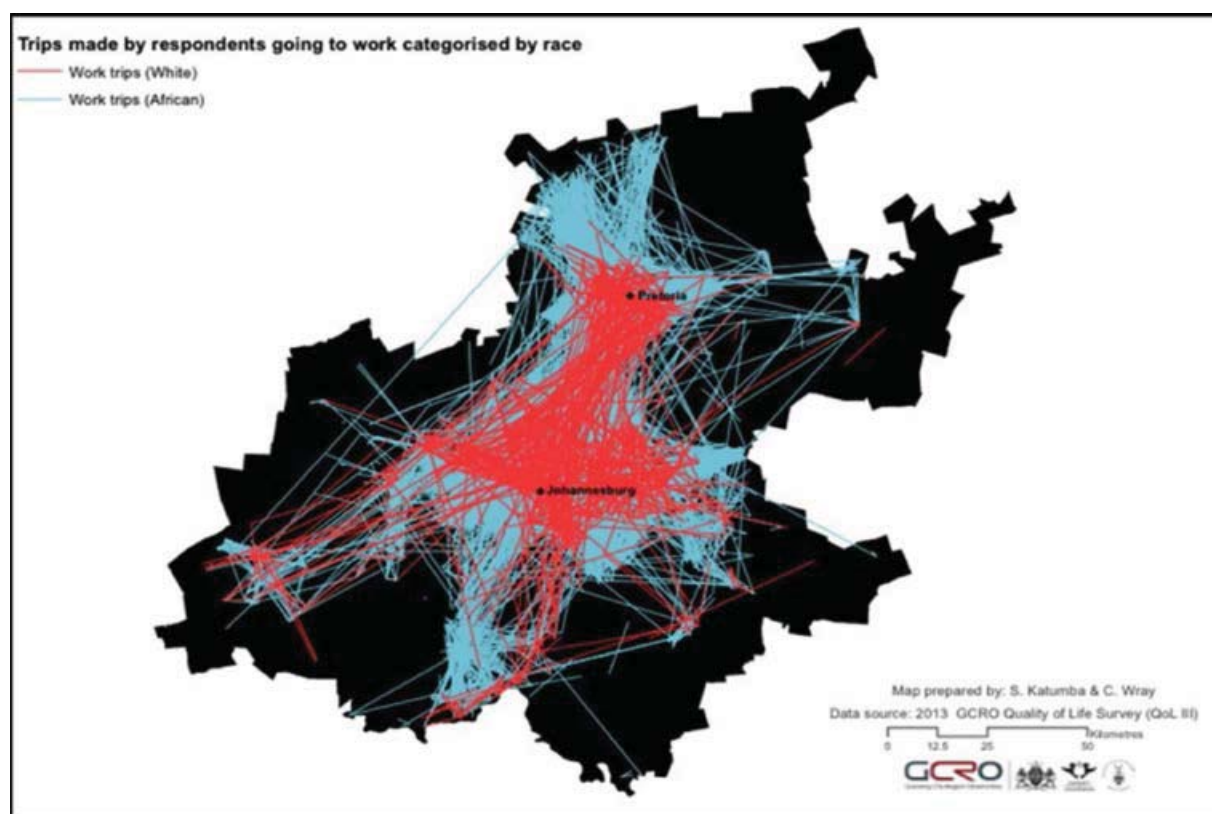


Source: (1) Schensul, D., Heller, P., "Legacies, change, and transformation in the post-apartheid city: towards an urban sociological cartography" 2010.

Source: Presentation by I. Turok to the High Level Panel (2017)

The continued distorted spatial form of South African cities is evident in its skewed density patterns, which increase with distance from the urban centre – the source of transport inefficiencies and the resultant increase in transportation cost and carbon emissions. Since the latter part of the twentieth century, South African cities have continued to expand outwards (sprawl), instead of upwards (through high-rise, high-density developments) or through infill development. The difficulties associated with increased urban sprawl include costly infrastructure and service delivery, and congested transport corridors. The racially based separation of cities finds expression in the glaring disparities of the commuting patterns of black and white workers. Nearly 71% of the

population (mostly poor black households) use minibus taxis as their primary source of commuting, while nearly two-thirds of the lowest income earners spend more than 20% (in some instances it is as high as 40%) of their household income on transport. Research indicates that, over the past decade, the average commuting times for black households have increased from, on average, 88 to 102 minutes per day.



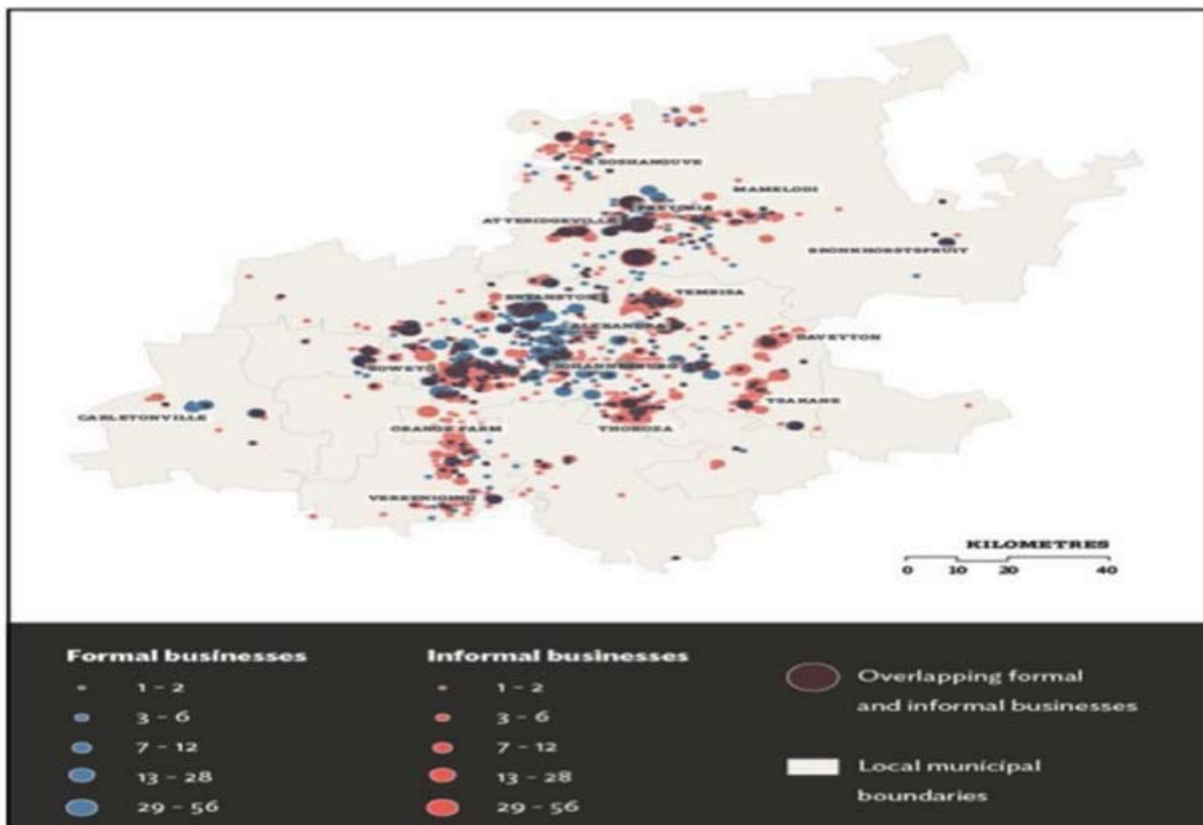
Source: Turok et al. (2017)

Urban spatial inequality also finds expression in the spatial divergence between formal and informal businesses, with the latter concentrated in the peripheral townships, while the formal sector is mainly confined to the urban core. In the context of high unemployment, especially among the youth, the informal sector serves as an important source of livelihood and a useful point of access



into the economy. The importance of the informal sector is evident in the fact that, in 2016, about 14.4% of persons employed (excluding agricultural and domestic workers) in Gauteng were active in the informal sector. A key factor, which entrenches the disparities between the formal and informal sectors, is municipal by-laws, which discourage informal trading in well-located spaces based on public health, welfare and safety concerns.

Figure 5.2: Mismatch between formal and informal enterprises



Source: Turok et al. (2017)

The effects of the physical separation between where the urban poor live and where jobs are based may have further implications for their chances of securing and retaining jobs. Empirical evidence

supports the view that unemployment appears significantly higher in the peripheral townships, whereas jobs are located in the urban core. The way in which South African cities are spatially organised thus serves as a poverty trap in which poor people are confined to the periphery, yet life on the periphery reduces their chances of finding work. The country's urban structure therefore deprives the poor of their socioeconomic rights, which ultimately undermines social cohesion and equal citizenship. (See Chapter 4: Social cohesion and nation-building)

An important issue spanning both cities and former Bantustans pertains to the nature of land rights. During apartheid both urban and rural black people were denied land ownership, with land generally held by the state on their behalf. People were either tenants or trust beneficiaries. Recent research estimates that the land tenure rights of 60% of South Africans remain informal and outside the Deeds Registry system. This includes land in the former homelands, people in informal settlements and half the people who have received RDP houses.

People without recorded tenure rights are vulnerable to eviction. They also do not have formal addresses which puts them at the mercy of others in relation to obtaining 'proof of address' letters. This has consequences for their interaction with the formal economy, including financial and telecommunications services. The Panel makes recommendations for the recording, administration and protection of rights.



Recommendation 5.1

People need strong and enforceable recorded rights to the land they occupy and use in order to ensure that their land rights are protected. Government needs to invest in an affordable land recordal system that can be rolled out at scale, together with strong land administration and enforcement institutions that are accessible to all, in both urban and rural areas. Upgrading informal rights to freehold title is not always the best option, as global experience has shown. What is needed is a robust recordal system that can interface with the deeds register. Without such a system, it is inevitable that powerful elites will exploit the vulnerable. The poor will remain invisible to the formal economy and excluded from it. This is a crucial but complex intervention. The Panel recommends that further work to concretise a land recordal law must be taken forward, and tested through the rollout of pilot projects. By its nature such work can only be driven by a permanent institution, or structure with an adequate life span. The Panel recommends that the task be delegated to the Law Reform Commission, or to the proposed Commission/Council should that recommendation be accepted (Recommendation 5.3 below).

Why the persistent spatial disparities since 1994?

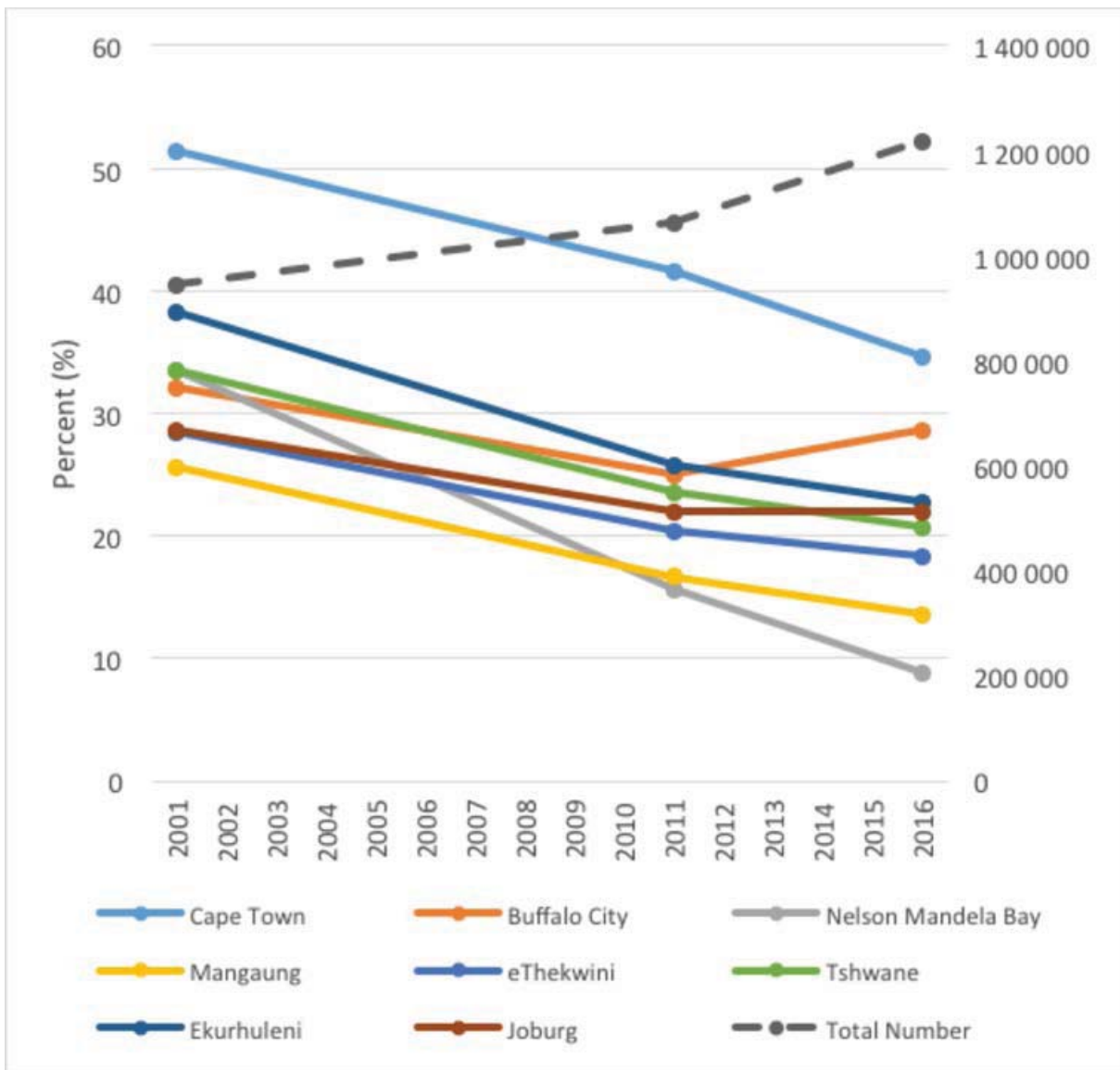
Since the transition to democracy in 1994, there have been attempts to use affordable state-subsidised (commonly known as RDP) housing as a vehicle to undermine the spatial segregation characteristic of the urban landscape, and to bring poor people closer to jobs and transport corridors. However, this approach has been beleaguered by the inherited legislative framework, which was essentially designed to emphasise the separation of different land-uses and social groups. The result is an urban configuration that defies attempts to create a more inclusive and compact spatial structure. Evidence suggests that one of the unintended consequences of the massive affordable housing projects is that it entrenches urban spatial inequality, because it is built on cheaper land

on the margins of cities. This locks people into poverty. To date, there has also been very little *in situ* upgrade of informal settlements, despite this being a policy priority. The resistance to urban transformation and its key drivers is an intractable problem despite the focus of the National Development Plan and the Spatial Planning and Land Use Management Act (SPLUMA) on spatial inequality.

Figure 5.3 shows the number and proportion of African households living in shack accommodation within all the metros. Despite the massive expansion of low-cost RDP housing (and the falling proportion of shack dwellers) the supply is not fast enough to offset the growing demand for housing, partly because of rapid urbanisation. Poor rural migrants are predominantly African (there is a negligible proportion of white and coloured households living in shacks) which means that the proportion of African households living in informal settlements is higher than commonly reported. For example, in Cape Town, more than one in three Africans lived in a shack.



Figure 5.3: African households living in shack dwellings; 2001 – 2016



Source: Census 2001, Census 2011, Community Survey 2016

In its deliberations, the Panel was confronted with the following key questions:

- Why do cities retain the features of apartheid despite billions spent on housing for the poor?
- Given the priority afforded to the upgrading of informal settlements where they are situated, why has progress been so slow?
- What is driving the lack of progress to transform our spatial landscape and how can these drivers be addressed?

Some of the root causes of the persistent spatial inequality are addressed in the NDP chapter on transforming human settlements and the national space economy. The Panel considered it worthwhile to revisit some of these constraints, as outlined in chapter 8 of the NDP:

- There are powerful special interests that are intent on maintaining the spatial status quo, that operate at all levels. At community level, it is known as the not-in-my-backyard (NIM-BY) syndrome, where middle and higher income neighbourhoods actively oppose low-cost housing developments in close proximity, citing the risk of diminishing property values. At a provincial level, the recent controversial evictions of working class families with historical links to the suburb of Woodstock in the Western Cape also points towards strong private sector interest overriding public interest considerations such as social cohesion, social justice and socioeconomic integration in a persistent spatially segregated urban system.
- Economic and social policies are implemented with spatial outcomes that are not only different but also often conflicting. Policies and programmes in the areas of trade and industry, transportation, environment, human settlements, health, education, infrastructure, *etc.* are not routinely scrutinised for their potential spatial impact, while there has been limited effort to achieve sustained spatial alignment.
- The absence of an overarching strategic approach to spatial planning results in a fragmented system across different sector departments. Spatial planning also lacks sufficient institutional authority within the system of government.



The Panel believes that an integrated solution that goes beyond the mandate of any single government department, or specific level of government, is needed. This proposal will be addressed in more detail in the latter part of this section.

As argued above, the development of affordable state-subsidised housing tends to entrench and reinforce spatial inequality because RDP houses are located on the periphery of cities. Yet available well-located public land is, in most cases, sold on the open market, rather than being released for the development of housing in order to address spatial inequality.

The release of well-located public land in the cities can play a significant role in breaking up and disrupting spatial poverty traps. State-owned enterprises holding public land should also be obliged to release it for the purpose of developing affordable housing or well-situated schools, markets and other amenities that cater for the poor. This should take into consideration, as overarching principle, that well-situated land must be used to address spatial inequality before it can be released for other purposes. Part of the problem has been lack of implementation of the Government Immovable Asset Management Act, Act 19 of 2007 (GIAMA). GIAMA provides for a uniform framework for the management of an immovable asset that is held or used by a national or provincial department and it ensures the co-ordination of the use of an immovable asset with the service delivery objectives of a national or provincial department. It is thus important that legislation such as GIAMA is implemented in full and not selectively.

Participants at the roundtable on spatial inequality argued that Parliament should introduce better laws and oversee their implementation properly. Parliament is over-dependent on government departments with siloed interests to draft law. This manifests in the lack of an integrated approach to address urban land needs, especially by the following Departments: Rural Development and Land Reform, Co-operative Governance and Traditional Affairs, Public Works and Human Settlements.

Several recommendations emerged from the reports commissioned by the Panel as well as a roundtable discussion with stakeholders. They include a variety of potential reforms to the regulatory framework that could help to bridge the spatial divides in South Africa, including reducing the barriers between where people live and work, and addressing the underdevelopment of informal

enterprises through their exclusion from affluent consumer markets in central cities and suburbs. Several regulatory procedures appear to exacerbate these problems. They include the national housing policy, environmental regulations, land-use planning procedures, building regulations, business licenses and trading permits.





Recommendation 5.2

- Encourage 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 taken into account when determining compensation.
- Most of the cities have very large tracts of fairly well-located land owned by organs of state or single companies and this land should be redistributed to South Africans (see section on wealth redistribution in Chapter 2).
- Review and strengthen the legal framework governing the disposal of SOE-owned land. Many are bound by law to sell assets on a competitive basis, which conflicts with the imperative that well situated land must be prioritised to address the legacy of spatial inequality.
- Establish consistent and coherent local, provincial, national and SOE use, selection and disposal requirements and processes, including clear conditions that must be met before state-owned land can be disposed of.
- Effective oversight mechanisms and evaluation of current assets and public inspection of custodian and user immovable asset management plans as mechanisms to facilitate and promote transparency and accountability.
- Better regulation is important, i.e. rules and procedures that are consistent, less burdensome, more responsive to socioeconomic realities and more developmental in orientation. Improved land development regulation, through the SPLUMA framework, can revive debate about the rationale for town planning law which, in turn, regulates private investment to protect public interests.

- The solution should include:
 - > A broader range (or progressive system or ladder) of affordable tenure options that are supported by institutions with the capacity to regulate it in a mainstreamed way;
 - > Minimisation of institutional overlap, duplication and competition. Target, provide capacity and resource the sphere of government with capacity as close as possible to the delivery space, preferably through local government. Amendment of the Spatial Planning and Land Use Management Act by Parliament to allow for greater flexibility so that decision-makers and regulators can be more responsive to diverse realities (e.g. in townships versus suburbs), including exemptions or fast-track arrangements in particular situations, such as informal settlements.

Recommendation 5.3

The Panel recommends the establishment of a co-ordinating structure responsible for spatial development, similar to the South African National AIDS Council (SANAC), which will be able to drive a coherent and co-ordinated spatial framework for South Africa. The key mandate of such a co-ordinating structure, led by the Deputy President, should be:



- (a) To set national spatial development targets, shared between the three spheres and sector departments, linked to resources and timeframes.
- (b) To improve consistency and co-ordination across key policies and procedures, particularly in (i) the pursuit of well-located housing, (ii) upgrading of informal settlements, and (iii) support for informal enterprises.
- (c) To undertake an audit of all well-located and underused land in the cities to identify the opportunities for low- and middle-income housing development.
- (d) To reduce the red tape in the approval processes by consolidating the four separate approval processes for environment, heritage, water use and land use planning. This could assist with expediting development considerably.
- (e) To ensure that the regulatory procedures for the three related issues of environmental, water and planning authorisations are aligned and integrated into a single approval system to avoid overlap and unnecessary duplication, causing excessive delays and compliance costs.
- (f) To simplify and streamline restrictive regulations to reduce the burden they place on enterprise, investment and development; these include building regulations and business registration.
- (g) To resolve the problem occurring in many townships of the poor correspondence that exists between the layout and extent of each property in the official register (the cadastre) and the reality on the ground, where many structures, boundaries and access routes have emerged over time that bear little or no relationship to the official plans; this prevents the granting of title deeds when properties are bought and sold. The Land Records Act that is proposed below would address this problem.

- (h) Develop and pilot the proposed Land Records Act to provide people living in informal settlements, backyard accommodation and inner-city buildings with greater security and enable them to gradually regularise their status, invest in upgrading the property, and start a formal enterprise.
- (i) To provide exemptions or fast-track arrangements in particular situations (e.g. upgrading informal settlements without having to follow all the usual environmental, township establishment and other planning procedures). Special zones could be established in and around certain low-income townships and informal settlements to encourage private investment in productive activity. Different zones could offer different management arrangements, types of infrastructure, financial incentives and relaxed regulations as an experiment to support investment, enterprise and job creation.
- (j) To find more creative approaches to mixed-income (inclusionary) housing to include a requirement that all private sector developments above a certain size should make provision for a specific proportion of the housing units to be within a predetermined affordable price bracket. The policy should draw upon the experience of cities in South Africa and abroad to identify appropriate targets, thresholds and delivery mechanisms. It should also formulate proposals to limit gentrification and the displacement of low-income households from well-located neighbourhoods.
- (k) To formulate a policy to support higher-density housing in and around economic nodes and along public transport corridors. This should take into account the higher costs of land and construction for multi-storey buildings. More flexibility in housing subsidies may be required and more explicit support for rental housing rather than ownership may also be important. Careful alignment with transport, education and land use planning policies may be important



on matters such as requirements for car parking, school playgrounds and floor area ratios. Land use zoning schemes could also be relaxed in designated areas to permit second and third dwellings to be built by property owners without having to apply for permission;

To ensure the co-operation and commitment of all levels of government and sectors departments, as well as to facilitate high-level co-ordination, it is recommended that this structure be chaired at the level of Deputy President (essentially borrowing from the success of the SANAC model). The NDP, in its call for the development of a national spatial framework to support spatial policy, recognises that policy can only work if integrated with plans for concrete public and private investment sustained over time, and adapted to the needs of and opportunities of specific places. The Panel concurs with this assertion, and supports such recommendation. It is the contention of the Panel that this is the only way to ensure that progress towards the achievement of spatial transformation can be better monitored and co-ordinated, as well as ensuring shared responsibility for changing the current apartheid spatial structure of our urban spaces.

Spatial inequality in rural areas

Twenty years after the end of apartheid, about 17 million people - a third of the population of South Africa - reside in the former homelands. Most of these people live in severe poverty and vulnerability. While absolute poverty in South Africa has decreased slightly (mainly through the provision of social grants and the extension of basic services to poor households (Leibbrandt, Woolard, Finn and Argent, 2010) the former homelands have persistently been burdened with 'significantly higher levels of deprivation and poverty than the rest of South Africa' (Noble and Wright, 2013; Noble, Zembe and Wright, 2014). Of the most deprived wards in the country (the

bottom 20% of wards with the highest levels of deprivation), the vast majority (more than 90%) are located within the former homelands, as described in the introduction to this chapter. Moreover, these findings show that the 'deprivation gap between [those living in the former homelands] and the rest of the country has not narrowed in the period between 2001 and 2011'. The poverty found in the former homelands is structural or 'chronic' in nature – that is, poverty that lasts for a period of five consecutive years or longer – which has deep-seated causes and is much harder to eliminate (Francis, 2006).

To understand the causes of the extreme poverty and disadvantage in the former homelands, it is important to adopt a holistic approach. Economists have argued that it is critical to unpack the environmental and systemic conditions that render people structurally vulnerable (Francis, 2006). This includes prevailing power relations and social dynamics. Moreover, when attempting to develop targeted interventions to alleviate social ills, the potential impact of any structural, legislative or policy intervention must be carefully scrutinised to ensure that such intervention does not entrench the very conditions or social relations that 'create marginality, maintain vulnerability and undermine the agency' of the rural poor (du Toit, 2005).

It is therefore critical to take stock of who is likely to be empowered by legislative and policy interventions and who is likely to be disenfranchised. In the South African context, it seems evident that powerful elites (including traditional leaders, land speculators and international and local corporations) have been disproportionately advantaged by the legislative and policy framework put forward by government in the post-apartheid era, while the rights and interests of individuals and families living on communal land have been systematically undermined or ignored. In an in-depth analysis of the causes of poverty in the North West, Francis writes that rural households from the former homelands have been rendered particularly vulnerable by the exploitative systems of patronage and local political structures that were propped up during apartheid that shaped the heavily skewed distributional regime that continues to exist today (Francis, 2006).



Customary Law and Communal land tenure

Legislative interventions about the powers of traditional leaders (the TLGFA of 2003, and the Traditional Courts Bill of 2008, 2012 and 2017) have bolstered the powers of traditional leaders over people living within the former homelands. The same laws and Bills have locked people into the tribal boundaries created in terms of the infamous Bantu Authorities Act of 1951, making it impossible for people to define their own identities or opt out of the control of traditional leaders who were superimposed on them during apartheid. The Communal Land Rights Act of 2004 would have given traditional leaders authority over, and ownership of, land within these tribal boundaries. The Act was declared invalid by the Constitutional Court in 2010 on procedural grounds, after rural communities challenged it on the basis that it undermined, rather than secured, their tenure rights. Another Bill, the Communal Land Tenure Bill of 2017 has recently been published for public comment. It is broadly similar to the repealed Communal Land Rights Act and is likely to attract similar public opposition and legal challenge.

From the research reports commissioned by the Panel and the expert roundtables convened for the purpose, the Panel heard that problematic issues surrounding the question of communal land tenure today have many origins, chief among which are the interferences of colonialism and apartheid. The most glaring consequence of these interferences is the continuing tenure insecurity of millions of South Africans living on land in the areas that were once ‘homelands’, whose land rights remain unrecognised. This means that they lack the legal and practical ability to defend their ownership, occupation, use of and access to, their land against interference by others. This is the case even where individuals and families have had undisturbed occupation and use of the land for generations – they remain susceptible to exploitation and dispossession.

The colonial and apartheid governments systematically established and maintained a complex legal framework that effectively prohibited black people from legally owning land. Colonial administrators held distorted perceptions of communal land tenure systems, seeing them as wholly collective systems of land ownership under the control and whims of an absolute sovereign. Moreover, they interpreted communal tenure through the common law lens of their own countries, in particular their own notions of ownership and, failing to find anything in communal tenure that was familiar,

they concluded and declared that ownership was alien to customary law. This opened the way to the approach that saw black people as perpetual tenants on the land they occupied and used; their land rights were of ‘second-class status’. These rights were generally subservient, permit-based, or ‘held in trust’ by the government or the South African Development Trust.

There is scholarship (Ogendo, 2008; Kerr, 1990; Cousins, 2008; Gasa, 2016) contradicting these colonial perceptions and describing communal tenure accurately as a system of complementary interests, rights and obligations, based on relationships, containing aspects of both ownership and communality. For these reasons, decisions about land and rights to land involve negotiation and joint decision-making among a range of people and groups. These are ‘layered’ or ‘nested’ rights managed at different levels of society for different purposes. Women have strong rights over family fields, yet all family members have a say in important decisions about family property including the homestead, and the fields. Similarly, villages and clans have control over common property resources that they use exclusively, but where such resources are shared with other bigger groups, the locus of decision-making becomes wider to include all those who have socially recognised access to common property resources.

In addition to questions about the nature and content of ‘customary land rights’ in communal areas, there is the equally important issue of the meaning and significance of land to African people. As pointed out by Nomboniso Gasa at a roundtable on this matter, it is problematic when policy fails to understand that in the African cultural context land is much more than property. It is also about spirituality, ancestral connectedness, family solidarity, identity and dignity. Failure to appreciate this leads, for instance, to legislation that undermines customary law rights, which include: shelter, grazing, food, burial spaces, firewood, thatch, water and medicines. These conceptions of land and identity tend to get lost in conversations about productivity and markets.

The challenge facing the post-apartheid government, was not only to repeal the apartheid laws that had created and fostered the insecurity of people on communal land, but also to rectify the ways in which existing property relations are inadequate. In execution of this mandate the government has enacted a list of measures, which attempt to comply with the Constitution’s requirements. Yet the question remains: *‘Why have these measures been so disputed and why have they failed to bring about transformation?’*



At the heart of the matter lies the issue of customary law. An understanding of the direct relationship between this law and the question of communal tenure is key. The distortions of communal tenure by the colonial and apartheid governments were distortions of customary law. The alarm over the powers granted to traditional leaders by recent legislation is essentially a recognition of how far these powers contravene customary law. There are thus at least two (overlapping) dynamics at play here: (i) a colonial and apartheid segregationist agenda denying rights of ownership over communal land to its inhabitants; and (ii) an attempt by traditional leaders to bolster their authority by claiming ownership of communal land.

The untenability of many of the recent legislative interventions lies precisely in the fact that they appear to support apartheid distortions that empower traditional leaders disproportionately. Laws and Bills like the TLGFA, TKLB, the Traditional Courts Bill and the Communal Land Rights Act (before it was invalidated) are criticised for the government's failure to imagine the new South Africa outside of familiar apartheid frameworks. They reflect a distorted sense of history and of customary law, as exemplified in the erroneous assumptions that Bantustan boundaries are a legitimate way of conceiving of cultural identity, that traditional leaders are the absolute founts and custodians of customary law, that there is anything 'African' about vesting land in traditional councils, and that Africans historically knew only one form of tenure.

Briefly stated, the customary law issue replays age-old debates about distortion, which produced the notions of 'official' versus 'living' customary law. The core issues in the debate were settled when the Constitutional Court made it clear in the *Certification*² and *Alexkor*³ judgments (to name just two landmark decisions) that the customary law recognised by Section 211 of the Constitution was the 'living' version, being the norms, adapted to circumstances, that guide the lived reality of people's day-to-day lives.

² The Constitutional Court In re: Certification of the Constitution of RSA, 1996 (10) BCLR 1253 (CC)

³ *Alexkor Ltd and Another v Richtersveld Community and Others* (CCT19/03) [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) (14 October 2003)

In respect of the two dynamics mentioned above, living customary law dictates that strong rights over communal land are held by the people living on those lands and that such land does not belong to traditional leaders, whose claim to freehold ownership is inconsistent with living customary law. The corollary of this is that communities and individuals have a right under customary law (as well as under statutes like IPILRA) to be consulted extensively and to give or withhold consent before any decisions about their land may be taken by traditional leaders, or anyone else (such as the Minister of Rural Development and Land Affairs the registered nominal owner of most communal land). Any decision affecting customary land rights cannot be taken without the consent of the people whose customary land rights would be affected by the decision.

These issues then led to an examination of the conduct of state entities like the Ingonyama Trust (IT), whose behaviour appears to contravene living customary law. Such behaviour includes the conversion of ownership rights to leasehold for people living on IT land, the authorising of mining operations without consulting the communities affected, and the routine dispossession of holders of historical land rights.

Many such groups can demonstrate independent ownership rights. This includes groups who clubbed together to buy land before the enactment of the 1913 Land Act, and others who managed to buy land subsequently through exemptions from the Land Act. In some cases, clans and other groups managed to secure recognition of elected 'community authorities' rather than 'tribal authorities' when they steadfastly rejected tribal identities during the implementation of the Bantu Authorities Act. Whereas this task is clearer in areas where groups and/or individuals had proof of ownership in the form of Deeds of Grant, it may be less clear where groups may have had strong customary rights that were not recorded by the colonial and apartheid governments.

Issues around informed consent and the formalisation of land rights bring into relevance the crucial question of land administration and land administration systems which, if properly managed, could provide a crucial backstop and protection for people made vulnerable by insecure tenure, such as rural people living on communal land.

A strong recordal system that records local agreements about current practice, and layered rights,



which also lists the names of the families and people who exercise these rights would act as a buffer against everything defaulting to exclusive common law understandings of tenure. A Deeds Office that had the benefit of data enabling it to record countervailing customary rights would be an effective protection against tenure insecurity for rural people.

The identification of the legislation and the policies that operate in this area makes it clear that the legislative and policy frameworks have so far been ineffective at reflecting and recording the nature of the customary and de facto land rights that exist in practice for most South Africans. There has been a failure to fulfil the promise in Section 25(6) of the Constitution that people whose tenure is legally insecure as a result of past discrimination obtain secure rights to the land which they hold on the basis of customary law and socially legitimate everyday practices.

The reasons for this are identified primarily as bad policy formulation, legislative lacunae and (where legislation exists) bad or non-existent implementation. Bad policies (leading to bad law) are identified as arising from uninformed advice and official ambiguity as to whether legislation should come down in favour of the people or of traditional leaders. Opting for the people means the adoption of living customary law. Weighing in on behalf of chiefly authority supports authoritarian distortions of customary law with a pedigree going back to colonial agendas.

The special vulnerability of women in rural areas

During the public hearings the Panel repeatedly heard of the problems facing women across the country and particularly in rural areas, where they live under the rule of traditional leaders and their lives are governed largely by customary law. These voices were strongly corroborated by research findings given in evidence at an expert roundtable convened specifically to hear inputs on women's issues.

According to evidence put before the Panel, a fundamental problem facing women in rural areas living under traditional leadership was that there was a disconnect between their lived realities and the laws that are passed to regulate their contexts and the institutions that govern them. According to Mnisi-Weeks, this proposition can be established by assessing seven key points:

- The first is that rural women's existences are determined by unequal power relations, in which context women have very little power with which to negotiate their security (physical, social and material). Reporting on her research work among the women of Msinga in KwaZulu-Natal and Mbuzini in Mpumalanga (Mnisi-Weeks, 2011; Mnisi-Weeks, 2013), Mnisi-Weeks lists some of the more common problems faced by rural women:



- Women are often evicted from their marital homes when their marriages fail or when they are widowed;
- Divorced/widowed women who returned to their birth homes when marriages end are often made unwelcome and evicted by their brothers;
- Unmarried sisters are often evicted from their birth homes by their married brothers after their parents die as sons assert that they alone inherit the land, even where the father may have chosen a daughter to be responsible for the family home;
- Married women are not treated as people with rights in the land, which is treated as the property of the husband and his birth family. Wives are therefore often not consulted on decisions regarding land use or transactions, and women are still treated as minors in their families and communities;
- Women, especially single women, struggle to access residential land because 'traditionally' residential sites in patrilineal areas are said to be allocated only to men;
- Women are often excluded from traditional institutions such as traditional and village council meetings where key decisions about land rights are taken – including that fact that women are not represented in traditional councils and courts, not allowed to address meetings (especially as widows), and are often denigrated or ignored when trying to speak in these forums;
- Traditional courts that decide family and land disputes are generally dominated by older men and are perceived to favour men over women.

She argues that customary land administration and the resolution of land disputes occur ‘at multiple levels of nested and layered authority...that align with people’s social identities’ and that (quoting Cousins (2008)) while these rights and systems are relatively stable they are also flexible, allowing for distortion and abuse. As such, they require constant negotiation, in a context skewed in favour of men due largely to the colonial and apartheid governments distorting customary law by entrenching a top-down version of the relationship between male authorities and women. This leads to the second point.

The second point is that this was not always the case. Pre-colonial, traditional communities were both patriarchal and matriarchal. This did not always mean that women were equal. But, within the context of the delicate tension between those two poles, women had some power with which to exercise agency and control over their lives and thus also negotiate their security. This was undermined by colonial laws rendering black women perpetual minors and excluding them from decision-making bodies (Nhlapo, 1995). With the distortion of principles of customary law by colonial and apartheid governments, women’s loss of such negotiating power has had devastating long-term consequences for their security.

The third point is that there was a brief moment immediately after apartheid when different political conditions existed in which women could negotiate greater security for themselves. This was due to the window of opportunity formed by the enactment of the Constitution, which created the impression that the government now supported equality for all, especially women. This is clearly shown by the survey of 3 000 households on Women, Land and Custom that was conducted by the Community Agency for Social Enquiry (CASE) in the three rural areas of Msinga, KwaZulu-Natal; Keiskammahoek, Eastern Cape; and Ramatlabama, North West province. The survey documented the post-1994 increase in single women (unmarried and widows) negotiating access to residential sites in customary areas in their own right. This process entails both women making claims, and local customary structures accommodating and validating these claims.

The fourth point is that, as research has shown, the social and political economy of rural areas has shifted, and is continuing to shift away from marriage being at the centre of African family formation. Already in 2004, 44% of rural households were female headed. Not only that, even



when women do share homes with men, they do not necessarily live with their husbands or partners but may rather live with their fathers, brothers or sons. Hence it is important for laws affecting rural communities to provide for women, not only as wives but also (perhaps more importantly) as sisters, daughters and heads of households themselves.

The fifth point is that the laws that government is enacting for rural areas are not typically tailored to this stark reality, or even accommodating of it. The government's assumption that marriage still forms the centre of traditional families is in stark contrast to the ways in which customary communities are adapting their lived laws and practices to their changing reality. Yet the failure of the so-called customary law legislation passed by government to honestly engage with women's lived realities is not innocent or harmless. In fact, it changes the delicate balance of power in customary communities in favour of traditional leaders (who are predominantly male), thus making it even more difficult for women to negotiate greater material security.

The sixth and final point is that the one positive requirement in the so-called customary law legislation so far passed or proposed by the democratic government is the requirement that women form a third of members of traditional councils. This requirement that women be represented in these important administrative bodies in traditional communities can result in women gaining some power and influence with which to introduce changes that enhance women's security on the ground. However, regrettably, almost 15 years after TLGFA was enacted, this change to the gender composition of traditional councils has not been brought into operation in most provinces.

The conclusion from all of this is that the ways in which laws – such as the Traditional Leadership and Governance Framework Act 41 of 2003 (TLGFA), Communal Land Rights Act 11 of 2004 (before it was struck down), and Traditional Courts Bill B15 – 2008/B1 – 2012 (and, less so, the TCB B1 – 2017) – signal that government supports traditional leaders and patriarchal versions of customary law over equality for women, changes the balance of local power in rural communities and reduces the space for women to positively renegotiate their status and security. In this sense, these laws align with the ways in which the colonial and apartheid governments stripped African women of the forms of power and authority they had under pre-colonial customary law.

Recommendation 5.4

- Laws such as the TLGFA have bolstered patriarchal power relations and autocratic interpretations of customary law that oppress women and limit their potential to transform living customary law from within. The TLGFA should be repealed or, at least, amended as proposed below in the section on the TLGFA;
- Government must ensure women's equitable representation in decision-making bodies in traditional communities, and enforce the composition requirements set out in the TLGFA which should be increased from 30% to 50%;
- Government must ensure that women (who make up 59% of people living under traditional leadership) are always carefully and thoroughly 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.



Security of tenure: proposals for a Land Records Act

The vulnerability of off-register rights

Research commissioned by the Panel reveals how the current cadastral and deeds registry system works well for the wealthy and middle class, but fails to legally recognise and record the off-register rights of millions of South Africans. Those whose rights remain vulnerable include:

- Seventeen million people living in former Bantustan areas
- Two million people living on farms where the land is owned by others;
- More than a million residents of urban informal settlements and backyard shacks within the five largest metros and unquantified numbers of individuals and families in similar circumstances across every city and town in the country;
- Many beneficiaries of land reform living on, or having rights to, the more than eight million hectares of land acquired through the restitution and redistribution programmes (Hornby, D., Kingwill, R., Royston, L. and B. Cousins 2017).

Many of these issues have been addressed in earlier sections but it is worth articulating some of the issues that arise in urban areas here. In urban areas, the formal titling system has been unable to meet the needs of millions of people, who have neither titles nor alternative forms of secure legal recognition of their rights to the land and dwellings that they occupy. Research indicates that close to 50% of all low-income houses built through the housing subsidy scheme have not been registered on the Deeds Registry. This directly contradicted the government's policy position that provision of subsidised housing with individual title was an important contribution to poverty reduction. The Department of Human Settlements further noted that 'the inability of recipients of

subsidy-housing to pay for municipal services and taxes has meant that such housing projects have been viewed as liabilities to municipalities'. This inability to pay extends to the transfer of title within the deeds registry system.

While high transaction costs affect the accessibility of the Deeds Registry, it has been found that even when the state offers support through subsidies or free title updating by Titles Commissioners, other factors continue to mitigate against titleholders keeping their title deeds current. These include reluctance to register family property in the name of a specific individual who is thereby empowered to sell the property or evict other family members. In some instances, people prefer the property to be registered in the name of a deceased ancestor through whom others can establish their membership of the family.

It seems unlikely that the Deeds Registry will close this gap, and even if it were able to, it is doubtful whether this would have beneficial impact. As noted by the World Bank, title deed systems remain institutionally onerous and unaffordable for poor households, so even if titles are registered on the handover of a house, they are seldom formally transferred to record further transactions on the property. Indeed, many state subsidised houses are sold informally, despite legal prohibitions on their sale, leading to a rapid breakdown in the integrity of the deeds system and fruitless state expenditure.

The absence of functional, affordable and appropriate recordal and land rights management systems for off-register rights

The roots of the failure to fulfil constitutional requirements to address the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources lie in the inability, to date, to develop an inclusive national land governance system to replace the historically segregated systems developed under colonialism and apartheid.

It is widely acknowledged that there is a complete breakdown in land administration in the former Bantustan regions. Old systems, which include Permissions to Occupy and Quitrent, have fallen into disarray, and little has been put in place to replace them. Likewise, there is no systematic approach



to manage overlapping rights on farms and clarify rights in the burgeoning informal settlements in cities and peri-urban areas. The functions relating to the administration of land rights remain fragmented and unco-ordinated. Where laws have been passed in a bid to protect these rights, they remain largely unimplemented, contributing to the persistent invisibility of off-register rights and their vulnerability to appropriation.

A key problem with current registration laws and practices is that they do not allow for the preference by rights holders to retain ownership as families rather than as individuals, except by creating (costly) family trusts or through undivided shares that tend to fragment into chaos over generations. Naming individuals on the title deed runs counter to this norm, since individuals may alienate the property. Women and vulnerable family members are easily overridden when male family members gain control over the titles. The majority of titleholders do not register transfers, but use witnessed oral agreements or unofficial written notes outside of the official system.

Land owned collectively through title deeds held by Traditional Councils, Trusts and Communal Property Associations is highly susceptible to abuse by leaders of these collectives, who claim ownership when their role should be that of trusteeship or custodianship on behalf of the members of the collective. The evidence strongly suggests that collective ownership tends to elicit abuse of power because it does not provide real and enforceable rights to families and individuals within the collective. Ongoing disputation and contestation has come to be associated with collectively owned land reform projects in South Africa.

The critical absence of an overarching recordal and land rights administration and management framework to address the unique legacies of colonial and apartheid land laws and the deep systemic spatial inequalities which are at the heart of South Africa's social and economic geography emerges as a core finding of the Panel's review.

This multifaceted problem statement provides the basis for strong arguments in favour of the conceptualisation of a new national Land Records Act which can provide a foundation from which to progressively ensure the security of tenure and equitable access to land for the majority, and not only a privileged few.

The key trends identified above were further substantiated through the Panel public hearings. A wide range of testimony was offered detailing the breakdown in land administration, the insecurity of rights in former communal areas and the overall lack of clarity in policy concerning land allocation.

The testimonies and supporting research indicate a complete breakdown with regard to the administration of off-register rights. Rights that are locally sanctioned and orally transmitted have become difficult to defend, while Permission to Occupy (PTO) and quitrent registers are in disarray. These weaknesses facilitate land grabbing by powerful individuals and corporate interests, and create an institutional vacuum, enabling the use of communal land for personal gain. In urban areas, there are no official record systems to administer rights in informal settlements. The lack of clarity about land rights and the collapse of administration systems restrict the potential for sustainable and equitable investment and development.



Recommendation 5.5

The Panel motivates for the enactment of a Land Records Act to enable compliance with Sections 25 (6) and (9) of the Constitution, which should also be read with Section 25 (1) and (2) which guarantee the right to property, and Section 33 which guarantees equitable and accountable administration.

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. As a whole, this approach rests on the proposition that a key driver of tenure insecurity is the breakdown in land administration. There are two key sides to this proposed law: firstly, the idea of having different categories of rights being made ‘visible’ and, secondly, the elevation of such rights to constitute property.

Dismantling the hierarchy of rights

Current legislation and systems of land administration are built upon a rigid hierarchy of rights that privilege rights registered in the Deeds Registry. Official policy discourse assumes that the answer is to move all rights into this system — an argument that appears to offer both historical redress and increased tenure security. Currently, in South Africa, criteria for registrability require, at minimum, a one-to-one relationship between a parcel of land surveyed to within centimetre precision, and an identifiable ‘owner’, whether singular or joint. Rights in land that do not meet these requirements may not be registered. Owners, moreover, have rights of alienation, which threaten familial claims. These criteria mean that roughly 60% of the population who hold land in customary and informal tenure are either excluded from the national register by definition or, alternatively, lose access after registration has been effected.

Recognising a land rights continuum consistent with international trends

United Nations agencies and the World Bank advocate for systems of legal flexibility to cater for recordal of off-register rights around the world. This thrust is being enhanced by geospatial digital technologies, which accommodate the recording of flexible property boundaries and make it possible to record layered property rights as part of a dynamic land information system. Such methodologies are being tested in various South African urban and rural settlements.

The proposals for the promulgation of a Land Records Act seek to provide a basis for legal recognition and administration of off-register rights, many of which are currently undocumented. This must ensure that individual families should have secure rights legally equivalent to ownership of residential and arable allocations along with defined rights to grazing and natural resources held in common. The Act will be pivotal in putting in place a robust and integrated land information and administration system for the country which will enumerate, adjudicate and record the rights of some of the poorest families across rural and urban settings and provide a mechanism for advancing our obligations in terms of Section 25(6) of the Constitution.



Key features of the proposed legislation

The proposed Land Records Act aims at filling the gap in legislation in land administration, recognising that the Deeds Registry, as currently constituted, is unsuited to the complex and diversified local realities of the South African land tenure landscape. 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, viz. enumeration, adjudication, spatial identification, recordal and mediation, as well as maintenance and updating of recorded rights. 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.

Key principles

Consistent with the international trends highlighted above, the Land Records Act will allow for a range of different tenure and landholding possibilities within a continuum of land rights. It will provide legal support for shared, layered, family ownership combined with access to common property which will make an important contribution to the social support systems and livelihoods of the poor, and which currently are not adequately acknowledged in law.

The Act will apply to all off-register rights in the country – urban and rural, which includes, but is not limited to, rights holders (people, families and groups) living in communal land areas, in common property institutions such as CPAs and Trusts, farm dwellers, and people living in informal settlements and backyard shacks.

The drafting of the Land Records Act will require alignment with existing land rights legislation, *inter alia*:

- the Interim Protection of Informal Land Rights Act (31 of 1996) IPILRA, which is recommended to be amended and made permanent as PILRA;
- the Communal Property Associations Act (CPA);
- the Prevention of Illegal Eviction from and Unlawful Occupation Act 19 of 1998 (PIE);
- the Land Titles Adjustment Act 111 of 1993 (LTAA);
- the Upgrading of Land Tenure Rights Act 112 of 1991 (ULTRA);
- the Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA);
- the Extension of Security of Tenure Act 62 of 1997 (ESTA);
- the Land Reform (Labour Tenants) Act 3 of 1996 (LTA).

It is proposed that, in the process, ULTRA and LTAA will be substantially amended and merged, as much of their content will be superseded by the Land Records Act.

The Act will require the training of officials and accredited land rights adjudicators in tertiary institutions, and will require curriculum review and development as part of a process of decolonising the cadastre and enabling a land rights management system which addresses constitutional obligations. The Act will enable the establishment of an independent national land ombud to provide land rights holders with recourse to independent determinations and hold officials to account.



Institutional implications and global innovation

It is proposed that the Act will be administered by the Department of Rural Development and Land Reform as part of its existing mandate to support the Deeds Registry. Given the transversal nature of land, various line functions would have to be involved in various capacities. The new institutional structure could be attained by re-engineering of existing structures and assigning of new functions to existing personnel.

Land recordal is seen to be a national competency, which 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 offers enormous opportunities.

A blockchain is a digital registry that cannot be tampered with. It provides a mechanism for various parties to agree on a set of facts. It prevents those parties from making false statements, since everyone else can check the facts; it also prevents statements from being changed after they've been recorded, since all parties are alerted to these changes.

Blockchain processes are currently being piloted in the Swedish Land Registry. Elsewhere, blockchain is being promoted as a key and cost-efficient technology for the public sector, particularly suited to registering property titles and rights in land along the land rights continuum as it has the potential to 'reduce, if not entirely prevent property fraud'.

The proposed Act should be seen in the wider context of property law and land administration, in which land administration can be metaphorically viewed as a road network, while different tenure forms or systems can be viewed as different vehicle models. The information should also reflect restrictive conditions imposed on land use in terms of local customs and practices.

Laws that impact negatively on accountability, power relations and tenure security in communal areas: The Traditional Leadership and Governance Framework Act (TLGFA) and the Minerals and Petroleum Resources Development Act (MPRDA)

The Constitution of South Africa recognises customary law as a part of the South African legal system equal to the common law. As such, the Constitution presents a radical departure from the pre-constitutional position that recognised customary law rules only where no rules could be sourced from the common law or statute law.

This constitutional position of customary law has been affirmed by the Constitutional Court on numerous occasions and with specific reference to the following sections of the Constitution:

- Section 30 and 31, protecting the right to participate in and enjoy the cultural life of one's choosing;
- Section 39(3), which protects all rights and freedoms recognised or conferred by customary law that are not inconsistent with the Bill of Rights;
- Section 211(3), that enjoins all courts to apply customary law where it is applicable, subject only to the Constitution and legislation that specifically deals with it.

In addition, there are various other provisions of the Constitution that protect related aspects of customary law:



- Section 25(6), which provides that forms of tenure that remained insecure due to past racial discrimination (a prime example being past denial of indigenous property rights) should be secured;
- Section 211, which recognises traditional leaders who derive their status from customary law.

Following the adoption of the Constitution, the judiciary and the legislature embarked, over the last two decades, on the further recognition, regulation and, where necessary, development of customary law. Unfortunately, the two arms of government moved in diametrically opposite directions.

The judiciary established an understanding of customary law as a living system of law that develops as it is lived by the community, taking care to give effect to an understanding of customary law not as 'mere' cultural practice, but as law. It recognised customary property rights, customary land and resource governance and customary rules of evidence. The legislature, on the other hand, focused on the institution of traditional leadership. This derecognition of customary law by the legislature has far-reaching consequences for the communities who live by this law. Their customary land rights continue to be denied while the powers of traditional leaders are bolstered through the way in which laws such as the TLGFA and the MPRDA are interpreted and implemented. These laws do not and cannot give traditional leaders power to transact unilaterally on behalf of rural communities, or to be their sole representatives (*Pilane and another v Pilane and another*)⁴. This is not only because of the Bill of Rights but also because of the land rights and accountability requirements of customary law, particularly in relation to inclusive and accountable decision-making processes.

⁴ *Pilane and Another v Pilane and Another* (CCT 46/12) [2013] ZACC 3; 2013 (4) BCLR 431 (CC) (28 February 2013)

Parliament's efforts to introduce other laws that create far-reaching top-down powers for traditional leaders such as the Communal Land Rights Act of 2004 and the Traditional Courts Bill of 2008 and 2012 have not succeeded. The Constitutional Court struck down the Communal Land Rights Act in 2010 and the majority of provinces rejected the Traditional Courts Bill in the National Council of Provinces in 2014. Many of the provincial mandates rejecting the Bill explained that the centralised powers it provided to traditional leaders as presiding officers followed the precedent of the Black Administration Act rather than living customary precedents of inclusive council-based restorative justice.

Equally critical is the failure of the legislature's attempts to dismantle the apartheid and Bantustan boundaries that enclosed people in constructed and imposed units of identity. Instead of scrapping the apartheid model of traditional leaders as state employees in charge of often artificially constituted communities, it was decided to retain it with a few minor changes. As a result, not only is the radical spatial inequality and poverty of the Bantustans alive and well today, but people caught within these areas continue to struggle for basic political and socioeconomic rights. Their rights to exercise customary affiliation and to demand accountability from their leaders are neutralised.

The Traditional Leadership and Governance Framework Act

The TLGFA has been interpreted to provide traditional leaders with the power to sign agreements affecting land rights (for example, mining deals) without consulting those whose land rights are at issue. This interpretation flouts the Section 25(6) rights protected by the Interim Protection of Informal Land Rights Act of 1996, which has been renewed annually. This is only possible because the Department of Rural Development and Land Reform that is responsible for IPILRA has failed to enforce it, and the Minister who is the nominal owner of much communal land appears to disregard IPILRA in authorising surface leases without ensuring that those whose land rights are at issue have been informed of the content of such agreements, and have consented.

Because the TLGFA fails to recognise the status of customary law and the land rights that arise from it, traditional leaders and their councils routinely assume the power of land administration, including land allocation, even though there exists no statutory basis for such powers and, in



many areas, no customary law basis either. This was raised repeatedly in the public hearings where particular traditional leaders were accused of unilaterally selling land allocations, rather than respecting the decisions of local neighbourhood meetings (*ibandla*) about whether there is sufficient land available to accommodate non-community members seeking residential or business sites without jeopardising existing community rights and needs.

At the centre of the divergence between Parliament's attempts to pass laws that empower traditional leaders and the rich jurisprudence about living customary law emanating from the Constitutional Court are two issues. The first is that traditional leaders' demands for governance powers are inconsistent with the Constitution, which vests governmental powers exclusively in the three tiers of local, provincial and national government. Traditional leaders challenged the Constitution on the basis that it did not provide them with powers and functions, but were not successful (*Certification*⁵ judgment). Closely related to this is that laws which seek to empower traditional leaders without requiring accountability are inconsistent with both the Bill of Rights and customary law.

This has led to an extremely unstable status quo in which parts of government have encouraged autocratic interpretations of the TLGFA that are contrary to both the terms of the law, and to the Constitution. Linked to this has been the abject failure of the Department of Co-operative Governance and Traditional Affairs to enforce the limited transformation measures in the law, namely, the election of 40% of the members of traditional councils, and the quota of one-third women members. Exacerbating matters further has been the failure of provincial governments to exercise the financial controls and oversight requirements contained in the TLGFA and its provincial counterpart laws.

These problems combine and manifest most seriously in communal areas affected by mining as emerged from the public hearings in North West, Limpopo, Mpumalanga and KwaZulu-Natal. People at the hearings described mining in communal areas as a second wave of dispossession that has locked them into ever-deeper poverty. They accused both national and provincial government of being complicit in mining deals that benefit a political elite at the expense of the poorest and

⁵ *The Constitutional Court In re: Certification of the Constitution of RSA, 1996 (10) BCLR 1253 (CC)*

most vulnerable South Africans. Numerous examples were put forward of Premiers refusing to release commission recommendations where claims had been lodged challenging the legitimacy of particular traditional leaders, and of officials refusing to enforce the financial accountability sections of the TLGFA.

Mr S Malangwane informed the Mpumalanga public hearings that: *'Chiefs are compelling us to pay for stands as well as annual fees yet the government gives them a budget. That money does not help us as residents. That is an old law and government must repeal it because it is burden on us.'*

Dikeledi Emily Mogale of Mmantserre village in the North West made the following submission at the provincial public hearings:

'The chief controls who gets hired at the mines. He told the management of the mines not to hire people who are opposing his administration. No chief has ever bought the land but they control the finances and the property and share them with their families. The mine built a hall and it is hired by the people but its money goes to the chief. Remove the chiefs from controlling the community's assets. The land belongs to the community and they are not benefiting from it. DMR gives investors permission to mine on the land belonging to the community without the community's knowledge. We have not seen a financial report since 2003'.

The Panel received input from the Chamber of Mines, which confirmed that the Chamber and its members are aware of the Interim Protection of Informal Land Rights Act which provides that people may not be deprived of their informal land rights without their consent, except by expropriation. It stated further:

'However, our understanding is that companies are required, or at least face strong recommendations, by the Department of Mineral Resources to do their community BEE transactions with the traditional authorities where they exist. We are conscious that the legitimacy of traditional leaders is disputed by some community members in some jurisdictions, and that this can be the source of negative relationships between mines



and adjacent communities. There have also been cases where the proceeds of these transactions have been mismanaged. None of this is satisfactory for the mines and the companies that own them.

[T]he industry's interest is in greater stability and a reduction of social conflict both within those communities and between disaffected members of those communities and the mines. That would need to include acceptance of greater accountability by traditional leaders.'

This explanation does not absolve mining companies who have entered into deals with traditional leaders in breach of IPILRA and customary law accountability requirements. It does, however, illustrate the role of the Department of Mineral Resources in advising mining houses to contract with traditional leaders rather than the people whose land rights are at stake. In an attempt to put the DMR's interpretation of the powers of traditional leaders beyond legal doubt and legal challenge, there is a Bill before Parliament, the Traditional and Khoi-San Leadership Bill that would repeal the TLGFA and provide explicitly that traditional leaders have the power to enter into agreements with third parties about communal land (clause 24). The Bill provides for no consultation whatsoever with affected rights holders, and is unlikely to pass constitutional muster.

The Traditional and Khoi-San Leadership Bill of 2015 ('TKLB') was introduced in the National Assembly in September 2015. The Bill's stated aims are to incorporate statutory recognition processes for Khoi and San communities, councils and leaders for the first time in South African history; replace the TLGFA and National House of Traditional Leaders Act of 2009 by merging them into a single law on traditional governance; and amending the laws governing the remuneration of traditional leaders and the role of traditional leaders on municipal councils.

At the same time that the Portfolio Committee on Co-operative Governance and Traditional Affairs is processing the TKLB (which repeals the TLGFA), a new Bill to amend the TLGFA was introduced in the National Assembly in May 2017. The Traditional Leadership and Governance Framework Amendment Bill 8 of 2017 proposes, among other things, to extend the timeframes within which traditional councils can be properly constituted in terms of Section 28 of the TLGFA. Despite having

more than a decade to comply with the transformative provisions for traditional councils in the Act, many traditional councils have not complied, including all of those in Mpumalanga and Limpopo and the majority of traditional councils in North West. This necessitates an amendment to save these councils from invalidity. The Department of Co-operative Governance and Traditional Affairs has indicated August 2017 as the deadline for passing the Amendment Bill into law.

The Department of Traditional Affairs made a presentation to the Panel on 6 September 2016. It stated that it had conducted an assessment of the state of governance among recognised institutions of traditional leadership in 8 provinces. Among the key challenges the assessment identified were that:

- Accountability is a weakness within the institution of traditional leadership.
- There is a lack of capacity on the part of the traditional leadership to engage in effective partnerships with other institutions.
- There are disparities among provinces in implementing capacity-building programmes.
- In order to enhance stability in traditional communities, the Department developed a Dispute Resolution Framework to support provinces to deal with conflictual relationships between traditional leaders and their communities.

During the Panel's public hearings, the public raised concerns that post-apartheid legislation on traditional leadership resuscitates the apartheid geography of the former Bantustans in rural areas, resulting in divided citizenship and economic inequality between rural and urban areas. The apartheid distortion of customary law and incorrect assumption that authority over land is necessarily restricted to officially recognised traditional leaders was raised by several speakers.

The public also raised concerns about the failure of the TLGFA provisions that were meant to transform apartheid structures into traditional councils. Broadly speaking, the TLGFA provides for two 'transformative' mechanisms to redress apartheid distortions. The Commission on Traditional Leadership Disputes and Claims (the Commission) was intended to be one of these mechanisms,



and was empowered to decide disputes about incumbents to traditional leadership positions, the existence of the positions themselves and on boundaries. In theory, then, while the TLGFA would start with traditional authority jurisdictions akin to apartheid boundaries, through the Commission the landscape of traditional leadership would be transformed back to its pre-colonial integrity.

By April 2008, it had only dealt with the status of twelve 'kingships' without pronouncing on the rights and status of the incumbents to those kingships and its mandate had to be extended by amending the TLGFA in 2009. As a result, a series of provincial Committees were set up to hear disputes on behalf of the Commission. These Committees are even smaller and have even fewer resources than the main Commission did, while the number of disputes registered with them is very high. In Limpopo alone, more than 500 leadership disputes had been lodged by May 2012.

The 2009 amendment to the TLGFA also shifted the power between the Commission and its Committees on one hand, and the President and Premiers on the other hand. Whereas before the Commission had the power to make decisions regarding leadership disputes, after the amendment the Commission and its new Committees were only empowered to make recommendations.

The power to decide whether to accept or reject those recommendations now rested with the President and Premiers. Claimants have had to resort to litigation in order to obtain Committee reports and reasoned decisions by the Premiers. Most disturbing has been the poor quality of the Commission investigations and Premier decisions.

The second mechanism set up by the TLGFA to mitigate against apartheid distortions was the requirement that traditional councils transform their membership composition.

Transformation requirements are set out in Section 3(2) of the TLGFA as follows:

- Total number of members according to guidelines published by the national Minister of Traditional Affairs and applied by the Premier of each province;
- At least one third of total number of members to be women; and
- Forty per cent of total members to be elected by the community, with the remaining 60% selected by the senior traditional leader.

In the thirteen years since the TLGFA came into force, there has been inconsistent and poor implementation of the requirement for tribal authorities to transform into properly constituted traditional councils. Government has explicitly acknowledged these failures in the Memorandum accompanying the Traditional Leadership and Governance Framework Amendment Bill 8 of 2017.

The Memorandum admits that the legal status of many traditional councils is precarious as they have not complied with the transformation requirements set out by law. This means that many of the agreements signed by such traditional councils with third parties are also legally precarious. Some of these are multimillion-rand agreements with mining companies, for example Lonmin and the Bapo ba Mogale traditional authority in North West, Anglo American Platinum and Kgosi David Langa in Mapela, Limpopo, and Pallinghurst and Kgosi Nyalala Pilane of the Bakgatla ba Kgafela traditional council in North West. Another example is that of Mineral Commodities Limited (MRC) and the Xolobeni community in the Eastern Cape.

According to Business Leadership South Africa, in conjunction with Business Unity South Africa, the precarious legal status of traditional councils is a factor impeding investment and employment.

They state that:

[T]here is a lack of clarity around whether the current traditional councils actually comply with the prerequisites stipulated by Government and hence this is a very risky area for



industry as they are unclear who they can officially engage with as representing the community.

It is important to know whether traditional councils currently have legal status because they are often put forward by the government and private actors as democratic institutions that represent communities. In practice, traditional councils are considered to be and dealt with as community representatives in respect of development initiatives, service delivery agreements with local municipalities and mining deals. If traditional councils have no legal status, they cannot act on a community's behalf in this way – their actions would be unlawful and legally unenforceable.’ (Business Leadership SA and Business Unity SA, 2017).

Rather than address the root of the problem, which is the failure of traditional councils to include women and elected members, or to adequately consult those whose customary land rights are at issue, the TLGFA Amendment Bill seeks to legalise traditional councils by amending the Act to remove the consequences of their failure to meet the composition requirements.

The flaws in the TLGFA, and in its implementation, have resulted in severe and material consequences for people who live under the authority of some traditional authorities. Public testimonies reveal that there is an increasing amount of physical violence and intimidation being employed against people living in some traditional communities, particularly in areas affected by mining. This is a direct consequence of the TLGFA's failure to include mechanisms for ordinary people to hold traditional leaders and councils accountable. A corresponding lack of transparency and consultation with people has created an environment in which trying to enforce basic democratic measures of accountability by traditional authorities is accompanied by high levels of risk for ordinary people and activists.

The charging of fees – or ‘tribal levies’ – by traditional authorities has emerged as a serious threat to the livelihoods of people living in the former homeland areas of South Africa.

Although the TLGFA does not expressly permit the charging of fees by traditional authorities, Section 4(3)(b) indirectly refers to ‘levies’ in relation to the public financial reporting duties of traditional councils. Some provincial iterations of the Act have prohibited the charging of levies, some make

no reference to levies at all, and one – the Limpopo Traditional Leadership and Institutions Act 6 of 2005 – has expressly provided in Section 25 that traditional councils can charge taxpayers in their areas an additional rate . Even in places where levies are not provided for in provincial statute, they continue to be imposed on people in practice.

Historical research has shown that customary forms of payment to traditional authorities or towards a community project were usually voluntary, for a specified purpose and based on the shared consensus of an affiliating group. In contrast to this, the current practices employed by many traditional authorities have rendered levies compulsory and, as such, are contrary to the customary practice of voluntary contributions to achieve shared goals. The payment of these levies is enforced through the withholding of ‘services’ – most notably, of proof of address letters required for accessing grants, opening a bank account or seeking employment.

Court interdicts to prevent people from exercising their civil and political rights are another method used to silence dissenting voices within traditional communities. These interdicts are granted in favour of official traditional authorities on the mere basis that they have official recognition in terms of Section 28 of the TLGFA. In *Pilane and another v Pilane and another*, the Constitutional Court made it clear that traditional leaders did not have the right to deny their community members the right to dissent, including the right to hold meetings without officially recognised traditional leaders’ presence or permission.



Recommendation 5.6

Customary law

Insert explicit wording into the TLGFA, including a definition of ‘customary law’, to emphasise the voluntary and living nature of customary law as recognised through Constitutional Court and other jurisprudence.

Explicitly incorporate guiding principles for determining the content of customary law, as per existing constitutional jurisprudence, into the TLGFA.

Amend the definition of ‘royal family’ in Section 1 of the TLGFA to remove circularity and provide for flexibility in the definition, so that the Act can also accommodate customary law realities where there is either no royal family governing a particular customary group or where there are multiple royal families at different levels within a group.

Apartheid geography and locking people into institutions

- Replace the current definition of ‘traditional community’ in the TLGFA with one that defines a traditional community in terms of customary law, rather than state recognition or the operation of the transitional mechanisms in Section 28. The new definition should emphasise that traditional communities are formed through the voluntary affiliation of groups of persons who share customary laws and a customary governance structure (whether traditional leadership or another) and who self-identify as a community.

- As an additional protective mechanism for the right to culture of groups within groups, and other groups who contest their current status under the TLGFA, the TLGFA should explicitly enable the withdrawal of groups from ‘traditional communities’ and the flexible formation of new group identities or ‘traditional communities.’

Accountability and consultation

Amend the TLGFA to make explicit the distinction between the administrative authority of traditional leaders and councils on the one hand, and authority over land and property on the other hand so as to make it clear that land rights vest in individuals in terms of Section 25 of the Constitution, not in traditional authorities.

Amend the TLGFA further to include an explicit obligation to comply with the consent and consultation requirements in the Interim Protection of Informal Land Rights Act of 1996, before any person living within a traditional authority area can be deprived of their rights to land.

Insert a specific requirement in the TLGFA that, prior to making a decision (not relating to deprivation of land rights) that purports to represent a group of persons or community, traditional councils and traditional leaders are required by customary law to consult all those who would potentially be affected by the decision. The consultation must be in accordance with customary law procedures and must be accompanied by all relevant information related to the decision. Affected persons must have been given a meaningful opportunity to participate. Only if the traditional authority can show on record that this process has been followed can the decision be deemed valid.



Insert in the TLGFA a duty on traditional councils to prove that, in addition to meeting the relevant consent and consultation requirements for decision-making mentioned above, they had also met all other requirements imposed on traditional councils by the TLGFA at the time of purporting to represent a traditional community or any other group in any decision-making process or transaction. Fulfilment of this duty should be a requirement for the validity of the decision or transaction. These include the composition and financial oversight provisions in the Act having been complied with, particularly the auditing of traditional accounts on an annual basis.

Amend the TLGFA to expressly prohibit the exercise of powers by traditional institutions not mandated in terms of statute or customary law.

Preventing abuses and violent consequences

- Amend the TLGFA to include explicit requirements for accountability, reporting and consultation by traditional leaders and councils to the people they purport to represent and exercise authority over.
- The Code of Conduct provided in the Schedule to the TLGFA should explicitly be made enforceable for all persons who affiliate to traditional communities and consequences for breach of the Code of Conduct should be strengthened by, for example, adding the possibility of a traditional authority's removal for serious misconduct and abuses.

Tribal levies

- Amend the TLGFA (and relevant provincial Acts) to explicitly prohibit the imposition of any levies by traditional authorities.

- Instead, the TLGFA (and relevant provincial Acts) could permit the collection of voluntary contributions for specific projects that have been agreed to in advance by affected persons in terms of customary law procedures. The TLGFA should explicitly require traditional authorities to publicly report on the collection and spending of these voluntary contributions and provide receipts to persons who volunteer to pay.

Legal education

Insert in the TLGFA a duty on the Minister responsible for Traditional Affairs, in consultation with the Minister responsible for the administration of justice, to provide regular circulars to traditional councils, High Courts and Magistrates Courts that explain any new jurisprudence relating to customary law and traditional authorities.

Legal standing

Rather than through state recognition, the legal personality of traditional communities should be established in terms of the proposed flexible definition for ‘traditional community’ in the TLGFA based on the consensual nature of customary law, as discussed earlier in this document.

The TLGFA should, like the Restitution of Land Rights Act, explicitly provide for a part of a community to have standing in terms of the Act; alternatively, like the National Environmental Management Act, recognise a group with shared interests that does not necessarily coincide with a traditional community.

Amend the TLGFA to explicitly acknowledge the rights, including land rights, of groups and individuals within traditional communities. Nothing in the TLGFA, including affiliation to a traditional community, should preclude those rights holders from exercising or protecting their rights.



Amend the TLGFA to explicitly acknowledge that the legal standing and existence of groups can be established in terms of customary law and other legal sources. The legal status of a group does not depend on and cannot be trumped by the official recognition of a 'traditional community' in terms of the TLGFA – even where that group also affiliates to a traditional community.

Commission

Create a duty in the TLGFA requiring the Commission and its provincial Committees to publish a report including detailed reasoning and recommendations in the *Government Gazette* as soon as recommendations in respect of a particular claim have been finalised.

Amend existing provisions of the TLGFA dealing with the Commission to incorporate principles from Constitutional Court jurisprudence that has developed around the Commission's procedures and methodology, by requiring the Commission, in its investigations, to ensure that all parties before it have access to the information that the Commission intends to take into account when making its decision, and that they have a meaningful opportunity to respond to the information.

Amend the annual reporting requirements of the Commission in the TLGFA to require annual reporting to Parliament, in addition to the Minister responsible for Traditional Affairs.

Insert a duty in the TLGFA that requires the Commission and its provincial Committees to report to claimants every six months on the status and progress of their claims.

Traditional councils

Amend the TLGFA to increase the proportion of elected members to traditional councils, so that they are in the majority.

Provide increased protection to elected and women members of traditional councils by requiring that, in order to proceed with any meeting or decision-making process, a quorum of at least 50% elected members, 50% selected members and 50% women members must be in active attendance.

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. These must be seen against the background of the Constitution and the preamble to the MPRDA.

Section 25 of the Constitution emphasises the state's obligation to legislate 'to redress the results of past racial discrimination'. This mandate is echoed in the preamble to the Mineral and Petroleum Resources Development Act No 28 of 2002 (MPRDA), which calls for:



- Transformation of the mining industry through ownership, participation and benefit for communities that host or supply labour to mining;
- Substantial and meaningful expansion of opportunities in mining for black South Africans ‘including women and communities’; and
- ‘a social or economic strategy, plan, principle’ to achieve broad-based black economic empowerment in the industry.

Two processes are critical in understanding the transformation challenges that the post-apartheid state’s mineral policy has run into. The first critical process is the attempt by the government to redefine residents in former homelands, through legislation, as subjects of ‘traditional communities’ (or ‘tribes’) under traditional leaders. The second process is the post-1994 state attempt to use minerals policy as a redistributive mechanism. Through the MPRDA, the state has promoted a range of measures, including broad-based black economic empowerment (B-BBEE), mine-community partnerships, continued royalty payments, and social labour plans as requirements for mining companies. Communities that previously received royalty payments for mineral rights on their land have been encouraged by the state to convert their royalties into equity shares.

There are two main ways in which the state’s redress mission has failed in former homeland areas. Mining has led to land dispossession and loss of livelihoods, and there are no real benefits for communities.

Mining has led to land dispossession and loss of livelihoods

In order to advance transformation, the MPRDA established that mineral resources are not owned by landowners, who are predominately white, but are the common heritage of all South Africans, with the state as the custodian. To make this meaningful, the MPRDA abolished landowners’ rights to say no to mining on their land. While intended to advance transformation, this change has had devastating impacts for members of rural and customary communities, who have borne the brunt

of the removal of the express right to say no.

With much of mining's expansion taking place on 'communal land', communities have faced land dispossession, displacement and loss of traditional agrarian livelihoods. While the Interim Protection of Informal Land Rights Act of 1996 (IPILRA) recognises and seeks to secure the undocumented rights of people who own or use land, it has been almost universally ignored by mining companies and the Department of Mineral Resources in the negotiation of mining rights on communal land.

The Panel heard testimony from residents of mining areas of the acute disruptions caused in their lives and livelihoods by mining, a problem compounded by the role of traditional leaders who have assumed ownership of communal property and therefore the right to enter into commercial deals without consulting their populations. Forcible removal in the wake of these deals has been reported. Part of the solution lies in requiring compliance with IPILRA in these circumstances, supplemented with express provisions in the MPRDA ensuring that communities receive adequate information on proposed mining activities prior to deciding whether to consent or not.

For communities who have already faced dispossession, clear provisions regarding compensation are required.

There are no real benefits for communities.

Community representatives insisted in every public hearing in a mining area that they had seen no benefit from mining. Examples were put forward of traditional leaders who have created a legion of mining-related investments through contracts they enter into with the mining companies, but who never report on, or distribute these benefits among the people whose land rights are undermined in the process. Community companies are also hamstrung by usurious vendor financing, and abuse by majority shareholders and through transfer pricing and other means linked to asymmetrical power and access to information.

The administration of community (mining) revenues by provincial governments remains a contentious issue. During apartheid, in the former Bophuthatswana 'homeland' (now under North West province), community royalties were kept under custodianship of the Bantustan president,



Mr Lucas Mangope, as a trustee. These royalties, amounting to hundreds of millions of rand, were kept in the so-called 'D-accounts' (development accounts) administered by the President's office through a complex system of financial controls. The communities on whose behalf these accounts were held made formal requests through their tribal councils to the offices of local magistrates whenever they wanted to utilise money in these accounts. When the homelands were dismantled in 1994, more than 800 D-accounts were transferred to the office of the Premier of the North West province. Since 1994, these accounts, worth hundreds of millions of Rands, have never been audited and millions have gone missing.

Recommendation 5.7

Benefit

- Where mining has already taken place on communal land and the directly affected community has not benefited, the MPRDA must provide for compensation for individuals, households and communities to be calculated to put affected persons in the position that they would have been in had the mining not occurred.
- The MPRDA must be amended to ensure that both revenues from mining-related activities and opportunities generated by such mining activity are shared in an equitable and transparent manner among people whose land rights are directly affected.
- The MPRDA must be amended to include clear and binding financial and administrative protocols for entities that purport to represent community interests and companies that do business with them, including accountability mechanisms that align with customary law principles of transparency and accountability.
- The MPRDA must be amended to provide for a Charter to protect and promote customary and artisanal small-scale miners, and set a framework for the participation of communities in the sustainable and equitable exploitation of the resources of their communal land.
- Section 47 (Minister's Power to Suspend or Cancel Rights, Permits or Permissions) must be amended to expressly provide for the suspension or cancellation of mining rights where a company has significantly failed to meet its Social and Labour Plan and B-BBEE commitments. (This power has never been used, so must be made explicit to put the matter beyond doubt.)



- The MPRDA must also be amended to establish a mechanism to independently investigate and advise on community grievances in an efficient, democratic and transparent fashion.

Dispossession

- Section 10 of the MPRDA must be amended to expressly require that directly affected communities must be invited to negotiate and seek agreement on any mining application.
- The MPRDA must be amended to expressly require compliance with IPILRA as a condition for the grant of a mining-related right. (IPILRA rights are routinely ignored so compliance with IPILRA before a mining right is granted must be made explicit.)
- The MPRDA must be amended to specify the minimum information to be shared with community members, including full mining right applications and environmental impact assessments, prior to any decision to accept mining under IPILRA.
- The MPRDA must be amended to provide that a mineral-right applicant must, at its own expense, invite the community to appoint an independent expert(s) of their own choosing to assist in the IPILRA negotiation in communal areas.
- The MPRDA must be amended to provide that, where more than one community is affected, each shall have the right to independently decide whether to grant or refuse its consent.

- Where mining requires the relocation of specific community members' homes, insert a requirement that the majority of those to be relocated must consent to the mining activity.
- The MPRDA must be amended to provide that no person or community may be relocated to enable mining unless such relocation is unavoidable. Where relocation is unavoidable and consent is granted, remedies and compensation must be clearly defined.
- Alternative land must be the default compensation and people must be offered living conditions equal to, or better than, their conditions prior to the relocation.
- Cash compensation must be based not on market value, but on real value to affected people, taking into account the effective value of resources such as ploughing and grazing land, water access and cultural value.
- Amend Section 5A (Prohibition relating to illegal acts) to make it illegal to mine without community consent under customary law and in compliance with IPILRA.
- Should mining commence or a right be granted without the consent of the community, that community shall have the right to set aside the licence and to be paid compensation for the full damages suffered, or to consent to the mining retrospectively through the process to be set out in the MPRDA – including the negotiation of compensation, and to recover all compensation that would have been owed to it had the community's consent been received from the outset.



- Communities to have a right to revoke their consent should mining activities be conducted in a manner contrary to the MPRDA and its regulations, with communities then entitled to compensation for the full damages suffered by all mining activities.

Conclusion

In conclusion, the Panel found that the enduring quality of spatial inequality is not simply a legacy of apartheid geography; it reflects enduringly unequal power relations between those who benefited from apartheid and those who were marginalised by racially discriminatory laws and policies. This applies across both urban and rural areas. Early laws and policies that sought to break down the barriers that exclude and marginalise the poor, such as the RDP, appear to have been replaced by laws and policies that entrench apartheid categories and divisions. It is of great concern to the Panel that specific laws, and the way in which they are interpreted and implemented, re-enforce unequal power relations between the more powerful and the least powerful in society. This contradicts the essence of the Preamble to the Constitution.

CHAPTER 6

CHAPTER 6: IMPLEMENTATION OF LEGISLATION





Introduction

The Panel has been presented with extensive evidence of the challenges that government faces in implementing policy and giving effect to legislation. Implementation has emerged as a cross-cutting theme across the various topics considered by the Panel. This chapter will not rehearse those issues again but serves as a synthesis that covers the key themes that emerged from the Panel's work with regards to implementation. However, for illustrative purposes, some examples of challenges to implementation will be provided. In the same vein, the recommendations made to improve the implementation of a vast array of laws will not be presented here again. This chapter will focus on the most important and overarching recommendations to sharpen Parliament's role in guiding execution.

Though the chapter attempts to deal with each of the various themes that make up the topic of implementation in turn, the Panel acknowledges that these are often interrelated. To give an example: if one takes the backlog in the issuance of title deeds for RDP housing beneficiaries as an example, the causes range from the administrative burden of complying with prescribed processes, government capacity and access to technical expertise and cost.

The Panel recognises that implementation of legislation involves a wide set of actors. The executive branch of government is at the forefront of the implementation of policy and legislation. Parliament shapes implementation through its various functions, according to Sections 55, 59, 68 and 72 of the Constitution (Constitution, 1996). In the first instance, it is the institution responsible for producing (or rejecting) legislation. It is also responsible for providing oversight over the executive and all organs of state, and wields incomparable convening power as a forum for deliberation.

Gaps in policy-making and legislation

There are areas in which policy-making proceeds without a clear governing framework that supplies the goals and objectives that law and policy should pursue. For example, in land reform, the Panel found that there is no overarching framework that provides a rationale and logic to guide the development and implementation of new land reform laws and policies. A white paper produced

in 1997 (White Paper on South African Land Policy) has become outdated. Land reform is also undermined by the absence of a law on land redistribution to give effect to Section 25(5) of the Constitution.

Evidence presented to the High-Level Panel in commissioned research reports, roundtables and public hearings over the past year has demonstrated profound problems in the conception and implementation of the land reform programme. Redistribution has been slow when assessed against both its targets and society's expectations, highly uneven in spatial terms, and benefited women much less than men. Targeting of the poor and vulnerable has not been effective and has seen slippage over time, so that many recent beneficiaries are the relatively well-off or well-connected rather than the poor. The livelihoods of most beneficiaries have not been improved greatly. Post-transfer support has generally been inadequate, in part because of poor co-ordination among government departments and between levels of government. Urban land reform has been neglected, despite its potential to underpin effective human settlement programmes. The budget for land acquisition and transfer has declined over time, in part perhaps because of the lack of an overall strategic framework within which land redistribution can be assessed. In this instance, the Panel recommends that new legislation be passed to create a framework that will ensure that existing and new laws are consistent with constitutional obligations and give effect to society's desire for justice and transformation (see Chapter 3).

Another illustration can be found in the realm of education. The provision of education is a far cry from the fragmented and discriminatory system that characterised apartheid. However, outcomes remain weak, as evidenced by international and regional assessments presented in Chapter 2. A key feature missing from the system is a credible path for vocational education. Part of this depends on certification before the all-determinative Grade 12 certificate. Technical and vocational education colleges are supposed to admit learners who have completed Grade 9, but due to lack of certification at this stage, end up taking learners after Grade 12. Yet a Grade 9 qualification has been on the agenda as far back as the Education White Paper 1 of 1995 and was included as a recommendation in a Ministerial Committee review in 2014.

The post-democratic order inherited an economy that relegated the majority of the population



to unskilled labour, whereas local economic development and global pressures demand skills that can support a more diversified, knowledge-based economy. Skills development is crucial in providing post-academic training to meet the demands of the economy and society, and also to avoid relegating those who have not received adequate basic education to becoming another 'lost generation'. Nonetheless, skills development efforts have suffered from lack of a clear policy direction, as discussed in Chapter 2. In this case, policy does not include a clear definition of the target beneficiaries of skills development policy and law. Identification of target groups would then shape the design of policy to meet the needs of those groups to enable them to contribute to the economy and society. The resultant policy priorities would also be reflected in the budget allocated to programmes. However, the lack of specification of clear goals and targets limits the impact that a skills development policy could make to reversing the triple challenge of poverty, inequality and unemployment.

The Panel believes that Parliament has a comparative advantage over the executive in initiating legislation that deals with cross-cutting issues, especially given the tendency for government to work in silos. In discharging its oversight role, Parliament should also assist the executive in identifying gaps and/or conflicts in legislation and policy-making.

Quality of implementation

The Panel received many submissions that revealed inadequacies in the quality of implementation, for example:

- Submissions were received on the inadequacies of implementation (and design) of aspects of South Africa's social safety net. These cover failures in the delivery of RDP housing, affordable public transport, quality health care and education services. These were said to be insufficiently generous, of an inadequate standard of delivery or that they did not reach every eligible person.
- Quality issues were at the forefront of public and expert submissions made to the Panel. An underfunded public health system is plagued by overcrowding, which tends to affect

the quality of services provided in terms of availability of human, financial, equipment and facility resources and medicines. In Chapter 2, we point to the paucity of information on the quality of health care and the reliance on anecdotal evidence and media coverage of what may be considered remarkable cases. This can be contrasted with survey information which, for various reasons, does not provide a good indicator of quality. Respondents often report very high levels of satisfaction as patients, which may reflect gratitude or the lack of comparator experiences. There is sufficient evidence to point to concerns about interpersonal service quality, such as respectful treatment and staff morale issues, and structural quality of care as highlighted in terms of drug stock-outs and other service availability challenges.

- Selective implementation of legislation that would help to level spatial inequities, if applied properly (Government Immovable Asset Management Act 19 of 2007, Giama) (Chapter 5).
- ‘Total system failure’ in the tenure reform aspect of land reform (see Chapter 3).
- The poor operation of the Equality Review Committee (ERC) underpinning the implementation of the *Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (Chapter 4).
- Despite many recommendations over time to improve the implementation of the Domestic Violence Act, the prevalence of domestic violence is extremely and unacceptably high. As detailed in Chapter 4, challenges with implementation include outright non-compliance of SAPS and DOJ officials with the provisions of the Act. Victims of domestic violence are subjected to negative attitudes. This non-compliance persists despite many training interventions. There is no accountability for not complying with legislation and delivering poor service. Since 2013, the National Police Commissioner has failed to provide reports to Parliament, as required by law. Not much progress has been made on the Integrated Programme (IPA) addressing Violence Against Women and Children.

It is clear from the experience of law-making in the first two decades of the post-apartheid era that

the best legislation does not always translate into the best delivery of goods and services. The next generation of legislation should be inspired by practice, within an iterative process of monitoring and evaluation.

The successful implementation of legislation is hindered by fragmentation in government, where different departments can be observed to be working in silos. The lack of co-ordination across departments and spheres of government results in contradictory policies and actions and poor implementation. Spatial inequality remains entrenched partly because of fragmentation. This can be seen in relation to social housing, where institutions are polarised; and land, financial and social housing legislation contradict one another on planning and utilisation of resources needed for social housing delivery. As argued in Chapter 4, successful implementation of policy in this area depends on legislation integrating planning, and the adequate supply of land and finance.

Recommendation 6.1

Parliament, working jointly with the Executive, should consider commissioning research that informs a comprehensive audit of the implementation challenges arising from several key laws designed to promote the progressive realisation of socioeconomic rights, and to reach conclusions on remedial actions

In Chapter 4, the Panel recommends that Parliament should strengthen ‘Chapter 9 institutions’ so that they can play a central role in the implementation of legislation, policies and programmes that protect human rights.

Recommendation 6.2 (see also 4.4)

Parliament should ensure that the Chapter 9 institutions play a central role in the implementation of legislation, policies and programmes that protect the rights of individuals, groups and vulnerable individuals by:

- i. Urgently building on the Asmal Report with the objective of strengthening and ensuring the effectiveness and reachability of Chapter 9 institutions;
- ii. Introducing additional regulating mechanisms for these institutions to ensure their independence;
- iii. Ensuring the timeous appointment of Commissioners of the Chapter 9 institutions;
- iv. Where needed, strengthening the powers of the Chapter 9 institutions to ensure that their requests for co-operation and recommendations are taken seriously by departments and Parliament, and enforceability is ensured; and
- v. Providing Chapter 9 institutions with appropriate resources.

Funding and capacity

Funding does not always reflect core constitutional imperatives or established policy. In land reform, a reflection on funding decisions suggests that officials have neglected to fund laws related to security of tenure (Extension of Security of Tenure Act and the Labour Tenants Act). They have also diverted funds from established policy to new initiatives (such as agri-parks and the 50/50 policy).

The extent to which government officials understand their mandate under various pieces of legislation determines their prospects of success in implementation. The Panel received evidence



of officials' lack of understanding of core elements of law and policy. Some illustrative examples below:

- a) Tenure security – government officials across a broad range of spheres (including SAPS members, DRDLR and municipal officials) do not fully understand legislation protecting farm dwellers.
- b) Equality courts – the Promotion of Equality and Prevention of Unfair Discrimination Act is hamstrung by the attitude of some presiding officers towards adjudicating equality court cases, poor training of magistrates and clerks, understaffing, insufficient infrastructure and lack of promotional materials.
- c) Domestic violence – the scourge of domestic violence continues, as discussed in the section; there is the quality of implementation; furthermore, inadequate resources are dedicated to the implementation of legislation, including there being insufficient funds to provide shelters for victims of domestic violence.

Complex procedures and concepts that are beyond the capability of institutions and intended beneficiaries lead to poor implementation and unintended consequences. For instance, the Social Assistance Act includes a means test whose administration burdens poor beneficiaries, especially those who are illiterate or not proficient in English, distorts selection of beneficiaries and creates opportunities for fraud and corruption.

In the skills development arena, the number of institutions that play a role in determining quality undercuts that aim. These include the South African Qualifications Authority (SAQA); the Council on Higher Education/Higher Education Quality Committee (CHE/HEQC); Umalusi; the Quality Council for Trades and Occupations (QCTO); 21 Sector Education and Training Authorities (SETAs); 93 professional bodies; the National Artisan Moderation Body (NAMB) and South African Institute for Vocational and Continuing Education and Training (SAIVCET). This problem extends to the number of bodies with planning, monitoring and/or advisory responsibility: for example, the National Skills Authority (NSA), Human Resource Development Council (HRDC), along with SAQA, CHE/HEQC, SETAs, skills development forums and so forth.

Government agencies have also struggled to develop the internal capacity to deliver their core services. The South African Social Security Agency is a case in point. Its reliance on private sector companies to distribute social grants has been the subject of much controversy related to alleged corruption in the tender process. However, this also speaks to the agency's failure to develop its business processes and to enhance the capacity of its staff.

There is a need, during the legislative cycle, to assess whether there is adequate capacity to implement proposed legislation. Laws should also be crafted with clear action steps, and with provision made for monitoring and evaluation. Legislation needs to be linked to targets and measures. Socioeconomic impact assessments have to be strictly enforced.

The capacity challenges partly have to do with the quality and the stability of the public service. The time has come to professionalise the public service. This will aid in halting churn in senior levels of the public service.

Recommendation 6.3

Parliament should lead the discussion on how to professionalise the public service.

As part of the next generation of reforms to accelerate fundamental change, trust in leaders and institutions needs to be restored. As discussed in Chapter 4, lack of trust is often informed by inappropriate appointments to senior positions in the state, which undermines trust in those individuals and the institutions that 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 in ensuring that Executives are more accountable to electorates.

This innovation in appointment processes would be in accordance with the principles of participatory democracy recognised in the Public Participation Framework (PPF) adopted by the South African Legislative Sector (2013). The PPF recognises (SALS, 2013: 14) that “[p]romoting public participation in the legislatures, according to [their] Constitutional mandate, is not only important to promote a people-centred democracy, it is also critical because it strengthens the functioning of the legislatures. Effective public participation can improve the capacity of legislatures to fulfil their role to build ‘a capable, accountable and responsive state that works effectively for its citizens’” (National Planning Commission, Vision 2030). 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).

Recommendation 6.4 (see also 4.31)

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

Corruption

The Panel has been presented with evidence of how corruption undermines the implementation of policy and law. Corruption seeps into all facets of public and private life and distorts appointments and the allocation of resources and benefits, as many submissions to the Panel indicate (see Chapter 4). In housing, corruption has led to poor quality structures being built and has also bedevilled the allocation of RDP houses. In some mining communities, the proceeds of mining activity destined

for community development are diverted to local elites. In the public service, many civil servants are found to have undisclosed business interests that present a conflict of interest with their public duties. At local government level, the Auditor-General, as cited in Chapter 4, has found a significant increase in irregular expenditure. As the Panel was in the process of concluding its work, evidence of the extent of ‘state capture’ and the diversion of resources from important state-owned enterprises began to emerge.

To combat corruption, the Panel makes a recommendation with regards to key appointments to the relevant institutions in the criminal justice system, including the National Prosecuting Authority, the South African Police Service and the Hawks:

Recommendation 6.5 (see also 4.21)

Parliament should consider opening a 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 and accountability.

The role of Parliament

Challenges with the implementation of legislation and policy point to the need to strengthen the role of Parliament as a representative of the public. Parliament has developed a model to fulfil its oversight role, and there are various capacity-building initiatives, including those with tertiary institutions, to strengthen the capacity of its members. The success of these initiatives will be demonstrated by its ability to detect problematic aspects of legislation and to resolve tensions, conflicts or lack of coherence between different laws.

Success will also be demonstrated by Parliament’s ability to initiate legislation. As matters stand,



Parliament remains dependent on the Executive, which operates in silos, to draft law. This manifests in a lack of an integrated approach to address issues that involve multiple departments. Parliament has a particular comparative advantage in the development of intersectoral and framework laws.

In discharging its oversight mandate, Parliament also needs to ensure compliance with legislation and implementation of the programmes arising from the relevant legislation. This oversight role includes the introduction, or strict enforcement, of penalties for non-compliance.

Parliament must deepen its engagement with the monitoring and evaluation of legislation. Progressive laws and policies languish due to inadequate monitoring and evaluation. The Commission for Gender Equality reports that women have made very limited progress in breaking the glass ceiling in the private sector. This can be traced to lack of effective monitoring of compliance with laws and lack of application of sanctions where the law is flouted.

Monitoring and evaluation cannot proceed without adequate information. It is difficult for society to hold the police to account for the prosecution of domestic violence when SAPS does not report a category of crime specifically capturing incidents of domestic violence. There is also poor record keeping and poor completion of forms related to the Domestic Violence Act. Similarly, for the Sexual Offences Act, there is a lack of gender-disaggregated statistics. Reports have not been produced annually, as required by law, and are of poor quality.

The institutional reforms that will allow Parliament to play a more activist role need to adhere to the following principles:

- Be aligned with the objectives of the developmental state that South Africa aspires to become;
- Lead to a deepening of interaction between Parliament and civil society;
- Increase the capacity of Parliament;
- Enable Parliament to provide annual reports on its activities that will be accessible to the public;

Given the depth of the socioeconomic challenges that remain, and the historical lines on which they fall, Parliament should monitor the progressive realisation of socioeconomic rights with the emphasis placed on designated groups – black people in general, women and people with disabilities – as well as the poor of all race groups, as discussed in Chapter 4.

Parliament should also prioritise its legislative programme and deliver accordingly. The time it takes between the first submission of legislation to Parliament and its passage is too long. Prioritisation would improve the efficiency of the legislative cycle. Parliament should encourage the Executive to phase in new legislation throughout the year, to ensure quality and due process, including conducting sufficient public consultations. Parliament is mandated by the Constitution to facilitate public participation in lawmaking. To strengthen this role, we recommend:

Recommendation 6.6 (see also 4.24)

Parliament should consider identifying and reviewing all legislation that includes a public participation component, including those that relate to Parliament’s 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.

The National Development Plan

The National Development Plan (NDP) is a 20-year project to fundamentally turn the fortunes of our country around by 2030, across all key sectors, with a targeted focus on the triple challenges of poverty, unemployment and equality. It is informed by a long-term perspective approach to



development and, as such, its implementation over time will require more than the normal five-year term of a government administration and must, by implication, involve all political parties and the entire South African society.

All political parties have, in one way or another, expressed support for the NDP; and, for its part, Parliament has held a debate and a number of activities to engage with the plan. All these notwithstanding, the NDP remains largely the programme of the Executive which enjoys the reasonable endorsement of the Legislative Sector. It is, however, the considered view of the Panel – a view that is informed by case studies elsewhere in the world – that Parliament needs to do more to own the NDP and ensure its ownership by the broader society.

Recommendation 6.7

Parliament may consider passing legislation on the NDP to elevate its status into law in order to streamline and deepen its implementation. Such legislation may define the architecture for the implementation of the NDP across the country through the three tiers of our state, but may enforce compliance by state organs with NDP targets in their planning and budgeting. Such legislation will also help Parliament in its oversight work, in holding the Executive accountable.

The NDP will be on a stronger footing when it is anchored in national consensus, with significant backing from key constituencies. The legislative process towards turning the NDP into law will naturally be accompanied by a public participation component which should help the country reflect on the status of the implementation of the NDP and associated challenges.

The broad objective of the NDP is to build a capable, developmental state. This task cannot be left to the Executive alone. Nor can Parliament limit its role simply to endorsement and political applauding of the Executive. Parliament should be bolder and deploy one of its core functions – lawmaking – to help our country build and strengthen the capability of its state institutions towards a developmental end.

The electoral system

The interim Constitution (Act 200 of 1993) provided for the members of the National Assembly and the legislatures of the nine new provinces to be elected in the first democratic elections in 1994 by universal adult franchise in accordance with a system of proportional representation. With minor modifications, the 1994 electoral system was carried over to the 1999 national and provincial elections. The provisions of the final Constitution relating to an electoral system did not extend beyond the 1999 elections. The Constitution required that an electoral system be introduced through the enactment of national legislation. In 1998, an Electoral Act (No. 73 of 1998) was passed by Parliament and subsequently amended only once before 2003 following the passage of the Local Government: Municipal Electoral Act (No. 27 of 2000). It retained the system of proportional representation for elections for the National Assembly and the legislatures of the nine provinces.

On 20 March 2002, Cabinet resolved that an Electoral Task Team (ETT) should be established to ‘draft the new electoral legislation required by the Constitution’. The ETT, led by Dr F Van Zyl Slabbert, submitted a majority and minority view on reform of the electoral system. The majority felt that electoral reform was necessary to ensure ‘multi-member constituencies together electing 300 members of the National Assembly and a compensatory closed national list providing 100 members (giving a total of 400 members)’.

In terms of this proposal, there would be 69 multi-member constituencies. The number of representatives to be elected in a constituency would vary, depending on the number of voters, from three to seven for a national election, and 300 of the 400 members of the National Assembly would be elected, initially, from closed constituency lists in this way. The remaining 100 representatives would be allocated from closed national lists in order to restore overall proportionality.



The primary argument in support of this proposal is that it is the best electoral model to ensure individual accountability. One of the major challenges with the current electoral system is the weakness of the PR system in holding politicians to account to the electorate. Members of Parliament are appointed not directly by voters, but rather by their party, based on candidate lists submitted to the Electoral Commission ahead of the elections. This makes them beholden to the party and its leadership rather than voters and places party politics and loyalties ahead of effectiveness and delivery. By contrast, a constituency system will hold politicians more directly accountable to the voters and will better ensure that election promises are kept for fear of being voted out. Such a system will serve to limit the power of individual party leaders and encourage MPs to vote in accordance with the needs and desires of their constituencies rather than only following party lines (Moepya, 2015).

The majority of members of the ETT argued that the only way to increase individual accountability significantly would be to create the possibility for a candidate to be rejected without concomitant rejection of a party. This could best be achieved by using open rather than closed party lists, with voters influencing the order of candidates. The majority argued that open lists would not only improve the accountability of individual candidates dramatically, but would also substantially increase voter participation in the democratic process.

With regard to the latter, most members of the ETT felt that the current system does not lend itself to participation by the electorate in the selection of candidates. This is an inherent weakness in all systems using closed candidate lists, which include both the current system and (for the time being) the 69-constituency option. The difference is, however, that the current system does not lend itself to ever evolving into having open lists where the electorate may rank candidates according to preference, since the lists simply contain too many names for that to be practical. The 69-constituency option is, however, eminently suited to its candidate lists (three to seven names) becoming open lists when the time is ripe.

In addition, the proportional representation system distances Parliament from the people. Although constituency offices do exist, most people are unaware of their constituency representatives or of the existence of such offices. A constituency-based system would bridge this gap by ensuring that

people directly elect the representatives they want in a multi-member constituency-based system. Such a system would also enable citizens to exercise their constitutionally guaranteed right to stand for public office independently at a national and provincial level. This is not possible under the current system (Solik, 2014).

Recommendation 6.8

The Panel recommends that Parliament should amend the Electoral Act to provide for an electoral system that makes Members of Parliament accountable to defined constituencies on a proportional representation and constituency system for national elections.

Conclusion

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 most important have been detailed in this chapter. 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 this chapter, the Panel has made 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.

CHAPTER 7

CHAPTER 7: THE WAY FORWARD





Introduction

This chapter presents some guidance on the implementation of the recommendations made throughout this report (and summarised in the executive summary). In a presentation to the Speakers' Forum in April 2017 to update the legislative sector on the Panel's progress, the Forum directed that the Panel's mandate should include the development of a plan to guide the implementation of the recommendations made in this report. This chapter highlights those recommendations that the Panel would like Parliament to prioritise, and also some of those that are urgent.

The Panel has produced a wide range of recommendations for Parliament. The recommendations fall into three categories. First are recommendations to accelerate fundamental change by resetting the country's development trajectory and breaking vicious cycles inherited from the past. Then there are recommendations to strengthen the progressive realisation of socioeconomic rights. Finally, the Panel recommends urgent interventions to minimise the unintended or harmful consequences of legislation. This arises partly from the timing of the unfolding legislative programme, especially insofar as the Panel makes recommendations that impact on pending Bills and policies, such as the Traditional and Khoi-San Leadership Bill and the National Health Insurance policy process.

Many of the problems confronting South Africa are deeply entrenched and require long-term solutions that need more time than the panel had at its disposal. Moreover, there are intrinsic limits to what a panel comprised of 'experts' can diagnose and purport to provide solutions to. Some issues require the dedicated effort of Members of Parliament, government officials and civil society over many years to craft, implement, assess and adopt policies and laws to bring about meaningful change. Of crucial significance is the role of Parliament in assessing the impact of the laws it passes, and in holding the Executive to account. In some instances, laws need to be amended to ensure regular reporting back to Parliament against goals set and outcomes delivered. It is only through active oversight of implementation that Parliament will be in a position to amend and adopt laws in order to bring about the progressive realisation of rights.

The Panel learned, from members of the public, experts and civil society that law and policy is bedevilled by a fragmented approach to complex problems. This was a constant theme throughout

the Panel's work: the state works in silos in the face of multi-faceted challenges that require an integrated and cross-disciplinary approach. This observation inspires us to urge Parliament to process this report by adopting an integrated approach to avoid perpetuating fragmentation. The Panel recommends that Parliament set up a Special Task Team that cuts across portfolios to process this report.

Though the Panel is a special purpose structure with a limited lifespan, its members are available to assist Parliament in bringing its findings and recommendations into operation.

The Panel engaged the public extensively, through public hearings, calls for submission and roundtables, in the preparation of this report. To close this process of engagement, the Panel believes that it is important that the report be taken back to the people, possibly through provincial channels.

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 the 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. However, 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 creation of a National Health Insurance Scheme 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 an 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 measures 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. We identify 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.
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 one of several Bills relating to traditional leadership for the concurrence of the National Council of Provinces on 22 August 2017. We call for an urgent review of these Bills (including 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 and those living elsewhere in South Africa. Parliament should use its powers to introduce legislation that limits the powers of traditional leaders and places all South Africans under municipal councils so that every citizen can enjoy the same rights under the Constitution.



Effective oversight by Parliament to improve legislation and implementation

Broaden the interpretation of oversight practised by Parliament:

1. A recurrent theme emerging from research, public voices and expert roundtables 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 of (or, where lacking, introduces) 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 overdependent 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 to developing legal drafting capacity in Parliament.
4. Strengthen the accountability of Parliament to the public, 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 on a proportional representation and constituency system for national elections.

The sections below elaborate on the recommendations judged by the Panel to be of high priority and/or urgent.

The way forward: Poverty, unemployment and the equitable distribution of wealth

To break the back of poverty, achieve a more equitable distribution of wealth and incomes and to spur jobs-rich growth will require Parliament to guide society to focus on fundamental issues that underpin outcomes in the economy and in society.

This process entails filling the deficits created by apartheid and setting people and communities up for success. The Panel thus centres the development of human capabilities at the core of its recommendations. Parliament needs to oversee reform measures in health care and education to radically improve access to quality services. The Panel also makes a package of recommendations to change the structure of the economy so as to encourage labour absorptive economy growth. These include getting out of the way of small business, stimulating labour-intensive sectors of the economy such as agriculture and tourism, and dealing decisively with spatial inequality.

Below, the Panel highlights the recommendations that it considers of high priority. As discussed in Chapter 2, the best way to reduce poverty is to create jobs for as many people as possible. Various theories have been advanced to explain the low level of labour absorption in the South African economy. To steer the economy towards a jobs-rich economic path, the Panel makes the recommendations below.



Recommendation 2.1

The Panel recommends that Parliament review 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.

Recommendation 2.2

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.

Recommendation 2.3

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.

Recommendation 2.4

Parliament should ensure that the next budget appropriations include resources for supporting informal traders and upgrade their trading places such as creating low-cost kiosks, cubicles and stalls with suitable infrastructure and storage space.

Recommendation 2.5

Parliament should support legislative efforts to promote the advancement of patient capital to new or small businesses, with an emphasis on equity and royalty-based financing schemes, in addition to loans.

Recommendation 2.6

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.



Recommendations on access to quality education

Recommendation 2.14

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 since 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 curriculum 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. 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 should be provided to quality and standardised early childhood development programmes. This will require expansion of support to Early Childhood Development (ECD), with a 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 that 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 of early childhood development services by denying 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 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 on time at school, and so on. At the same time, the NDP and SA 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 returns on investments 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 in as far 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 eventually will complete Matric and thus enjoy high returns to 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.



Recommendations on access to quality health care

Access to quality health care is an important element of the development of human capabilities. The country labours under a high burden of disease and poor health outcomes. Improving access to quality health care will not only extend life expectancy, but will also have a positive impact on economic productivity.

Recommendation 2.16

Parliament should express its support for the introduction of a system of universal health care underpinned by the principles articulated below:

- i. *Right to access health care*: The NHI will ensure access to health care as enshrined in the Bill of Rights, Section 27 of the Constitution.
- ii. *Social solidarity*: The NHI will provide financial risk pooling to enable cross-subsidisation between the young and old, rich and poor as well as the healthy and the sick.
- iii. *Equity*: The NHI will ensure a fair and just health care system for all; those with the greatest health needs will be provided with timely access to health services.
- iv. *Healthcare as a public good*: Health care 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*: Health care resources will be allocated and utilised in a manner that optimises value for money that combines allocative and productive efficiency by

maximising health outcomes 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 health care programmes for the entire population.

vii. *Effectiveness*: The health care interventions covered under the NHI will result in desired and expected outcomes in everyday settings. The NHI will ensure that the health system meets acceptable standards of quality and achieves positive health outcomes.

viii. *Appropriateness*. Health care services will be delivered at appropriate levels of care through innovative service delivery models and will be tailored to local needs.

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.

To monitor use of the health care system, both in the public and 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 datasets, the facility-based District Health Information System, the BAS public financial management system, PERSAL human resource system and a range of household survey datasets, 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 records 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 'PHCre-engineering' and the 'Ideal Clinic' programmes to increase access to health care. However, there are aspects of these initiatives 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.

Recommendation 2.21

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.

Recommendations on skills development

Recommendation 2.12

The Panel recommends that Parliament guides the overhaul of the skills development policy in line with the principles outlined below.¹ Skills development must respond to two divergent dynamics: participating in a globally competitive environment that requires a high skills base including more skilled artisans and a local context that creates low-wage jobs to absorb the large numbers who are unemployed or in

¹ As mentioned earlier, this section draws on research commissioned for the panel, notably here Reddy *et al.* (2017).



vulnerable jobs. A greater impact on poverty, inequality and unemployment, which mostly affects persons who have not yet achieved an NQF level 4 qualification, can be made stronger by focusing on quality lower NQF level qualifications (1 – 4), both as goals in themselves through employment in as well as a pathway into high skills qualifications. Skills development must be focused not only on employability but result in a qualitative change in the lives of South Africans, fostering holistic human development, capabilities for sustainable livelihoods, and self-employment (and entrepreneurship).

The basic education sector is currently designed to channel learners towards a skilled (academic) career path. However, the results achieved indicate that this is an unrealistic expectation for most learners given current outcomes in basic education. To align the basic education sector to the economy's needs the following should be prioritised:

- Improving the quality of the senior certificate to adequately prepare learners on an academic career path for entry into higher education and professional and managerial careers. This will require a radical improvement of the quality of teaching and improving access of learners to online learning resources.
- Creating a track that would channel the majority of learners to vocational educational career paths. In countries with low youth unemployment (Germany, Switzerland and the Netherlands), around 50% of learners pursue a vocational track.

The reform of the Technical Vocational Education and Training (TVET) sector continued and resulted in a growing enrolment in TVET colleges, which more than doubled in three years, from 358 000 in 2010 to 794 000 in 2013 (Engineering News, 2014). However, the current design of TVET qualifications need to be aligned with employer needs and adjusted to improve employability on completion of studies by restructuring the practical component of the qualification in line with the models used in countries

with low youth unemployment. To achieve this goal, the following should be prioritised:

- Reducing the classroom blocks to allow more on-the-job experience from the first year of study, i.e. one-day classroom training linked to four days' apprenticeship training in a workplace.
- Adjusting the current B-BBEE codes to create incentives for companies to provide the apprenticeship (workplace-based learning) component in pursuit of the skills development expenditure targets. Systematic exposure to a potential employer over a number of years has been shown to increase the potential of employment of completion of vocational studies.
- Reviewing qualification content with employer/industry bodies to ensure that the curricula meet industry requirements. There is a general perception among employers that curricula are outdated and often include subjects with little practical application.

The higher education sector needs to be incentivised to produce adequate number of graduates to meet the economy's requirements. The approaches used internationally include establishing new government-funded institutions, encouraging the private sector to establish new institutions or a combination of both. Brazil has followed a combination of all these options and has increased access to tertiary education to 30% of the population with a third of students studying through the private sector (Redden, 2015).

To achieve this goal, the following needs to be prioritised:

- Reviewing qualifications to ensure they meet the requirements of future employers;
- Readjusting the subsidy system to prioritise scarce skill qualifications;



- Establishing higher academic institutions with a mandate on graduate output, not just the current mandate on teaching and research – this will improve throughput and increase the rate of students entering tertiary education;
- Improving retention during studies. According to the Council for Higher Education (CHE), only about one in four students in contact institutions graduate in regulation time; only 35% of the total intake, and 48% of contact students, graduate within five years, and it is estimated that some 55% of the intake will never graduate (Council on Higher Education, 2013). Unlike in the UK where universities have to keep attrition rates down to less than 13% or face financial penalties (Gaynor et al., 2006), there is no penalty system in South Africa linked to attrition.

Setting policy goals that explicitly aim to reduce poverty, inequality and unemployment in skills legislation

Policy should include in its definition of target groups specifically those that have been and continue to be marginalised from the system or are struggling to access the formal system: youth not in education, employment or training; poor, black rural and township communities, rural black women, and so forth, which can then be more expressly targeted as vulnerable groups, and targeted policy mechanisms can be designed to reach them and provide them specifically with access to skills development. In addition, the appropriation of the budget by parliament should explicitly target these groups and ensure adequate budgetary allocations are set.

As these are not often explicitly set out in legislation, this has led to poorly identified target groups. In addition to explicitly stating the policy intent and key target groups, legislation must include an indication of resources and the proportion of resources that will be allocated to these groups. Parliament has the competency to allocate resources, which it hardly exercises. These systemic silences limit the contribution that skills

development legislation and policy can make towards addressing economic, social and developmental concerns. Poor recognition of explicit policy goals at legislative and policy level translates into poor implementation of general policy intent.

Shifting the policy gaze from regulation to provision and outcomes

It is absolutely critical for addressing the triple challenge that post-school education and training (PSET) legislation shifts from its focus on governance, advising, planning, funding, quality assurance and standard setting towards actual provision of skills. The sprawl of regulatory institutions may have led to the slow pace of change. The overregulation and bureaucratisation of the system may be impeding rather than facilitating skills delivery.

Part of the reason for failure to implement is excessive complexity in the skills development system overall, which must be simplified and efforts made to rationalise regulatory institutions. Moreover, the complexity and lack of flexibility creates severe difficulties and disincentives for key stakeholders (such as SMMEs) to participate in skills development (e.g. WPBL provision), and in communicating the opportunities in the PSET system to the wider population, and for specific marginalised target groups being able to understand, access and succeed in PSET.

The sheer number of bodies that have some role in relation to quality, for example, has reached unsustainable proportions (they include, inter alia, the South African Qualifications Authority (SAQA); Council on Higher Education/Higher Education Quality Committee (CHE/HEQC); Umalusi; the Quality Council for Trades and Occupation (QCTO); 21 Sector Education and Training Authorities (SETAs); 93 professional bodies; National Artisan Moderation Body (NAMB); South African Institute for Vocational Training and Continuing Education and Training (SAIVCET), and so forth). Similarly, the number of bodies with planning, monitoring and/or advisory responsibility is excessive. They



include, for example, the National Skills Authority (NSA), Human Resource Development Council (HRDC), along with SAQA, CHE/HEQC, SETAs, skills development forums and so forth. There is a need to consolidate and rationalise this system and, for example, centralise the planning of human resource development at a level where it can ensure policy and implementation alignment across government departments.

Shifting the policy gaze to emphasise both higher education and continuing education and training

The higher education system has expanded to a level where it is now ‘massified’ and provides learning opportunities for close to 20% of the 20 – 24-year age cohort. Conversely, the vast majority of the same age cohort (80%) does not successfully participate in higher education, and the number of youth in general who are not in employment, education and training (NEET) is huge and growing. We thus recommend greater emphasis on occupations, trades and WPBL especially at FET and lower HET levels, alongside general/academic and professional HE.

What is critical for this recommendation to be successful is a simultaneous process to ensure that TVET institutions and the suite of occupational qualifications and WPBL provisions are attractive and have parity of esteem in society. Critical pre-requisites are improved throughput/success rates and achieving closer links with workplaces (see recommendation related to WPBL). The value of technical, vocational and occupational qualifications should be communicated better at basic education level (pre-Grade 9).

Embracing supplementation from abroad as an interim solution

- South Africa competes for skilled graduates in a global market and has lost substantial numbers of graduates to the international market. While South Africa has specific pull factors (enablers) that give it a competitive edge over wealthier nations –

such as work experience and lifestyle, there are significant barriers to entry to foreign skills. Most countries are (1) streamlining their application processes, often putting them online, (2) employing independent recruitment organisations to source and place required skills, and (3) continually amending policies to open the doors to potential applicants. Supplementation from abroad is, therefore, a viable and needed strategy, and current restrictive policies that place limits on qualified foreign professionals do not serve the needs of the country (Segatti, 2014). There is an urgent need to lower barriers to entry and to simplify bureaucratic processes. Closely monitoring the labour market needs linked to time-limited work permits for foreign qualified professionals will stimulate the economy in the short term while, in the long term, ensure that employment opportunities for locally qualified professionals are not hampered.

The way forward: Land reform - restitution, redistribution and security of tenure

Given the serious nature of the problems facing land reform, the vulnerability of existing land rights, growing indications of elite capture and corruption, and the symbolic importance of the land issue, the Panel is of the view that the special task team that processes the report as a whole consider whether the land and spatial inequality recommendations should be referred to a special sub-committee that can focus exclusively on these issues.

The vulnerability of the land rights of rural people living in the former homelands is particularly urgent. It derives not only from Parliament's delay in enacting the tenure security legislation required by Section 25(9) of the Constitution, but also from the way in which laws governing mining and traditional leaders have been interpreted and implemented. Many people with valid restitution claims are still waiting despite having lodged their claims 20 years ago. Redistribution of land to the poor has all but stopped, with beneficiaries now made tenants of the state. Land



administration has broken down entirely, rendering those with unwritten customary land rights vulnerable to eviction and dispossession by elites. Political will and direction is required in order to turn the situation around.

The proposed Land Framework Act is a crucial intervention to define what ‘equitable access’ means, and provides impetus to the flagging redistribution component of land reform. It provides a framework that articulates how the different components of land reform fit together and mechanisms to enhance oversight and accountability. An outline of the possible sections of such a law is included for illustrative purposes.

Various bills currently before the Portfolio Committee on Rural Development and Land Reform are at odds with the Framework Act approach. These include the Communal Property Associations Amendment Bill, the Private Member’s Restitution of Land Rights Amendment Bill, and the Extension of Security of Tenure Amendment Bill. At the same time, a draft Communal Land Tenure Bill has been published for public comment by the Department of Rural Development and Land Reform, as have a draft Deeds Registries Amendment Bill and a draft Regulation of Agricultural Land Holdings Bill.

The question therefore arises as to how Parliament can process the Panel’s recommendations at the same time as these and other Bills (particularly about traditional leadership) that are at odds with the Panel’s recommendations. The Panel has recommended that the Traditional and Khoi-San Leadership Bill be reviewed and potentially withdrawn. This illustrates one option, which is to put Bills that the Panel flags as problematic on hold until the Panel’s overarching recommendations have been thoroughly considered.

In this section we prioritise the various legislative interventions concerning land that the Panel proposes in relation to Bills currently before Parliament, and in relation to the urgency of the problems they are designed to address.

- 1 *The Land Framework Bill* proposal attempts to provide a comprehensive ‘catch-all’ response to problems besetting land reform. The Panel recommends that it be fully considered before current Bills affecting land reform are processed.

- 2 *Restitution Amendment Bill*: At the heart of the controversies surrounding restitution is whether there is the budget and capacity to deliver on the expectations created by the now-repealed 2014 Amendment Act. Our report shows that, at the current scale of delivery, it would take 709 years to settle existing and anticipated new claims. It is widely acknowledged that legislation that cannot be implemented at scale is bad law. It results in selective implementation that benefits some at the expense of others. To this end, Cabinet requires that all Bills that are tabled before it must be accompanied by a socioeconomic impact assessment. However, Bills introduced by Private Members do not go to Cabinet, which gets around this crucial requirement. The current Private Member's Restitution Bill does not address issues of budget and capacity. Instead it reinforces the danger that the Constitutional Court warned against, of newly elicited claims trumping old claims. In the view of the Panel, the current Bill is inadequate to address the problems besetting restitution. The Panel recommends that it be put on hold and puts forward an alternative draft Bill for urgent consideration. The issue is urgent because Parliament has only until July 2018 to enact a replacement amendment Bill. It is also urgent because of the severe problems and social divisions currently generated by land restitution.
- 3 *Communal Property Associations Amendment Bill*: This Bill should be put on hold as recommended under 1 above. The Panel makes far-reaching recommendations about CPAs as per the Land Records Bill proposals. It has, however, also engaged with the Amendment Bill in relation to some urgent matters before the Land Records Act is likely to be finalised.
- 4 *The Interim Protection of Informal Land Rights Act* and the *Ingonyama Trust Act*: The panel recommends that IPILRA be strengthened by amendment, and properly enforced. It recommends that the Ingonyama Trust Act be repealed, or substantially amended, to protect existing customary land rights. These two legislative interventions are the most urgently necessary of the land recommendations. This is because of the severe vulnerability of land rights on the ground, and to avert further breaches of Sections



25(6) and 25(9) of the Constitution. The proposed amendments are largely protective in nature. They seek to ensure that people with customary and off-register rights that fall within IPILRA's definition of 'informal land rights' are properly consulted and must consent or be expropriated where their land rights are undermined. Neither law is sufficient to give full effect to Section 25(6), which requires a law that goes beyond protection to provide positive content to land rights that are insecure because of past racial discrimination. Other laws, such as the proposed Land Records Act, is necessary to fulfil this positive obligation.

- 5 The Panel recommends that laws enacted after 1994 to protect farm dwellers and labour tenants be properly enforced, particularly their redistributive components. These are the Extension of Security of Tenure Act of 1997 and the Land Reform (Labour Tenants) Act of 1996. We recommend some amendments to ESTA, and engage with the current Amendment Bill, but call for a fundamental re-prioritisation of resources and capacity to address the structural vulnerability of people living on farms. The unequal power relations between landowners and farm dwellers, and the vulnerability of the latter, was raised in hearing after hearing. We think the Panel's recommendations about farm dwellers must be fully considered before the ESTA Amendment Bill is finalised.

Finally, the Panel recommends that the proposed Land Records approach be considered and further developed by a permanent structure such as the Spatial Inequality Council that we recommend be established, or by an institution like the South African Law Reform Commission. The approach has enormous potential to ensure that the property rights of all South Africans are recorded and registered on a sustainable basis. To succeed, the approach requires buy-in and innovation by key constituencies and is therefore something that lends itself to piloting and assessment over time.

The way forward: Spatial inequality

This report has highlighted the enduring problem of spatial inequality, and its severe consequences for poverty and inequality, and in re-creating divisions and forms of exclusion that undermine equal

citizenship and social cohesion. Because of its deeply embedded nature, we recommend that a permanent high-level co-ordinating council similar to the Aids Council be established to guide integrated interventions and policies to dismantle spatial inequality, going forward. The Council should review existing laws and policies that impose a punitive ‘tick-box’ regulatory framework on development in poor areas, and instead encourage and reward inclusionary innovations.

On the one hand, well-situated urban and rural land must be redistributed to black people who were marginalised during apartheid. On the other hand, the de facto property rights of black people that were denied during colonialism and apartheid must be rendered visible and protected. This not just a matter of recording and registering rights in a form that reflects people’s understanding of their rights and how they will be maintained, but also requires a robust system of land administration to enforce and protect rights. Without such a system, even redistributed land will fall back into ‘informality’ as has happened with much RDP housing, and poor people will remain locked into forms of group ownership that make it difficult to hold leaders to account, and protect their specific land rights.

We recommend that a Land Records Act be developed and piloted to formally record and define property rights that are currently off-register, largely because of past racial discrimination, but also because the Deed Registry system is not geared to reflect family-based systems of layered customary rights. This Act would provide for an continuum of rights and encompass the land rights of those in shack settlements around the cities, those on ‘communal’ land within the former homelands, families and individuals within Trusts and Communal Property Associations, and people living on farm land.

In addition to these longer term but structurally necessary proposals, we recommend some urgent short-term interventions.

- Well-situated urban land must be prioritised for social housing, both through expropriation, and through reviewing the conditions under which SOEs hold and dispose of well-situated land



- The Land Framework Act must be prioritised to speed up the redistribution and sub-division of commercial farm land
- Laws that treat people living in the former homelands differently from other South Africans must be amended urgently, in line with our recommendations in respect of the Traditional Leadership and Governance Framework Act, and the Minerals and Petroleum Resources Development Act
- Bills before Parliament that treat people living in the former homelands differently from other South Africans, such as the Traditional Leadership and Governance Framework Amendment Bill and the Traditional Khoi-San Leadership Bill, must be put on hold and reviewed in the light of the Panel's recommendations.

The way forward: 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 due to 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. In Chapter 4, the Panel 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. The creation of a new society out of the ruins of apartheid is a complicated challenge. Here we highlight those recommendations that we believe Parliament should prioritise. These are discussed in detail in Chapter 4, and summarised with their problem statements in the Executive Summary.

Progressive Realisation of Socioeconomic Rights

Recommendation 4.1

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

Recommendation 4.2a

Parliament should use its powers to introduce the following legislative changes to the *Social Assistance Act 13 of 2004*:

- i. the Act should be amended to enable teen mothers and child-headed households to receive the CSG simultaneously for themselves and the children in their care;
- ii. the Act should be amended to align it with the Children’s Act, allowing supervising adults supporting child-headed households to apply for the CSG on behalf of the children under their supervision;
- iii. the Act should be amended to deal with the lapsing of foster care grants; and the Act should be amended to include a widely accepted definition of disability.



Recommendation 4.2b

Parliament should ensure the following steps are taken to improve implementation of the *Social Assistance Act 13 of 2004*:

- i. simplify or eliminate the means test;
- ii. resolve SASSA's capacity constraints;
- iii. improve transparency;
- iv. address collusion between the commercial sector and administrators of social grants;
- v. circumscribe grants and earmark them for particular purposes;
- vi. grants should be indexed against inflation;
- vii. prioritise devising a means of addressing the plight of individuals who have no income but do not meet the criteria to receive grants; and
- viii. collaboration between the Departments of Social Development and Public Works to ensure that Community Works Programmes complement social assistance programmes.

Rights and Discrimination

Equality

Recommendation 4.3

Parliament should ensure that the National Action Plan (NAP) to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance is finalised with sufficient opportunity provided for public consultation on the NAP to ensure that it is widely accepted, and that the necessary measures are put in place to ensure that it is implemented and that Parliament develops the necessary institutional capacity to monitor this and similar transversal measures and seeks to play a leadership role in building a non-racial society.

Recommendation 4.5a

Parliament should use its powers to introduce the following legislative changes to the *Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* to strengthen the Act by:

- i. promulgating certain outstanding sections of the Act, such as the requirement that each department develop equality plans, or alternatively put 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;
- ii. strengthening the hate speech section of the Act and ensuring 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 over-broad and does not unconstitutionally limit the right to freedom of expression); and
- iii. transferring the tasks currently placed on the Equality Review Committee to Chapter 9 institutions, alongside the required funding required to fulfil this responsibility effectively.

Gender-based violence

Recommendation 4.7

Parliament should recommend to the Executive the development of a National Strategic Plan on Gender-Based Violence, which is multi-sectoral, co-ordinated and inclusive, with a strong monitoring and evaluation component to hold all to account and 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. Parliament should allocate funding for victim advocacy, criminal enforcement and local capacity to implement the Strategic Plan.

Recommendation 4.10a

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:

- i. 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
- ii. 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

Recommendation 4.11

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 *Refugees 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

Corruption

Recommendation 4.21

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

Recommendation 4.22b

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 and the success of the Information Regulator in resolving the serious problems in accessing information.

Public participation

Recommendation 4.24

Parliament should consider identifying and reviewing all legislation that includes a public participation component, including those that relate to Parliament's 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

Recommendation 4.26

Parliament should consider having a dedicated intersectoral public hearing with the relevant departments, including the Department of Justice and the National Prosecuting Authority, the Departments 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 above-mentioned issues.



Traditional leaders

Recommendation 4.29

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 found⁶ 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 Section 25(6) and (9) of the Constitution.

Distrust in institutions

Recommendation 4.31

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

⁶ *Alexkor Ltd and Another v Richtersveld Community and Others* (CCT19/03) [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) (14 October 2003)

The way forward: Implementation

The Panel recognises that implementation of legislation involves a wide set of actors, with the executive branch of government at the forefront of the implementation of policy and legislation. Nonetheless, Parliament shapes implementation through its various functions. The Panel would like to highlight the following recommendations as priorities to enhance implementation of laws and policy.

The National Development Plan

The National Development Plan (NDP) is a 20-year project to fundamentally turn the fortunes of our country around by 2030, across all key sectors, with a targeted focus on the triple challenge of poverty, unemployment and equality. It is informed by a long-term perspective approach to development and, as such, its implementation over time will require more than the normal five-year term of a government administration and must, by implication, involve all political parties and the entire South African society. It is the considered view of the Panel that Parliament needs to do more to own the NDP and ensure its ownership by the broader society.

Recommendation 6.7

Parliament may consider passing legislation on the NDP to elevate its status into law in order to streamline and deepen its implementation. Such legislation may define the architecture for the implementation of the NDP across the country through the three tiers of our state, but may enforce compliance by state organs with NDP targets in their planning and budgeting. Such legislation will also help Parliament in its oversight work, in holding the Executive accountable.



The NDP will be on a stronger footing when it is anchored in national consensus, with significant backing from key constituencies. The legislative process towards turning the NDP into law will naturally be accompanied by a public participation component, which should help the country reflect on the status of the implementation of the NDP and associated challenges.

The electoral system

The interim Constitution (Act 200 of 1993) provided for the members of the National Assembly and the legislatures of the nine new provinces to be elected in the first democratic elections in 1994 by universal adult franchise in accordance with a system of proportional representation. In 1998, an Electoral Act (No. 73 of 1998) was passed by Parliament and subsequently amended only once before 2003 following the passage of the Local Government: Municipal Electoral Act (No. 27 of 2000). It retained the system of proportional representation for elections for the National Assembly and the legislatures of the nine provinces.

On 20 March 2002, Cabinet resolved that an Electoral Task Team (ETT) should be established to 'draft the new electoral legislation required by the Constitution'. The ETT, led by Dr F Van Zyl Slabbert, submitted a majority and minority view on reform of the electoral system. The majority felt that electoral reform was necessary to ensure 'multi-member constituencies together electing 300 members of the National Assembly and a compensatory closed national list providing 100 members (giving a total of 400 members)'.

In terms of this proposal, there would be 69 multi-member constituencies. The number of representatives to be elected in a constituency would vary, depending on the number of voters, from three to seven for a national election, and 300 of the 400 members of the National Assembly would be elected, initially, from closed constituency lists in this way. The remaining 100 representatives would be allocated from closed national lists in order to restore overall proportionality.

The primary argument in support of this proposal is that it is the best electoral model to ensure individual accountability. One of the major challenges with the current electoral system is the weakness of the proportional representation system in holding politicians to account to the

electorate. Members of Parliament are appointed not directly by voters, but rather by their party, based on candidate lists submitted to the Electoral Commission ahead of the elections. This makes them beholden to the party and its leadership rather than voters, and places party politics and loyalties ahead of effectiveness and delivery. By contrast, a constituency system will hold politicians more directly accountable to the voters and will better ensure that election promises are kept for fear of being voted out. Such a system will serve to limit the power of individual party leaders and encourage MPs to vote in accordance with the needs and desires of their constituencies rather than only following party lines (Moepya, 2015). A summary of the arguments for and against electoral reform is presented in Chapter 6.

Recommendation 6.8

The Panel recommends that Parliament should amend the Electoral Act to provide for an electoral system that makes Members of Parliament accountable to defined constituencies on a proportional representation and constituency system for national elections.

Conclusion

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



The recommendations presented here are the fruit of the Panel’s work during its limited timespan. This chapter conveys the Panel’s sense of the prioritisation of the recommendations it has made. 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 be processed by a special task team of Parliament.





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Appendix - Supporting Documents and Materials

The High-Level Panel has collected a substantial record of information in its work. These include expert reports commissioned to inform the report, submissions from organisations and individuals, reports from roundtables and the audio-visual and written record of public hearings. This material can be found online:

- Written submissions from organisations and members of the public
- Transcripts of public hearings
- Link to YouTube videos of public hearings
- Presentations to the Gender Roundtable
- Plenary Roundtable Discussion for High-Level Panel Members (Durban, 19 October 2016)
- Roundtable with Traditional Leaders (31 May 2017)

Poverty, unemployment and the equitable distribution of wealth

- Skills development report - Vijay Reddy, Angelique Wildschut, Thierry M. Luescher, Ilhaam Petersen, Jennifer Rust, Marc Kalina (2017), Skills Development Legislation as a Lever of Change to Reduce Poverty, Inequality and Unemployment, HSRC.
- Basic education report - van der Berg S. & M. Gustafsson (2017), Quality of Basic Education: A Report to Working Group 1 of the High-Level Panel on the Assessment of Key Legislation and Acceleration of Fundamental Change, ReSEP (Research on Socio-Economic Policy), Department of Economics, University of Stellenbosch

- Triple Challenge Report – Centre for Development and Enterprise. (2017), Overcoming the Triple Challenge: Report to the High-Level Panel on the Assessment of Key Legislation and Acceleration of Fundamental Change.
- Triple Challenge Report – Amended Report
- Access to Quality Health Care report - Ataguba, A and D McIntyre (2017), Access to quality health care – commissioned report for the High-Level Panel on the Assessment of Legislation and Acceleration of Fundamental Change.
- Roundtable discussion – Business Stakeholders
- Roundtable discussion – National Health Insurance

Land reform, redistribution, restitution and tenure security, plus agrarian reform and rural spatial inequality

- Illustrative National Land Reform Framework Bill with Land Rights Protector (L1)
- Restitution: Judicial Amendment Bill (L2) Restitution of Land Rights (General) Amendment Bill (L3)
- Roundtable Discussion 1A: The Land Question in South Africa in Broader Political and Historical Perspective.
- Roundtable Discussion 1B: The Land Question in South Africa in Broader Political and Historical Perspective (Gauteng Provincial Legislature, Johannesburg, 14 September 2016).
- Roundtable Discussion 2: Spatial Inequality and Social Exclusion (Premier Hotel, Kempton Park, 6 September 2016).
- Roundtable Discussion 3: Communal Land in the Former Homelands. (Premier Hotel,



Kempton Park, 7 October 2016).

- Roundtable Discussion 4: Land Restitution (Kempton Park on 7 October 2016).
- Roundtable Discussion 5: Land Redistribution (Protea Hotel, Kempton Park, 1 November 2016).
- Roundtable Discussion 6A: Tenure Security (Rural Evictions) (23 November 2016).
- Roundtable Discussion 6B: Tenure Security (Urban Evictions) (Parliament of the RSA, Cape Town, 30 November 2016).
- Roundtable Discussion 7: Agrarian Reform (SAICA, Johannesburg, 3 December 2016).
- Roundtable Discussion 8: Drafting Alternatives (LARC, Cape Town, 15 February 2017).
- Diagnostic Report on Land Reform in South Africa (Institute for Poverty, Land and Agrarian Studies: University of the Western Cape, September 2016).
- Land Redistribution in South Africa (Thembelihle Kepe – University of Toronto/Rhodes University – and Ruth Hall, Institute of Poverty, Land and Agrarian Studies, UWC, September 2016).
- Land Reform in the Xhalanga District, Eastern Cape: a case study appended to the report on Land Redistribution (Lungisile Ntsebeza and Fani Ncapayi).
- Diagnostic Report on Land Reform in South Africa: Land Restitution (Maano Ramutsindela, Nerhene Davis and Innocent Sinthumule, September 2016).
- Communal Tenure (Michael Clark and Nolundi Luwaya, Land and Accountability Research Unit: University of Cape Town, October 2016).
- Report on Related Laws and Policies that Impact on Tenure Reform (Wilmien Wicomb,

Legal Resources Centre, September 2016).

- Land Reform in South Africa in the former 'Coloured' Rural Areas (Henk Smith, Wilmien Wicomb and Nasreen Solomons: Legal Resources Centre, October 2016).
- Tenure Security of Farm Workers and Dwellers Phuhlisani NPC, September 2016).
- Report on the Tenure Security of Labour Tenants and Former Labour Tenants in South Africa (Association for Rural Advancement in South Africa, September 2016).
- Report on Tenure Security In Urban Areas in Informal Settlements in South Africa (Phuhlisani NPC, September 2016).
- Agrarian Reform and Rural Development (Michael Aliber, Sunu Mabhera and Tafadza Chikwanha: University of Fort Hare, undated).
- The role of Land Tenure and Governance in Reproducing and Transforming Spatial Inequality (Phuhlisani NPC, November 2016).

Social cohesion and nation-building

- Roundtable Discussion 1: Durban, on 12 – 3 August 2016 – Kick-off Workshop
- Roundtable Discussion 2: Special Committee on Social Cohesion in KwaZulu-Natal, Race relations and poverty in the rural areas, Rural poverty and development on the Ingonyama Trust lands in KwaZulu-Natal and 'Myths and Realities about Race, Culture and Ethnicity' (Durban, 19 October 2016).
- Roundtable Discussion 3: Stakeholders from the Government Statistics on Social Cohesion and Nation-Building (Cape Town, 25 October 2016)
- Social Cohesion and Nation-Building: a Diagnostic Report for the High-Level Panel Working Group (ACCORD)



- HSRC Diagnostic Report

Spatial Inequality

- Roundtable Discussion 1 – Spatial Inequality (Pretoria)
- Reducing Spatial Inequalities through Better Regulation: Report to the High-Level Panel on the Assessment of Key Legislation and Acceleration of Fundamental Change by Professor Ivan Turok, Dr Andreas Scheba and Dr Justin Visagie of the Human Sciences Research Council delivered on 01 June 2017



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