
south african human rights commission

# REPORT OF THE SAHRC INVESTIGATIVE HEARING

## Monitoring and Investigating the Systemic Challenges Affecting the Land Restitution Process in South Africa

*12 November 2013*
*and 5 December 2013*





Land ownership in South Africa has long been a source of conflict. Its history of conquest and dispossession, of forced removals and a racially skewed distribution, has left it with a complex and difficult legacy. The Restitution of Land Rights Act (Restitution Act)[1] was passed in 1994 at the advent of democratic rule in South Africa and amended at the end of 1998. Its stated objective is:

*To provide for the restitution of rights in land in respect of which persons or communities were dispossessed under or for the purpose of furthering the objects of any racially based discriminatory law.*[2]

**In an "Investigation of the South African Human Rights Commission"**

and

| | |
|---|---|
| **The Department of Rural Development and Land Reform** | **First Respondent** |
| **The Department of Public Works** | **Second Respondent** |
| **The Commission on Restitution of Land Rights** | **Third Respondent** |
| **The Chief Surveyor General** | **Fourth Respondent** |
| **The Land Rights Management Facility** | **Fifth Respondent** |

1 Restitution of Land Rights Act No. 22 of 1994.

2 *Ibid.*

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# Introduction and Background

# 1. Introduction

This document is the report on the proceedings of an investigation undertaken by the South African Human Rights Commission (Commission or SAHRC) on the systemic challenges affecting the land restitution process in South Africa.

In investigating the systemic challenges affecting the land restitution process in South Africa, the Commission convened a hearing in terms of section 9(1)(c) of the Human Rights Commission Act, 54 of 1994 (HRC Act).

The current report documents the process followed and, in its concluding section, presents findings and recommendations.

# 2. Background

Land ownership in South Africa has long been a source of conflict. Its history of conquest and dispossession, of forced removals and a racially skewed distribution, has left it with a complex and difficult legacy. The Restitution of Land Rights Act (Restitution Act)[1] was passed in 1994 at the advent of democratic rule in South Africa and amended at the end of 1998. Its stated objective is:

*To provide for the restitution of rights in land in respect of which persons or communities were dispossessed under or for the purpose of furthering the objects of any racially based discriminatory law.*[2]

The Restitution Act empowers the Minister to make awards to restitution claimants where he or she is satisfied that there is a valid restitution claim, by restoring the lost land, awarding alternative land at state expense, and awarding financial compensation or other appropriate relief.

In addition, section 25(7) of the Constitution of the Republic of South Africa, Act 108 of 1996 (the Constitution) provides:

*A person or community dispossessed of property after 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.*

By the cut-off date for the lodgement of claims, 63,455 claims had been lodged, and by 2000 only 4,925 had been settled, with the majority of the settlements being cash payments, and only 162 involving restoration of land.[3] By 2006, according to the Centre for Development Enterprise, validated land claims for restitution numbered nearly 80,000, with most of it being urban land (81% urban while 19% was rural).[4]

While the thousands of land claims settled by cash payments in South Africa are lauded, this did not attend to some of the potentially more complex cases involving 'land restitution' in the literal sense of the term i.e. a process by which land and other property that was forcibly removed through discriminatory laws is restored to the rightful owner. The land restitution process has faced a number of challenges including the apparent unawareness of many people that the deadline for lodging

1 Restitution of Land Rights Act No. 22 of 1994.

2 *Ibid.*

3 Mngxtama, A., "South Africa: Land Reform blocked", Green Left Weekly, 24 May 2000, https://www.greenleft.org.au.

4 'Land reform in South Africa: Getting back on track', Centre for Development Enterprise, 2008, http://www.cde.org.za.

restitution claims was set at the end of 1998. Late registration was not permitted. In many of the restitution cases that were lodged on time, the primary beneficiary has died and consequently their children and grandchildren have become joint beneficiaries. Worn down by endless bureaucracy, and countless delays, many have opted for cash payments in lieu of the valuable land from which they were forcibly removed.[5] (There is now a Restitution of Land Rights Amendment Bill that could see the new deadline being pushed to 31 December 2018).

The SAHRC receives a number of complaints and queries on a regular basis relating to land restitution and broader section 25[6] rights. As at August 2013, the SAHRC had 193 section 25 complaints nationally. Sixty percent of these complaints were at the investigation phase, 37% at assessment phase, and 3% at litigation phase. While the issue of the 1998 deadline has been identified as one of the concerns, there appear to be a number of challenges that have made the resolution of existing claims difficult and/or severely delayed.

In addition to issues of redress and accountability, the SAHRC is of the view that the land restitution process in South Africa is also aimed at the progressive realisation of socio-economic rights. The SAHRC acknowledges that the process of restitution in the country has moved very slowly with regard to existing land claims and continues to be beleaguered by a number of challenges that shadow the desired effect of equitable redress and socio-economic empowerment. It is in the interests of the SAHRC's ability to fulfil its mandate, for a holistic view of these challenges to be attained. To this end, in November and December 2013, the SAHRC convened an investigative hearing[7] on the systemic challenges affecting the land restitution process in South Africa.

While recognising that the issue of exclusion of claims that came about through the 1998 lodgement cut-off is one of the matters raised with the SAHRC that may be addressed should the Restitution of Land Rights Amendment Bill [B35-2013] (introduced in May 2013 to revise the cut-off date for lodging a claim) become law, this issue was not intended to form the central part of the investigative hearing. Instead the hearing aimed to obtain a better understanding of why existing claims remain unresolved nearly two decades after the Act became law. However, a number of the submissions did centre on the potential implications of the re-opening of the claims lodgement process.

5 A new Restitution of Land Rights Amendment Bill was passed by the National Assembly on 25 February 2014 with the aim of re-opening the claims process for a further 5 years i.e. to 2019.

6 Section 25 guarantees property rights in the Constitution of the Republic of South Africa Act 108 of 1996.

7 The hearings were convened on 12 November 2013 and 5 December 2013.


# Summary of Proceedings

# 3. Summary of Proceedings

The SAHRC, acting in terms of its enabling legislation, undertook an investigative hearing into the systemic challenges affecting the existing land restitution process in South Africa.

The hearing, which was inquisitorial in nature, requested that the national Departments and other parties having a direct relationship to the State's implementation of the land restitution process make submissions to the SAHRC. These included national Departments mandated to initiate or implement South Africa's integrated rural development programme, provide equitable redress to victims of racially motivated land dispossession, resolve restitution claims and provide post-settlement support. The parties were also requested to present documentation to assist the SAHRC to establish the extent of the challenges relating to the land restitution process. In part, the decision by certain parties to focus on the proposed Restitution of Land Rights Amendment Bill enabled the panel to make findings that related to whether the proposed amendments would address current challenges and shortcomings.

The submissions requested from the parties were set out in the issues for discussion. These included requests for data on:

a. The mandate of the relevant body and its role in terms of land restitution;
b. The challenges experienced by that body in relation to land restitution;
c. The steps taken to address such challenges;
d. How the Department of Rural Development and Land Reform relates to the Commission for Restitution of Land Rights in terms of the monetary compensation awarded for land restitution;
e. The amounts that have been paid to compensate communities that claim land from which they had forcibly been removed;
f. On what basis the Department for Rural Development and Land Reform is able to realistically budget for land claims and how such budget is informed;
g. An outline from the Department of Rural Development and Land Reform on what forms of "equitable redress" it has used in the past;
h. To what extent the Department of Public Works has a comprehensive record of all of the land that belongs to the State, including at a local government level, and to what extent the Department knows how much land is owned by parastatals;
i. The number of gazetted claims;
j. The number of finalised claims that involved compensation, and the number that involved land being returned;
k. The manner in which the Commission for Restitution of Land Rights (CRLR) deals with a situation when a claim is under review that is on a piece of land that is being disposed of for other developments;
l. The manner in which the Chief Surveyor General records title in terms of land claimants in urban areas where there are disputes and the title is not properly recorded, and how this is managed in rural areas in terms of succession in title;
m. The number of claimants the Land Rights Management Facility is representing; and the number of claims it has assisted to reach a point of resolution;
n. The number of claims that are on state land;
o. Major challenges faced by the parties with regard to land restitution; and
p. The steps taken by the parties to overcome these challenges.

The panel received submissions and heard oral testimonies from representatives of the Department of Rural Development and Land Reform (DRDLR), the Department of Public Works (DPW), the

Commission for Restitution of Land Rights (CRLR), the Chief Surveyor General (CSG), and the Land Rights Management Facility (LRMF). The SAHRC also sought the inputs of the Land Claims Court – Acting Judge President Yasmin Meer participated in the hearing and contributed to the issues for discussion.

The DPW failed to submit documents but gave oral submissions at the hearing.

The panel sought to understand the systemic challenges affecting the land restitution process and to make recommendations where appropriate. The investigation was both retrospective in nature (that is, looking at past mistakes made in the handling and processing of land claims), and constructive, with a view to gaining a better understanding of the challenges and the steps that have been taken to overcome these challenges.

Due to the systemic nature of the challenges affecting the land restitution process in the country, larger contextual and institutional issues require further attention.

## Mandate of the SAHRC

# 4. Mandate of the SAHRC

The SAHRC is an institution established in terms of section 181 of the Constitution. The SAHRC and other institutions created under Chapter 9 of the Constitution are described as "*state institutions supporting constitutional democracy*". In terms of section 184(1) of the Constitution, the SAHRC is specifically mandated to: promote the protection, development and attainment of human rights; and monitor and assess the observance of human rights in South Africa. Section 184(2)(a) of the Constitution empowers the SAHRC to investigate and report on the observance of human rights in the country.

The HRC Act (No. 54 of 1994) further supplements the powers of the SAHRC. In addition to other powers, duties and functions, the Act confers powers on the SAHRC to carry out investigations concerning the observance of human rights in South Africa. The aforementioned proceedings were convened under the provisions of section 9(1)(c) and 9(1)(d) of the Act, which state:

9. *(1) Pursuant to the provisions of section 116(3) of the Constitution the Commission may, in order to enable it to exercise its powers and perform its duties and functions-*

*(c) require any person by notice in writing under the hand of a member of the Commission, addressed and delivered by a member of its staff or a sheriff, in relation to an investigation, to appear before it at a time and place specified in such notice and to produce to it all articles or documents in the possession or custody or under the control of any such person and which may be necessary in connection with that investigation: Provided that such notice shall contain the reasons why such person's presence is needed and why any such article or document should be produced; (d) through a member of the Commission, administer an oath to or take an affirmation from any person referred to in paragraph (c), or any person present at the place referred to in paragraph (c), irrespective of whether or, not such person has been required under the said paragraph (c) to appear before it, and question him or her under oath or affirmation in connection with any matter which may be necessary in connection with that investigation.*

The Act further provides for criminal sanctions in the event that a party to such a proceeding refuses to co-operate with an investigation of the SAHRC. This provision is located in section 18, which states:

*18. A person who-*

*(a) without just cause refuses or fails to comply with a notice under section 9(1)(c) or refuses to take the oath or to make an affirmation at the request of the Commission in terms of section 9(1)(d) or refuses to answer any question put to him or her under section 9(1)(d) or refuses or fails to furnish particulars or information required from him or her under that section; ...shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding six months..*

The SAHRC is further empowered by its Gazetted Complaints Handling Procedures which prescribe that the SAHRC is entitled, *inter alia*, to conduct hearings under a variety of circumstances.

# Legal Framework of Land Reform and Land Restitution

# 5. Legal Framework of Land Reform and Land Restitution

Currently, the South African Government is obliged by the country's Constitution to implement land reform processes. Legislation must be enacted and implemented to realise "the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources"; to provide for secure tenure or comparable redress in relation to land that is insecure as a result of past racially discriminatory laws or practices; and to secure the restitution of property or equitable redress to a person or community whose property was dispossessed after 19 June 1913 as a result of past racially discriminatory laws or practices. (Act 108, 1996, section 25) Based on constitutional requirements, land reform includes three major pillars: restitution, land redistribution and land tenure security.

## 5.1. National Frameworks on Land Rights

The 1997 White Paper on South African Land Policy[8] sets out the objectives (for Restitution):

"The goal of the restitution policy is to restore land, provide other redistributing remedies to people dispossessed by racially discriminatory legislation, in such a way as to provide support to the vital process of reconciliation, reconstruction, and development. Restitution is an integral part of the broader land reform programmes and is closely linked to the need for the redistribution of land and tenure reform. The programme's purpose is restitution of land in order to promote justice and reconciliation".

In South Africa the new democratic order ushered in, among other things, a land restitution programme which aims to restore land and to provide other remedies to people dispossessed by racially discriminatory legislation and practices of previous governments. This need gave birth to the Restitution of Land Rights Act 22 of 1994 (amended at the end of 1998)[9] which vested powers in the then Minister of Agriculture and Land Affairs to resolve restitution claims. The Restitution Act entitles communities and individuals to restitution if: (a) such a person (or direct descendant of such a person) or community was dispossessed of such rights; and (b) such dispossession was effected under the purpose of furthering the object of any law, which would have been inconsistent with the prohibition of racial discrimination contained in section 8(2) of the Constitution Act 1993, had that section been in operation at the time of such dispossession.[10] Section 1(7) of the Act defines a direct descendant to include the spouse or partner in a customary union, whether such a union has been registered or not. In terms of Section 1(4) a community is any group of persons whose rights in land are derived from shared rules determining access to land held in common by such a group.[11]

The Constitution of the Republic of South Africa[12] (the Constitution) sets out the legal basis for land reform, particularly in the Bill of Rights.[13] Section 25[14] places a clear responsibility on the state to carry out land and related reforms, and grants specific rights to victims of past discrimination.

8 White Paper on South African Land Reform Policy, 1997, p. 74, section 4.13, http://www.ruraldevelopment.gov.za.

9 The Restitution of Land Rights Act 22 of 1994 was amended by the Restitution of Land Rights Amendment Act 84 of 1995, the Land Restitution and Reform Laws Amendment Act 78 of 1996, the Land Restitution and Reform Laws Amendment Act 63 of 1997, the Land Affairs General Amendment Act 61 of 1998, and the Land Restitution and Reform Laws Amendment Act 18 of 1999.

10 Dawood, Z., "Is Restitution in need of a remedy", Report Paper for the NLC, April 1998

11 Jaichand, V., Restitution of Land Rights: A Workbook, Lex Patia, PTA, 1997, p.54

12 Act 108 of 1996

13 Chapter 2 of the Constitution

14 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.*
Section 25(6) of the Constitution 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(7) states that:
*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.*

It allows for expropriation of property for a public purpose or in the public interest, subject to just and equitable compensation, and states explicitly that 'the public interest includes the nation's commitment to land reform and to reforms to bring about equitable access to all South Africa's natural resources'.[15]

However, it should be noted that while the Constitution supports land reform, the right to own property is also protected. Any expropriation needs to take account of the current use, the history, the value, the extent of direct state investment and subsidy, beneficial capital improvement and the purpose of the expropriation.

This balance of rights sees land reform and property law as a complex area of law and the transactions required to settle a land claim often require historical, anthropological, social, economic and financial considerations to be taken into account. Documentation and rigor particularly on the part of the state employees charged with implementing the land reform process is critical.

Although the Act does not prescribe specific solutions for individual cases, it does provide a framework that includes five types of restitution: restoration of original land, provision of alternative land, payment of financial compensation, provision of alternative relief and/or priority access to other government housing and land development programmes.[16]

Section 4 of the Restitution Act and Section 123 of the Interim Constitution provided for the establishment of the Commission on the Restitution of Land Rights (CRLR or Commission) and the Land Claims Court (both set up in 1995). The Commission, which the law establishes as an independent body that reports directly to Parliament, consists of a Chief and Deputy Land Claims Commissioner, Regional Commissioners and other members appointed by the Minister of Rural Development and Land Reform.

Claims for restitution are lodged with the CRLR, which according to the 1997 White Paper on Land Reform is responsible to publicise the process and provide information, to investigate and mediate claims, to settle claims through negotiations and to assist communities and individuals to lodge claims. Section 11 of the Act stipulates that claims should be lodged with the Land Claims Commissioner, who, if satisfied that the claim meets the legal requirements set out in the Act, must publish a notice of the claim in the Government Gazette. The Commissioner must also inform (in writing) the owner of the land in question and any other party that may have an interest in the claim.

The Commission has wide-ranging investigative powers that include the power to demand information from government departments, organisations and individuals.[17] The Commission refers claims to the Land Claims Court in cases where claims generate conflict (or have the potential to do so) or where attempts at negotiation and mediation have failed.

## 5.2. International Law on Land Rights

Article 17 of the Universal Declaration of Human Rights[18] states:

1) Everyone has the right to own property alone as well as in association with others.
2) No one shall be arbitrarily deprived of his property.

15 Section 25(4)(a).

16 Department of Land Affairs, White Paper on South African Land Policy, Pretoria, April 1997.

17 Hall, R., 'The impact of land restitution and land reform on livelihoods', Institute for Poverty, Land and Agrarian Studies, 2007, http://repository.uwc.ac.za.

18 Adopted on 10 December 1948 by the United Nations General Assembly.

The reference to property rights was dropped in the two human rights Covenants adopted by the United Nations in 1966.[19] Amongst other things, the intentions of the International Covenant on Economic, Social and Cultural Rights (ICESCR) are to ensure the protection of economic, social and cultural rights to citizens of member states. This includes the rights to an adequate standard of living and health, as well as an adequate supply of safe food and nutrition.[20] South Africa signed the ICESCR in 1994 and, in October 2012, the South African Cabinet approved the ratification of the Covenant.[21] In addressing the right to be free from hunger, Article 11 of the ICESCR makes only one indirect reference to land when it encourages states parties to develop or reform "agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources."

Basic to international human rights law are provisions related to equality and non-discrimination. Article 2(2) of the ICESCR, for example, provides:

> The State Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

According to article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD):

> State Parties must assure everyone within their jurisdiction effective protection and remedies through the competent tribunals and other State institutions, against any acts of racial discrimination which violate his human rights...well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damages suffered as a result of such discrimination.[22]

United Nations (UN) declarations more specific to land include the Declaration on Social Progress, adopted by the General Assembly in 1969, which recognises the social function of property, including land, and calls for forms of land ownership that ensure equal rights to property for all.[23]

Of the UN specialised agencies, the Food and Agriculture Organisation (FAO) and the International Labour Organisation (ILO) have given most attention to land rights issues, in either binding conventions or nonbinding declarations. At its World Conference on Agrarian Reform and Rural Development in 1979, the FAO adopted a Declaration of Principles and Programme of Action, referred to as "The Peasants Charter," a major section of which is concerned with the reorganisation of land tenure. It advocates the imposition of land ceilings in countries where substantial reorganisation of land tenure and land redistribution to land-less peasants and smallholders is needed as part of a rural development strategy and as a means to redistribution of power. Other sections of the Charter are concerned with tenancy reform, regulation of changes in customary tenure and with community control over natural resources.[24]

ILO Convention No. 117, The Social Policy (Basic Aims and Standards) Convention of 1962, covers measures to improve the standard of living for agricultural producers.

19 Namely the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights.

20 International Covenant on Economic, Social, and Cultural Rights, 1976, New York: United Nations, http://www.ohchr.org.

21 'South Africa to ratify International Socio-Economic Rights Covenant', Sangonet Pulse, October 2012, http://www.ngopulse.org.

22 International Convention on the Elimination of All Forms of Racial Discrimination, 660 UNTS 195, entered into force 4 Jan. 1969.

23 Declaration on Social Progress and Development, GA Res. 2542 (XXIV), 24 UN GAOR Supp. (No. 30) at 49, UN Doc.A/7630 (1969). United Nations Declaration on Social Progress, 1969

24 Plant, R., "Land Rights in Human Rights and Development: Introducing a New ICJ Initiative," *The Review*, no. 51 (Geneva: International Commission of Jurists, 1993): 10.

They are to include control of the alienation of land to non-agriculturalists, regard for customary land rights and the supervision of tenancy arrangements. The ILO's Indigenous and Tribal Peoples Convention No. 169 of 1989 is a key instrument in the evolution of concepts of land rights in international law.[25] That convention:

- recognises the special relationship between indigenous people and their lands;
- requires states to adopt special measures of protection on their behalf;
- provides safeguards against the arbitrary removal of indigenous people from their traditional land, with procedural guarantees; and
- includes other provisions related to the transmission of land rights and respect for customary procedures.

The First Protocol to the European Convention on Human Rights states:

> No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

However, these provisions shall not "in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."[26]

Article 21 of the American Convention on Human Rights states:

> Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society...No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest and in the cases and according to the forms of established law.[27]

## 5.3. Regional Frameworks on Land Rights

Article 14 of the African Charter on Human and Peoples' Rights reads:

> The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.[28]

Article 21 states that "1) All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it. 2) In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation."

These provisions apply to ownership of land as well as security of tenure of land. One of the bases on which restitution has been claimed or provided has been discrimination – that land had previously been taken from an individual or group because of their racial, ethnic or other identity.

25 Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169), 72 ILO Official Bull. 59, entered into force 5 Sept. 1991.

26 Article 1, European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 as amended by Protocols Nos. 3, 5, 8 and 11, *entered into force* 1970, 1971, 1990, and 1998 respectively.

27 Article 21, American Convention on Human Rights, OAS Treaty Series No. 36 1978, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/11.82 doc.6 rev.1 at 25 (1992).

28 African (Banjul) Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* 21 Oct. 21 1986.

## 5.4. Interpretation of Land Rights and Relevant Legislation: South African Case law

One notable and unique case in terms of advancing the nature and content of land rights is the *Richtersveld*[29] case. The community of 3,000 used to be nomadic and pastoralist people who traditionally occupied the Richtersveld. The land claim was held by the state-owned diamond mine Alexkor, which was in the process of privatisation. The Richtersveld community brought a claim for the restoration of its ancestral land in terms of the Restitution of Land Rights Act. An important aspect of the case was the community's assertion that it used the land according to its indigenous customs.

In the Supreme Court of Appeal's view, the undisputed facts of this case show that the Richtersveld community, living in the margin of history on the edge of the country, was largely ignored by successive governments although these governments always recognised that the community had some kind of exclusive entitlement to the land. In the result they were left in undisturbed possession of the land which was never taken from them for settling colonists.

The Court's principal findings were that:

- The Richtersveld community was in exclusive possession of the whole of the Richtersveld, including the subject land, prior to annexation by the British Crown in 1847.
- The Richtersveld community's rights to the land (including precious stones and minerals) were akin to those held under common law ownership. These rights constituted a 'customary law interest' and consequently a 'right in land' as defined in the Act.
- These rights survived the annexation and the Land Claims Court erred in finding that the community had lost its rights because it was insufficiently civilised to be recognised.
- When diamonds were discovered on the subject land during the 1920's the State ignored the Richtersveld community's rights and dispossessed the Richtersveld community of its rights in the land in a series of steps amounting to 'practices' as defined in the Act and culminating in the grant of full ownership of the land to Alexkor.
- These practices were racially discriminatory because they were based upon the false, albeit unexpressed premise that, because of the Richtersveld community's race and lack of civilisation, they had lost all rights in the land upon annexation.

The result of these findings was that the Richtersveld community was entitled to restitution of the subject land and the appeal succeeded.

In defining and determining what is entailed by customary-law ownership of land, the Supreme Court of Appeal equated it with common law ownership, while the Constitutional Court found that its content should be ascertained by studying the customs and uses of the community. It was thus decided that the Richtersveld community's claim to the land incorporated a claim to the minerals in the land, and that the community's entitlement to both the land and the minerals should be acknowledged and restored. Incorporated in this was the right of the community to claim compensation for past exploitation of the land by Alexkor and the state. The court's reasoning shows "how the redefinition of the sources of South African property law affects the protection offered to relationships with land."[30]

29 Richtersveld and Others v Alexkor Ltd and Another (LCC151/98) [2001] ZALCC 34 (6 August 2001).

30 Mostert, H., and Pope, A., (eds.) *The Principles of The Law of Property in South Africa* 1 ed. (2010).

In the 1999 *Kranspoort*[31] case, the Kranspoort community made a claim that it was dispossessed of land under a racially discriminatory law or practice. The community lived on a Dutch Reformed Church mission station at the foot of the Soutpansberg in Limpopo from 1890 until they were removed between 1955 and 1964. The community applied for the restitution of their rights under the Restitution Act. The Dutch Reformed Church of Transvaal opposed the claim. The Church claimed:

- There was no "community" either at the time of the removals or at the time the claim was lodged.
- Even if a community existed, it did not have any rights in the land.
- Even if the community proved its claim, they should not receive restoration of the farm, but rather some other award such as compensation.
- It was not feasible to restore the land because the community could not viably re-establish themselves there.
- The area was environmentally sensitive and a restoration order would be bad for the environment.

The Land Claims Court decided:

- The evidence proved that there was a "community" at the time of the removals and at the time the claim was lodged.
- The community had beneficial occupation of the farm for at least 10 years before the removals.
- The removals were as a result of a racially discriminatory law or practice, as the Group Areas Act was used to remove the people and the removals were carried out in a racist manner.
- The group had not received "compensation", because any compensation given was not "just and equitable", as directed by the Act.
- Restoring the land to the community would be just and equitable, and allowed upgrading of the beneficial occupation to full ownership.

The Court imposed conditions that the community had to fulfil before there could be restoration of the land. These were:

- The formation by the community of a Communal Property Authority (CPA) to hold the property.
- The approval by the Court of a draft constitution for the CPA.
- Confirmation by the CPA that it wants restoration of the land and not some other form of compensation.
- The formulation of plans for the development and use of the property.
- The community had to meet these conditions within a fixed time limit, or the court order would fall away. Then the community would be able to get a different type of compensation.

On the issue of defining "community" as envisaged in the Restitution Act, the court made an inference to the effect that the community must exist at two different levels:

- At the time of dispossession it must be shown that, there were shared rules, which determined access to land, which was held in common by such community. Examples in this regard may include the existence of a Chief and his counsellors, etc.

31 Kranspoort Community: in re Farm Kranspoort 48 LS.

- At the time when the claim was lodged – this can be the same community or a part of the community that was dispossessed of rights in land. It does not have to be the identical community in that changes in the constituent families, the admission of new members and the departure of other members mean that the face of a community changes over time.

In the *Baphiring*[32] matter the court ruled that the plaintiff, as part of a community, is entitled to claim restitution of a right in land dispossessed from the full community (the Baphiring tribe). The plaintiff does not, however, act on behalf of the full community, as it is not representative of the majority of the tribe.

In the more 'high profile' *Sophiatown* claim, which was settled administratively, the former residents and individual titleholders of Sophiatown or their direct descendants lodged claims for the individual properties of the former township of Sophiatown, Gauteng Province. These urban claims were for financial compensation for the loss of freehold title. Sophiatown was renamed Triomf by the apartheid state and falls within the Northern Metropolitan Local Council of Johannesburg. The history of acquisition and dispossession of land rights that gave rise to the Sophiatown restitution claims is widely known and has been extensively researched and documented. [33]

Several pieces of legislation served as the basis for the implementation of the state's policy to remove black people from Sophiatown namely, the Native (Urban Areas) Act of 1923, the 'Western Area Removal Scheme' (WARS) of 1944, the Native Resettlement Act of 1954, and the Group Areas Development Act 69 of 1955. These Acts essentially declared the whole municipal area of Johannesburg to be an area within which Africans, except those exempted,[34] could not reside elsewhere than in locations, native villages or native hostels. The Western Areas, including Sophiatown, happened to be the only place that offered viable alternative accommodation for Africans removed from inner-city areas in terms of this legislation. The implementation of the Natives (Urban Areas) Act also pre-empted the influx of Africans to Sophiatown. Although the Act was in operation, its enforcement was not always consistent. Africans were still able to buy land within the "white" towns. Sophiatown, Martindale, and Newclare were the only townships within the municipal boundaries of Johannesburg where it was possible for Africans to have freehold title.

The WARS policy entailed the removal of Africans from Sophiatown, Martindale, and Newclare, following political pressure from white ratepayers and voters. These people were resettled in Orlando and Pimville in Soweto. The scheme also made provision for the rescheduling of Sophiatown as a white township.

The Group Areas Act 41 of 1950 and the Group Areas Development Act were invoked to effect the actual removal of Africans from Sophiatown. These forced removals occurred between 1955 and 1960. The removals persisted despite pressure from African property owners in the form of protests and resistance campaigns. Sophiatown was renamed Triomf within 5 years of the last removals. At the time of removals, the government gave assurances that it would take steps, if necessary, to ensure that the African property owners were fairly compensated. Property owners in Sophiatown and surrounding areas suffered from the negative effects of the apartheid laws e.g. the Group Areas Act, on the value of their properties i.e. properties were being valued by people with no formal qualifications in property valuation, no negotiations seem to have ever taken place. Sophiatown restitution claimants did not receive just and equitable compensation.

32 Baphiring v Uys and Others LCC64/98.

33 Van Tonder, "Sophiatown: Removals and Protest, 1940-1955", microfiches, UNISA: Pretoria, 1990.

34 The government had a policy of 'exempting' educated Africans from the application of some of its policies and legislation.

In dealing with this case, the Commission for Restitution of Land Rights (CRLR) had several challenges especially around determining the monetary value of the claim. The records of valuations conducted in Sophiatown at the time of dispossession could not be traced. This meant that vital information required for a historical valuation exercise could not be found and the CRLR then proposed an alternative approach that would not require a historical valuation exercise, but a current valuation of a vacant serviced site from the areas where the claimants were removed. This methodology came to be called the 'serviced site' approach that was then approved by the then Minister of Land Affairs as the approved policy. Those claimants who lost more than one property got financial compensation equal to the number of properties they had lost. About 540 claims were lodged for 1,001 properties. This meant that just fewer than half the people had lost more than one property. The Northern Metropolitan Local Council took a unanimous decision to rename Triomf back to Sophiatown, its original name, by which it was commonly known in South Africa prior to the removals.


# Procedures of the SAHRC Hearing

# 6. Procedures of the SAHRC Hearing

## 6.1. Composition of the Panel

1. Commissioner Janet Love, responsible for environmental, natural resource management, and rural development rights portfolio at the SAHRC: Chairperson
2. Commissioner Lindiwe Mokate, responsible for rights of children and basic education portfolio at the SAHRC: Panellist
3. Advocate Patric Mtshaulana, Advocate at Duma Nokwe Group of Advocates: Panellist

## 6.2. Terms of Reference

1. To receive information and to hear evidence from the respondents and other relevant parties relating to the systemic challenges affecting the land restitution process in South Africa;
2. To analyse evidence brought before the panel;
3. To make appropriate findings;
4. To enable the Commission to make recommendations.

## 6.3. Nature and Structure of the Proceedings

As indicated, the proceedings were inquisitorial in nature. Representatives were invited to assist the panel with the provision of relevant information to arrive at a fair reflection of the systemic challenges affecting the land restitution process in South Africa. The respondents were obliged to make written submissions as well as oral presentations. Each respondent had 1 hour to address the issues for discussion. The panel could then pose a series of questions, seek clarity or further information arising from the submissions. Before making submissions, respondents were invited to take an oath or affirmation in the manner of their choosing.

## Submissions from Respondents

# 7. Submissions from Respondents

The Commission posed a series of questions to the Respondents. Depending on the nature of the service provided, not all of the Respondents were necessarily asked the same questions, although, where more than one Respondent was identified as a duty-bearer in relation to the service provided, the same question was posed to more than one Respondent. The following comprises a sequentialoverview of the proceedings and the responses provided in the form of written and oral submissions. It is not necessarily reflective of the views of the Commission or the Panel appointed in this matter.

## 7.2. Submissions made by the Department of Rural Development and Land Reform

### *7.2.1. Mandate*

The mandate of the Department of Rural Development and Land Reform (DRDLR) is derived from the five priorities of government as set out in the Medium Term Strategic Framework (2009 to 2014). The DRDLR implements the Comprehensive Rural Development Programme (CRDP) adopted by Cabinet in July 2009.

The CRDP is a proactive participatory community-based planning approach to rural development aimed at creating vibrant, equitable and sustainable rural communities; contributing to the redistribution of the country's productive agricultural land as part of the land reform programme; improving food security; effective administration and management of the state land; creation of business opportunities; de-congesting and rehabilitation of over-crowded former homeland areas; and expanding opportunities for women, youth, people with disabilities and older persons. The CRDP focuses on the strategy of agrarian transformation, which is defined as a rapid fundamental change in the relations (systems and patterns of ownership and control) of land, livestock, cropping and community with the goal of the strategy being social cohesion and development.

The CRDP has three pillars: meeting basic human needs; rural enterprise development; and, rural industrialisation, supported by rural markets and credit facilities. Land reform has four components: restitution of land rights; redistribution; tenure reform; and development.

The Green Paper on Land Reform (2011) defines three principles underlying land reform: deracialising the rural economy; democratic and equitable allocation and utilisation of land across race, class and gender; and sustained production discipline.

The strategic thrust underlying land reform is that land reform should be carried out with minimal or no disruption to food security. Key transformational programmes, linked to the constitutional, legal, strategic and principle framework for land reform outlined above, which are either in execution or in various stages of development are as follows:

a) Land reform; the four-tier system:

   i) State and public land: leasehold;
   ii) Privately owned land: freehold with limited extent;
   iii) Land access to foreign nationals: a combination of freehold with limited extend and leasehold; and,
   iv) Communal land: communal tenure with institutionalised use rights.

b) Institutional support:

i) The Land Management Commission;
ii) The Office of the Valuer-General; and
iii) The Land Rights Management Board, with Local Committees.

### *7.1.2. The Role of the DRDLR with regard to the CRLR*

In terms of section 20 of the Restitution Act, the Director General of the DRDLR is the accounting officer for the Commission on Restitution of Land Rights (CRLR).

The Director General, and in some instances through officials of the DRDLR with delegated authority, ensures the implementation of, and compliance with, the provisions of the Public Finance Management Act 1 of 1999 (PFMA), particulalrly Chapter 5 therof, by the CRLR. Funds for the settlement of claims and operational expenses of the CRLR are appropriated through the vote of the DRDLR.

In addition, and with the Minister of Rural Development and Land Reform who is the executive authority responsible for the CRLR and the DRDLR, the Director General of the DRDLR provides strategic direction to the CRLR. The Chief Land Claims Commissioner (CLCC) who is the head of the CRLR is responsible for operatons and day-to-day management of the CRLR.

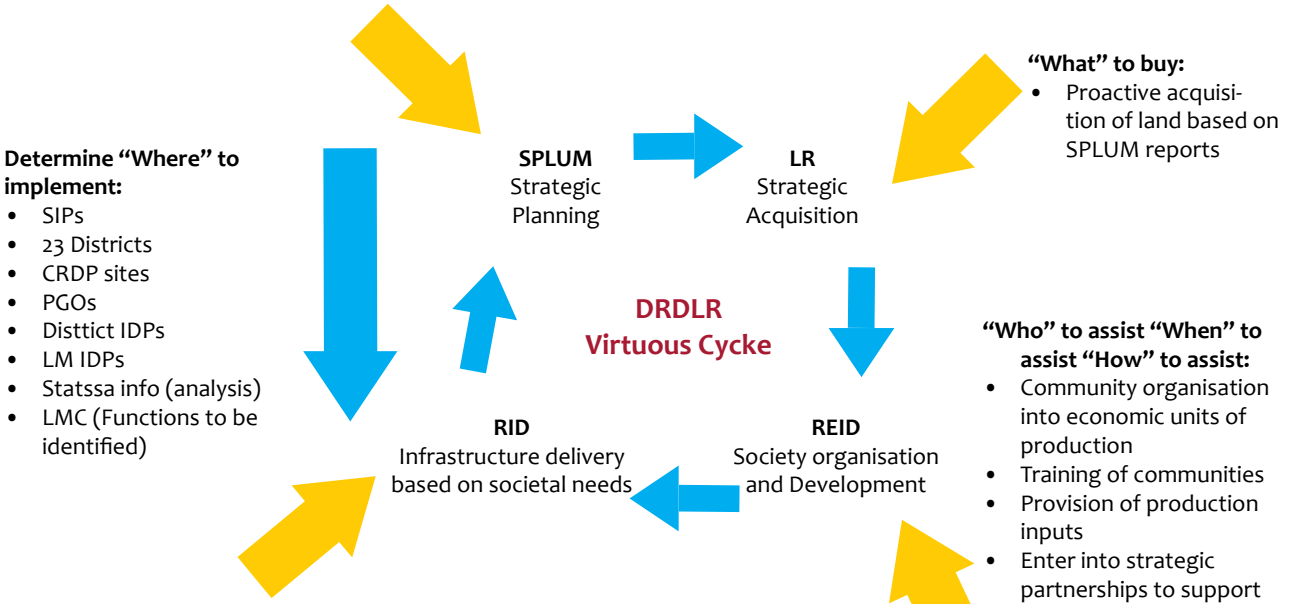
The Minister further provides policy direction to the CRLR and on rural development and land reform.

Since all land claims are lodged against the State, which is represented by the Minister, the Minister is a party to negotiations and, in order to expedite the negotiations, settlement models are developed by the Minister, DRDLR and the CRLR. This empowers the CRLR to negotiate the settlement of claims without the direct involvement of the Minister of the DRDLR, although all negotiations are subject to approval by the Minister.

The implementation of awards (of land and equitable redress) as settlement of land claims is carried out on behalf of the Minister by officials of the DRDLR or CRLR who are delegated to do so by the Minister.

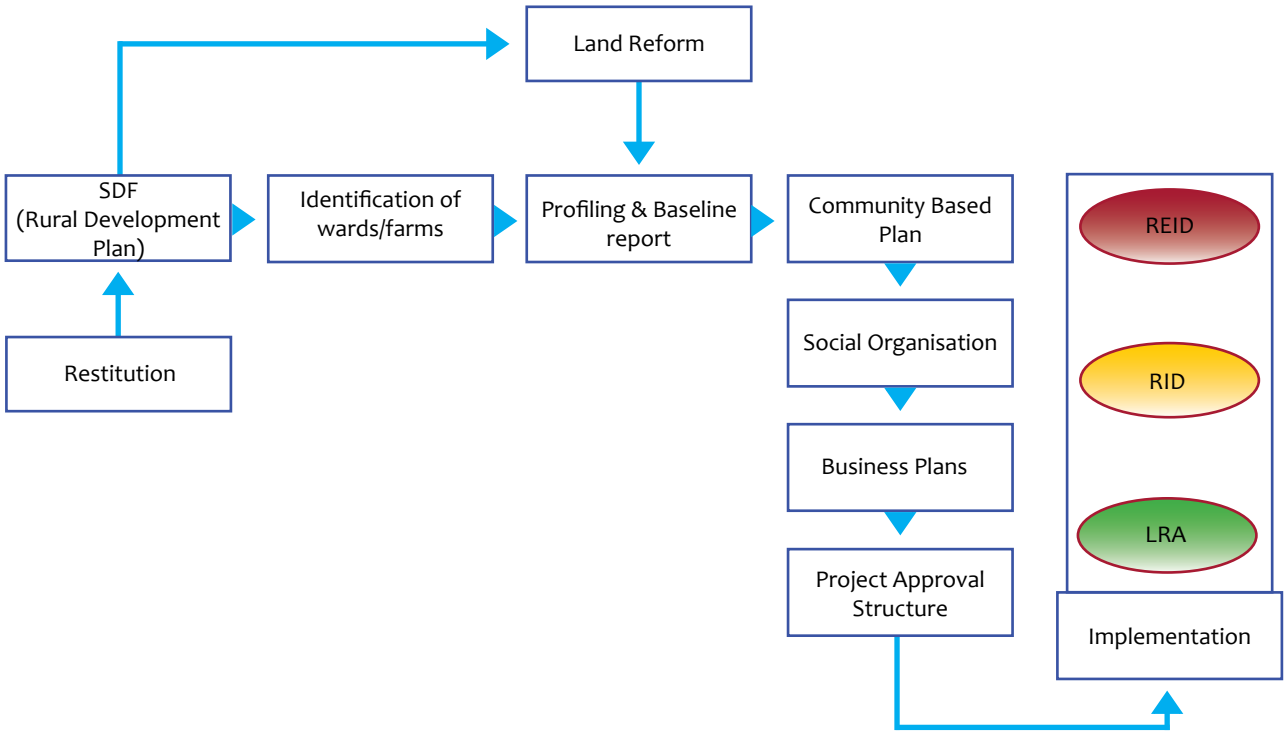
The CRLR functions as a division, chief directorate or branch of the Department. Furthermore, the DRDLR has ten branches, all of whom provide support to the CRLR in the performance of its functions. The CRLR, however, retains autonomy particularly in relation to decision-making in terms of the Restitution Act. The following twoprocess diagrams represent the applicable process flow (DRDLR Virtuous Cycle and CRDP Workflow Process):

**Figure 1: DRDLR Virtuous Cycle**




Infrastructure Projects i.e. When and what infrastructure to deliver is determined by community readiness to produce in the identified areas that maximise governments investment. Projects relating to the socio-economic regeneration of small towns. ICT and special projects will also be initiated by RID.

**Figure 2: CRDP Workflow Process**



### *7.1.3. Challenges related to the restitution process*

The challenges facing restitution include the following:

- ***Insufficient budget***

  As a result of the slow growth of the economy, other competing priorities of government, and other factors, the funding allocations for the settlement of claims have always limited the number of claims that can be attended to each financial year

- ***Slow pace of settlement of claims***

  The claims that remain are mostly rural claims which are very complex. They involve a high number of households requiring more engagement, and are in respect of vast tracts of land, mostly high value agricultural land. Some of these claims are competing or overlapping with each other.

- ***Inadequate capacity in the CRLR***

  The CRLR is not operating at optimum capacity. Owing to the nature of the CRLR when it was established, it also has a high attrition rate.Because of the job demands, the CRLR does not have adequate capacity to perform some of its functions. Research is an example of an area where the CRLR does not have adequate skilled capacity.

- ***High number of cases before the court and legal representation***

  As a consequence of the delays in the settlement of claims, and other challenges, affected current owners of claimed land and in some instances claimants often refer the claims to court for adjudication. Where cases are in court the DRDLR [per the Nkuzi Development Association v Government of the Republic of South Africa 2002 (2) SA 733 (LCC)] or the CRLR [per s29(4) of the Restitution Act] is often required to provide legal representation to the indigent parties before Court. Cases that are referred to court often result in further delays.

### *7.1.4. Steps taken to address these challenges:*

The following steps have been, or are being taken, to address the above challenges:

- ***Insufficient budget***

  Representations are made to National Treasury through Medium Term Expenditure Framework (MTEF) processes each year requesting funding. The MTEF gives effect to the rolling three-year planning in government and as such indicative allocations are known upfront to the department for the rolling three year cycle. The processes of settlment of claims as well as operations of the CRLR have been designed in a manner that takes into account the available resources within the 3-year cycle. Fiscal realities dictate that the land restitution process exists within a given set of economic constraints that all needs are subjected to. As a result, it has been accepted that the pace of the restitution process will be impacted by and respond to the ability of the state to raise revenue for the fiscus.

- ***Slow pace***

  Partnerships with the Human Sciences Research Council and the University of South Africa have been established to assist the CRLR with the research of claims and the transfer of skills to CRLR officials. Partnerships with other research institutions and universities are currently being discussed. Youth across the country participating in the National Rural Youth Service Corps, a flagship programme of the DRDLR that has enlisted 13,000 youth, shall be trained to assist in the processing of claims thereby increasing capacity within the CRLR.

- ***High number of cases before court***

  In an effort to address capacity issues in the Land Claims Court, the Restitution of Land Rights Amendment Bill 35 of 2013 currently before parliament provides for the Court to consist of a Judge President and as many judges as may be determined by the Judge President, who will be appointed (as opposed to the current secondments) by the President acting on the advice of the Judicial Services Commission each of whom must be a judge of the High Court of South Africa.

In addition, the DRDLR is looking at alternative means of settling disputes e.g. Mediations and Arbitrations. The DRDLR's strategy also includes the Land Rights Management Facility (LRMF) which was estbalished to provide legal representation and mediation services to indigent parties in land tenure, land restitution, mediation and other matters.

## 7.2. Submissions made by the Commission for Restitution of Land Rights

### *7.2.1. The Role of the Commission for Restitution of Land Rights in restitution matters*

The Restitution Act provides for the establishment of the Commission for Restitution of Land Rights (CRLR)[35] and sets out its functions which are, broadly, to solicit[36] and investigate[37] claims for land restitution and to prepare them for settlement by the Minister,[38] or adjudication by the Land Claims Court.[39] The CRLR consists of the Chief Land Claims Commissioner (CLCC), a Deputy Land Claims Commissioner (DLCC) and as many Regional Land Claims Commissioners (RLCC) as may be appointed by the Minister.[40] The general functions of the CRLR are contained in section 6 of the Restitution Act.

The CRLR processes claims in stages as follows:

1) Lodgement – This is a process where claims are lodged. The deadline for lodging claims was 31 December 1998.
2) Screening and Categorisation – This process involves a determination of the type of claim and whether it was lodged in the prescribed manner.

35 Section 4(1) of the Restitution Act
36 Section 6(1) o the Restitution Act read with Rules 3 and 5 of the Rules Regarding Procedure of the CRLR
37 Section 12 of the Restitution Act
38 Section 14(3) read with section 42D of the Restitution Act.
39 Section 14(2) read with section 35 of the Restitution Act
40 Section 4(3) of the Restitution Act

3) Research – This process involves the investigation or research of a claim by the CRLR,[41] its acceptance or dismissal,[42] publication of the claim in the government gazette, and the determination of the households that quality for restitution (verification).
4) Negotiations – During this stage the CRLR attempts to resolve the claim through negotiation and mediation.[43] The CRLR acts as a facilitator of negotiations.
5) Settlement/Court – In this stage the CRLR refers the claim to the Minister for approval of the settlement of the claim where there is an agreement on how the claim ought to be settled[44] or to Court for adjudication[45] where there are areas of dispute.
6) Implementation – During this process the award made by the Minister or Court is implemented (acquisition and transfer of land, or payment of financial compensation).

### 7.2.2. *Relationship between the CRLR and the DRDLR*

The CRLR is a national public entity as defined in the PFMA. The Director General of the DRDLR is the accounting officer for the Commission, in terms of section 20 of the Restitution Act.[46] The Director General of the DRDLR, in so far as the finances of the department are concerned, is fully accountable,[47] while the Chief Land Claims Commissioner (CLCC) is responsible for operations and day-to-day management of the CRLR.

The DRDLR provides strategic and policy direction to the CRLR, particularly in relation to the models for the settlement of claims and implementation. Models for settlement are guided by the vision and broad goals of the country set out in the National Development Plan (2012) (NDP) and the broader changing development context, as defined in the CRDP and other strategies for growth which are intended to promote national reconciliation and social cohesion. The model for implementation is illustrated in Figure 1 above on the DRDLR's virtuous cycle and Figure 2 above on the CRDP's Workflow process.

### 7.2.3. Challenges related to the restitution process

***Implementation/Operational Challenges:***

Key challenges in terms of implementation and operations include the CRLR's poor capacity to research; competing and overlapping claims; the creation of communities within communities; restraint regarding development of claimed land, and ineffective use of restored land, and insufficient state support.

a) Insufficient research capacity: Poor research results in delays in the settlement of claims as the current owners of claimed land find grounds to challenge the validity of claims resulting in long protracted litigation; disputes on entitlement to restitution, etc.

41 Rules 3 and 5 of the Rules Regarding Procedure of the Commission, Government Notice No. R1961 of 29 November 1996 and Government Notice No R706 of 3 August 2001.

42 Section 11 of the Restitution Act.

43 Section 12 of the Restitution Act.

44 Section 42D of the Restitution Act.

45 Section and section 345 of the Restitution Act.

46 Section 20 states that "the estimates of expenditure in respect of each financial year shall, after being prepared by the Chief Land Claims Commissioner or an official contemplated in section 8(1) and designated by the Chief Land Claims Commissioner, be submitted, not later than the first day of August of the preceding financial year to the Director General of Rural Development and Land Reform, who shall be the accounting officer."

47 Chapter 5 of the Public Finance Management Act, 1999.

b) Competing and overlapping claims: This results in the slowing down of the restitution process whilst alternative dispute resolution mechanisms are being explored. Where alternative dispute resolution mechanisms have not been successful, the disputes over competing and overlapping claims are referred to the Land Claims Court for adjudication.

c) Communal Property Institutions as supporting system to the restitution model: The determination(verification) of members of communal property institutions that constitute the claimants is often a challenge as no records exist as to who were members of which community. Individual rights on the communally owned land are also not set out.

d) Restraining development on land over which a claim has been lodged: The demand-driven restitution model creates expectations by claimants just as much as it creates uncertainty to current landowners and in the agricultural market. Such expectations by claimants begin when their claims are published in the Government Gazette, following the acceptance of claims by the CRLR which does not mean approval of the claim but rather that the claim is not precluded from being considered by the requirements for restitution. However, certain restrictions over development of claimed land are imposed in addition to the fact that the existence of the claim restrains investment in its development until there is certainty with regard to its resolution.

e) Ineffective use of restituted/restored land and inadequate State support: The beneficiaries of the restitution programme do not have experience in conducting farming operations on farms restored to them and there has been inadequate support from the State which tended to emphasise the number of hectares transferred as opposed to the long term sustainability of land that is awarded to the beneficiaries.[48] Furthermore, most settlements do not result in the economic empowerment of beneficiaries.

**Improving the planning and administration of the restitution process**

a) Research capacity: The CRLR has entered into agreements with the Human Sciences Research Council and the University of South Africa who shall assist with the research of outstanding claims and the new claims to be lodged, and the transfer of skills to staff of the CRLR.

b) Prioritisation of claims: In order to ensure effective implementation of the land restitution programme, and to promote certainty in the process (in the face of the possibility re-opening the lodgement should the legislation be amended), the claims shall be processed in phases as follows:
   i) Claims that were lodged by 31 December 1998 which remain unresolved;
   ii) Those who could not participate because of policies of the state (e.g. Betterment), misalignment of rights, or those who were left out during the settlement of existing claims that they should have been part of;
   iii) Those who could not participate because of the 1998 cut-off date (for stand-alone claims).

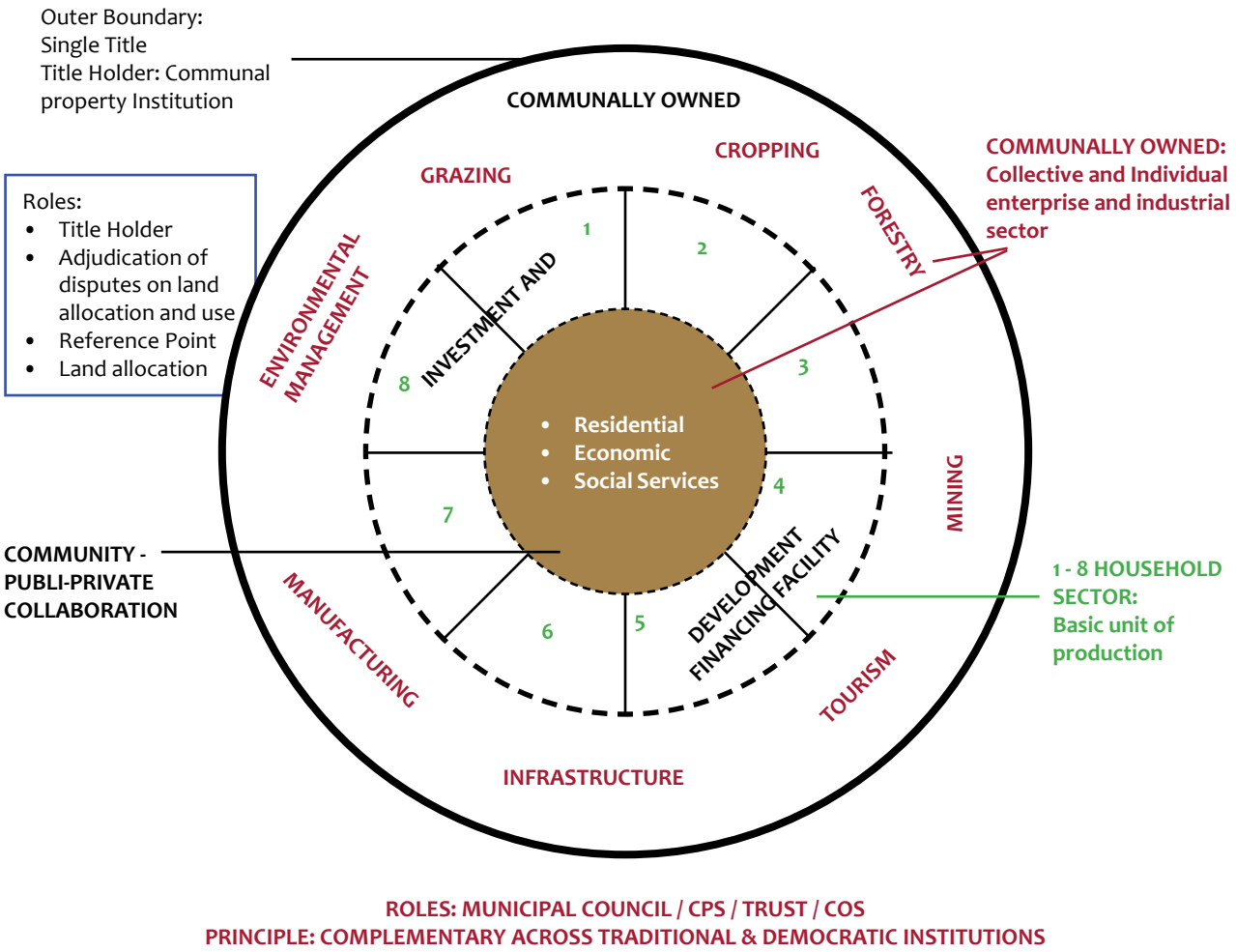
c) Prosecution for lodgement of fraudulent claims: In order to ensure that the resources of the State are not used in investigating fraudulent claims and to discourage people from lodging fraudulent claims, the communication campaign informing people of their right to restitution and to lodge claims shall clearly state that those who shall lodge fraudulent claims shall be subject to the full might of the law. Where a person is proven to have lodged a claim with an intention to defraud the State, such an action shall amount to a criminal offence punishable by law.

48 Minister of Rural Development and Land Reform, budget speech 2010.

d) Removing the restrictions imposed on developing land over which a claim has been gazetted: In order to address the challenges caused by the gazetting of claims, that the restrictions currently applicable to claims after they have been published in the Government Gazette shall be removed so that the gazetting of a claim on land does not hinder development.

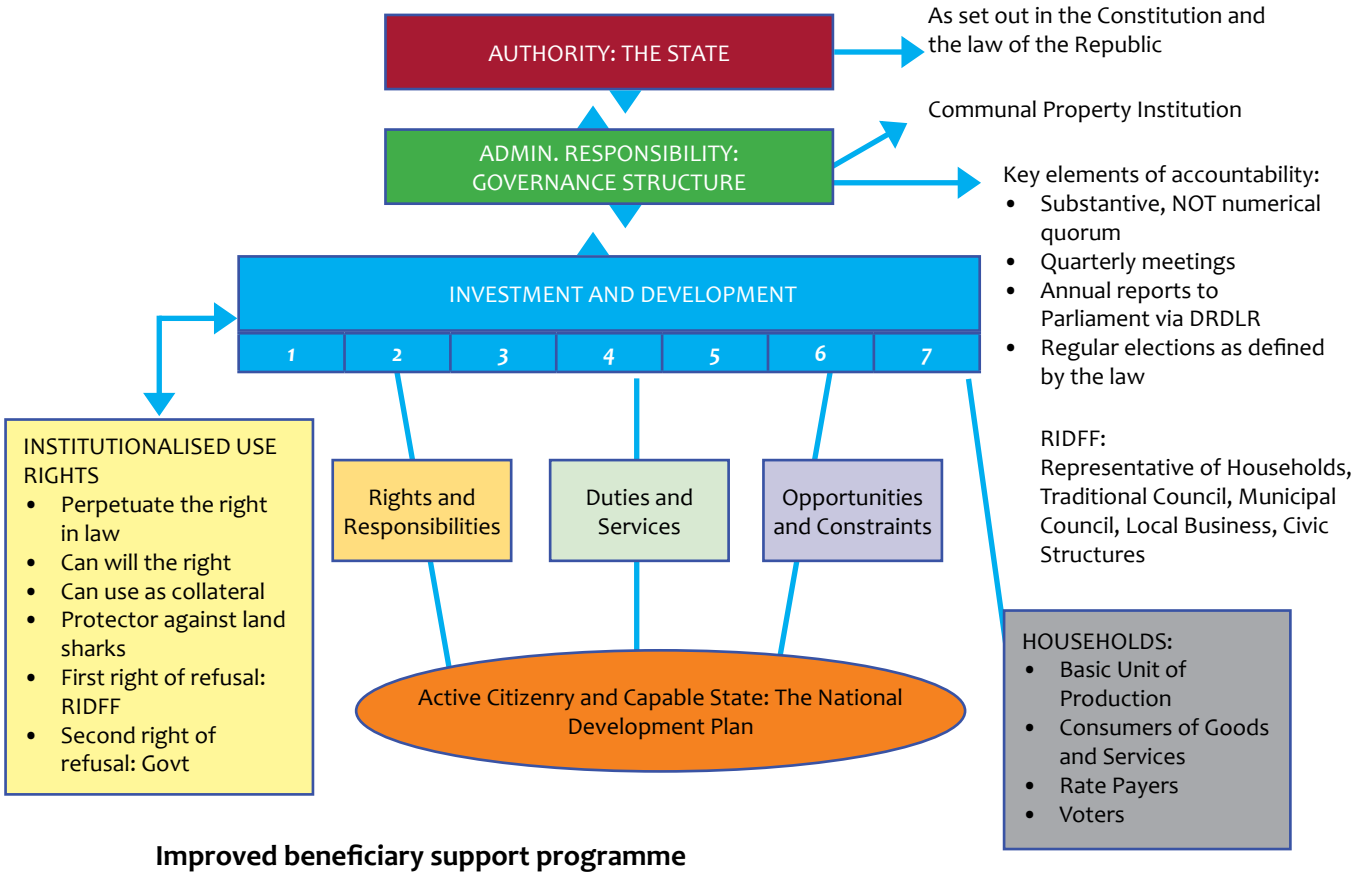
e) Addressing challenges of Communal Property Institutions (CPIs): Measures to ensure institutional reforms, governance strengthening, enhanced support by the State, and stronger accountability reforms in relation to Communal Property Institutions shall be put in place to manage land held communally, as set out in the Communal Property Institutions Policy. The policy provides for a Wagon Wheel model and the Institutional Roles and Relationships as indicated below:

**Figure 3: CPI Land Tenure Wagon Wheel Model**




The following diagram seeks to further illustrate the correlation between the authority of the state and the administrative responsibility of the governance structures (CPIs holding land in trust of the community).

**Figure 4: Institutional Roles and Relationships**




**Improved beneficiary support programme**

All the above proposals shall be underpinned by an improved beneficiary support system from the state to ensure that increasing food production, food security, commercialisation of small farmers and creating employment opportunities. A separate policy on the Recapitalisation and Development Programme (RADP) provides the framework through which support may be provided using the CRDP principles and approach.

## 7.3. Submission made by the Department of Public Works

The DPW has a mandate that relates to the management of state property in terms of the Land Affairs Act (No. 101 of 1987) and its reallocation which is carried out in terms of State Land Disposal Act and the Restitution of Land Act. That Land Affairs Act provides for the determination of amounts of compensation, purchase prices or rents in respect of immovable property expropriated, purchased or leased by the Department of Public Works and Land Affairs for public purposes and the giving of advice with regard to the value of land, rights on or in respect of land and purchase prices or rents in respect of certain immovable property; for that purpose to make provision for the establishment of a Land Affairs Board.

The challenges the DPW has include the need to coordinate between departments around matters concerning the registration of properties. A number of properties still need to be valued so that the asset register can balance. Delays could come from the Land Affairs Board which is currently appointed for a limited time and therefore there can be challenges of continuity and experience. Vesting also brings about challenges...where is it vested? There is no information about properties in deeds office, municipal land and so on. The CRLR puts pressure on the DPW to finalise a case and for the section 42(d) (of the Restitution Act) certificates but there are a number of procedures that need to be followed.

The relevant legislation applicable to the DPW is the State Land Disposal Act and Section 42(d) of the Restitution Act certificates. These certificates give the DPW permission to release property while the State Land Disposal Act gives the Minister the power to dispose properties for restitution. In terms of relevant structures to the actions the DPW carries out, the Land Affairs Board is considered under "Professional Services". Under this, the Board appoints valuers and town planners. This Board oversees that the valuations are within the standards. There is also a Provincial State Land Disposal Committee which falls under the Department of Rural Development. The committee discusses land matters, and disposal of land – i.e. will it be needed in the future by the state or should it be rented back from the community etc.

The DPW's processes are different from the execution of land restitution. But as the SAHRC understands it, where that environment has to be restored to the community, then the DRDLR approaches the DPW, and then there is a separate process for that. The DRDLR and the DPW then act together.

The DRDLR described a process where the Minister signs off for restitution to take place. The DPW also mentions pressure being placed on the department by other parties to release land. However, the DPW further clarified that this does not necessarily happen with every Regional Land Claims Commissioner (RLCC) – however, the Western Cape RLCC is particularly problematic in this regard.

The DPW does not always have certainty about which land is in the hands of the municipality. The asset register management moved from disclaimer to qualified audit, and they are attempting to get all the assets that belong to the State. The problem, from the auditor general, is that there is not a complete record. Also, what causes delays in the restitution process is that the Asset Register Management is being finalised.

The DPW has no register or statistics of land that is parastatal land and submitted that communal land was under the jurisdiction of the DRDLR.The DPW's involvement in terms of restitution is limited to state land. The DPW engages with the DRDLR. Most of the land is the DRDLR's land. The only obstacle is when the State is operating on the land. Those are the ones the DPW needs to negotiate on. In cases where land is leased to private companies, restitution is prioritised; so that means the private company's lease will be terminated. The contract mentions that if there is land claim, the lease is subject to that. The DPW does not generally deal with community claims and deals directly with the DRDLR.

## 7.4. Submission made by the Chief Surveyor General

### *7.4.1. The role of the Chief Surveyor General (CSG) in terms of land restitution:*

- The office of the CSG is part of the DRDLR. The CSG is the Branch Head of National Geomatics Management Service, one of the ten branches of the Department;

The duties of the Chief Surveyor are in terms of section 3 of Land Survey Act 8 of 1997 which state that the CSG shall be in charge of such cadastral surveying and land information services in the country as the Minister may direct and, subject to this Act, shall-

- Promote and control all matters connected with those surveys and services;
- Conduct such cadastral survey-related research as may be required;
- Take charge of and preserve the records of all surveys and operations which do not form part of the records of an office of a Surveyor General and which were carried out

before the commencement of this Act or under this section;
- Prepare, compile, and amend such maps and other documents as may be required;
- Supervise and control the survey and diagrammatic representation of land for purposes of registration in a deeds registry; and
- Regulate the procedure in each Surveyor General's office and determine the manner in which this Act shall be carried out.
- Any land surveyor employed by the CSG may, if authorised thereto by the CSG, perform any specified act or task which may be performed in terms of this Act or any other law by the CSG.

The powers and duties of the Surveyor General are in terms of section 6 of the Land Survey Act 8 of 1997:

- The CSG's role during the restitution process is to provide services and assistance as and when requested in relation to the following:

  - Provision of correct property information;
  - Identification of claimed land parcels;
  - The conduct of sub-divisions of land;
  - Preparation of consolidation diagrams;
  - Provision of historical information in terms of land-use and property name changes.

### 7.4.2. *Challenges related to this process (including any challenges of intergovernmentalrelations)*

The CSG, in written submissions, reported to not having any challenges that relate to land restitution. However, in it oral presentation, the CSG make it clears that it still has significant areas of land to survey. In addition, it faces a number of constraints in terms of its capacity to support the work that is needed to be able to contribute fully to the restitution process.

**Steps taken to address the challenges**

No steps were reported.

## 7.5. Submissions made by the Land Rights Management Facility

The Land Rights Management Facility (LRMF) was initiated by the DRDLR (Department) in 2008, motivated by the need to remedy evictions, threats of eviction and human rights violations in rural areas. The LRMF is a project aimed at improving access to justice in rural areas. The key rationale of the Department was to provide for dedicated state-funded panels of specialist land rights lawyers and mediators in order to provide legal and mediation services to poor, marginalised and indigent people in rural farming areas, to support land tenure reform and to contribute to stabilising and improving social relations in rural communities.

Separate panels of lawyers and mediators have been established in different parts of the country to deal with litigation and mediation matters referred under the auspices LRMF. These panels have a wide geographical spread and a countrywide presence, making services accessible in most areas where the Department's provincial and district offices are located. The panels include a wealth of specialist expertise and experience on a range of issues relating to land rights. A tariff of professional fees and disbursements applies to legal and mediation services provided under the LRMF.

In practice, departmental officials liaise with the public and screen cases in the national, provincial and district offices to assess which disputes are suitable for referral for legal or mediation services. Cases that pass the screening are referred to the LRMF under cover of case referral forms duly completed by the responsible departmental official. These cases are then assessed under the auspices of the LRMF in terms of the history of the matter, the facts of the case, available evidence, applicable law and policies, and the relief sought. Panel members are matched with cases in accordance with developed criteria which include taking into consideration geographic location, nature and complexity of cases, experience, expertise of panel members, an equitable distribution of cases and availability. None of Cheadle Thompson and Haysom[49] (CTH)'s – the organisation which the department contracted to administer the LRMF - lawyers or mediators serve on the panels, nor are cases referred to them.

The Department's initiative was profoundly influenced by the judgment in *Nkuzi Development Association v The Government of the Republic of South Africa and the Legal Aid Board (LCC 10/01) [2001] ZA LCC 31* where the Land Claims Court held, in the context of land rights, that the State is under a duty to provide legal representation or legal aid through mechanisms selected by it and directed the Ministers responsible for Justice and Land matters to take all reasonable measures to give effect to the judgment.

In this case, the Land Claims Court gave a declaratory order to the effect that:

1) the persons who have a right to security of tenure in terms of the Extension of Security of Tenure Act 62 of 1997 and the Land Reform (Labour Tenants) Act 3 of 1996, and whose security of tenure is threatened or has been infringed, have a right to legal representation or legal aid at State expense if substantial injustice would otherwise result, and if they cannot reasonably afford the costs thereof from their own resources;
2) the State is under a duty to provide such legal representation or legal aid through mechanisms selected by it.
3) the cases in which substantial injustice could result include, but are not limited to, cases where:
    - the potential consequences for the person concerned are severe, which will be so if the person concerned might be deprived of a home and will not readily obtain suitable or alternative accommodation; and
    - the person concerned is not likely to be able effectively to present his or her case unrepresented, having regard to the complexity of the case, the legal procedure, and the education, knowledge and skills of the person concerned.

The Land Claims Court directed the Minister of Justice and the Minister of Land Affairs (now Rural Development and Land Reform) to take all reasonable measures to give effect to its order, so that people in all parts of the country who have rights as set out in the order are able to exercise those rights effectively.

Before 1 June 2011, the LRMF focused primarily on facilitating the provision of specialised legal and mediation services to individuals and communities faced with the violation of their tenure security rights.

49 Cheadle Thompson and Haysom Incorporated Attorneys (CTH) is appointed (under bid number RDLR-0038 (2012/2013)) to manage the LRMF on behalf of the Department of Rural Development and Land Reform. CTH does so in its capacity as service provider and reports to the Project Manager: Land Rights Management Facility, who is an official of the Department of Rural Development and Land Reform.

After 01 June 2011, the scope of the LRMF was broadened to include the regularisation of dysfunctional community property institutions (communal property associations and land reform trusts) and to administer legal assistance approved by the Chief Land Claims Commissioner in terms of section 29(4) of the Restitution of Land Rights Act 22 of 1994. It is with respect to the latter that the LRMF plays a role regarding land restitution.

### *7.5.1 Role of the LRMF regarding land restitution*

***Extended scope of LRMF***

The extended Scope of the LRMF after 1 June 2011 provided for the administration of legal representation arranged by the Chief Land Claims Commissioner in terms of section 29(4) of the Restitution of Land Rights Act 22 of 1994.

**Section 29(4) of the Restitution of Land Rights Act**

Section 29(4) of the Restitution of Land Rights Act provides as follows:

*"29. Intervention to proceedings before Court, right to appear and legal representation…*
*(4) Where a party cannot afford to pay for legal representation itself, the Chief Land Claims Commissioner may take steps to arrange legal representation for such party, either through the state legal aid system or, if necessary, at the expense of the Commission."*

A significant proportion of section 29(4) matters referred by the Chief Land Claim's Commissioner for administration under the auspices of the LRMF involved matters predating 1 June 2011 which were previously administered by the CRLR. Matters referred for administration after 1 June 2011 involved a range of parties, some of whom were already represented in litigation by attorneys and others who were unrepresented.

In the case of unrepresented parties or where the section 29(4) approvals did not identify legal representatives, matters were referred to members of the LRMF legal services panel taking into consideration a range of criteria including geographic location, the nature and complexity of cases, the experience and expertise of panel members, the equitable distribution of cases and the availability of panel members.

CTH monitors case progress in section 29(4) matters dealt with under the auspices of the LRMF, reports thereon to the Department and to the Commission, assesses accounts received from the lawyers responsible for these cases (with the assistance of independent cost consultants where appropriate) and makes payments of their accounts after the approval of and on behalf of the Chief Land Claims Commissioner.

**Restitution referral volume and distribution**

The provincial distribution of current restitution matters administered under the auspices of the LRMF is set out below. There are currently 149 active restitution matters administered under the auspices of the LRMF.

### *7.5.2 Key challenges arising from restitution matters*

**Initial uncertainty regarding the role of the LRMF**

There was initially some uncertainty and concern amongst attorneys who had been instructed in restitution matters and received legal assistance from the Commission prior to 1 June 2011 about the role to be performed by the LRMF in relation to their matters. This was coupled with some discomfort with the reporting, tariffs and other requirements of the LRMF. These initial difficulties were resolved in due course.

**Challenges identified by attorneys instructed in restitution matters**

Feedback from attorneys dealing with restitution matters highlighted the following concerns:

- Difficulties in accessing relevant information and documentation held by the Commission which is needed to further the cases of their clients.
- Documents appear to be missing. In some matters this could be attributed to the change of staff within the Commission and in some others, the transfer of files between different provinces.
- In some cases, attorneys have experienced a lack of co-operation from the Commission, leading to threatened court applications to compel the Commission to make the relevant information available.
- A lack of communication between themselves and the Commission in so far as settlement negotiations are concerned. For example, attorneys are invited to meetings with farm owners / other stakeholders but do not receive feedback on the status of negotiations in respect of the sale of land.
- A lack of communication/co-operation by the office of the state attorney in respect of litigation proceedings and the processing and settlement of claims.
- Instances of non-compliance by the Commission and the state attorney with court rules and orders and applicable time periods.
- Delays in the State signing offers of sale in restitution matters that have been settled.
- The quality of research conducted by the Commission into the facts surrounding a claim which has led to a need for further requests for research or for other expertise to be sourced by attorneys.
- The complexity of resolving competing claims to the same land, such as conflicting claims between communities and individuals and between communities and traditional authorities needs focused attention, resources and a recognition that different experts, sources and records may be drawn together by each party to the conflict if the matter goes to court;
- The propensity for the representatives of land owners to routinely dispute all aspects of the claims lodged by communities, focusing on legal arguments of an essentially technical nature in an effort to frustrate or delay claims for restitution; and
- Each claim can absorb a significant amount of time of legal and other professionals such as researchers. The adequacy of the tariff of professional fees and disbursements applicable under the LRMF can therefore become a challenge;
- Innovative ways to expedite the resolution of multiple / competing restitution claims need to be found.

**Speeding up litigation**

Many of the restitution matters referred to the LRMF have been characterised by lengthy delays in the progress of litigation. These delays result from a variety of causes, including delays caused unnecessarily by the Commission, the State Attorney, LRMF panel members and the Land Claims Court itself. Delays contribute significantly to litigation costs and frustrate the resolution of land rights disputes. A priority focus on delayed restitution matters dealt with by the LRMF should consider innovative ways to expedite their finalisation.

**Data bases of relevant experts**

Based on the scale of funding requests for expert assistance (such as research, valuation and surveying) in restitution cases, it would be appropriate to compile data bases of experts with appropriate skills and experience to be drawn upon by panel members if justified by the requirements of their cases. The data base would need to accommodate a range of relevant skill sets.

**Restitution litigation priorities**

As far as restitution is concerned there is a need to focus on two priorities.

- Firstly, the complexity of resolving multiple/competing restitution claims between communities and individuals and between communities and traditional authorities has been highlighted by panel members as a key challenge resulting in significant delays in finalising claims. There is a need to focus on current restitution matters involving multiple claims and to consider ways to expedite resolution of these matters.
- Secondly, many of the restitution matters referred to the LRMF have been characterised by lengthy delays in the process of litigation. These delays result from a variety of causes, including delays caused unnecessarily by the Commission itself, the State Attorney, panel members and the Land Claims Court itself. Delays contribute significantly to litigation costs and frustrate the resolution of land rights. A priority focus on delayed restitution matters dealt with by the LRMF should consider innovative ways to expedite their finalisation.

## 7.6 Participation by the Acting Judge President of the Land Claims Court

The SAHRC heard the views of Acting Judge-President Yasmin Meer of the Land Claims Court[50] during the investigative hearing on the perception of a more favoured approach by the state of financial compensation as opposed to restoration of land being the most preferred resolution when it comes to land for mining. The SAHRC enquired as to whether the Land Claims Court (LCC) had engaged with this. The LCC submitted that it engages with these issues in relation to orders. In granting an order, the LCC has to consider if there is a claim for physical restoration of land, and whether or not such claim is feasible. It is not the place of the LCC to advise claimants to go for money instead of restoration of land. The LCC receives proposals from the Commission and/or from the claimants themselves. If there is a claim for restoration, for example with the *Bakgatla* case, where communities were dispossessed of land which is currently the home of the South African National Defence Force (SANDF), the LCC will weigh up the views of the opposing party. The communities in *Bakgatla* were passionate about that land. However, that land was dangerous and had land mines on it. In that circumstance, restoration did not happen. The LCC has needed

50 The Land Claims Court (represented by Acting Judge President Yasmin Meer) engaged with the SAHRC during the hearing but not as a respondent.

to consider whether a national asset should be restored. In Another example is that of Cavendish Square in Cape Town: where a coloured family who owned a tiny cottage that had existed on the land wanted restoration of this land. However during dispossession, that family did not lose Cavendish Square, they lost something different. This case was financially settled and the trial did not run. The LCC explained that when costing financial compensation, it is not always necessarily money that is awarded instead of land. The Restitution Act allows the court to order restoration of state-owned land as an alternative when the land from which the individual or community was originally disposed is not feasible to be restored. The calculation of the value of land is currently under review in the Courts. In *Florence*[51], the LCC used the Consumer Price Index to adjust what it viewed as a price for the land at the time of dispossession to current market value. One of the requirements for compensation is that the claimant should get paid a reasonable and fair amount for the land.

With regard to the 'fair price' for land on which mining rights have been awarded, the SAHRC enquired as to the calculation of fair price. The LCC submitted that in every case, it has to find a balance calculating both market price and market value in the current economic climate. The LRCC needs to consider what was lost, and what is there now? The Restitution Act provides for the LCC to take all these factors into account. It obtains valuations and then decides what the best form and amount of compensation ought to be. The LCC admitted that these types of land restitution cases are long and complex.

The DRDLR had submitted that one its major challenges is the high number of cases that need to be resolved by and remain before the LCC. When consulted, the LCC explained that the primary issue is not that there is only one permanent judge as this is not what delays judgments. The LCC case management system with the small team in place is efficient. However, the LCC is a circuit court and legal practitioners should know that they ought not to summon the court unless all aspects of the case are ready for trial. Unfortunately, there are a number of matters that reach the Court without all the necessary preparation. There are premature referrals, incorrect gazetting, and incorrect categorisation of claims i.e. a community and not an individual claim, or financial compensation versus restitution. The backlog is generally at the CRLR. There may be a claim which the CRLR has certified that cannot be settled but the necessary preparation has not been finalised to enable the matter to come to court.Consequently, there are also applications to compel the CRLR to bring cases to court. Once ordered, the CRLR sometimes does not respond andthe LCC follows up with a phone calldrawing to the attention of the CRLR the need for compliance withthe court order. Thereafter, there are challenges regarding preparation of the clients, the research that needs to go into every investigation, and cases are poorly put together without adequate preparation.

51 CCT 127/13.

# Analysis of Evidence and Recommendations

# 8. Analysis of Evidence and Recommendations

In terms of the Human Rights Commission Act, the Commission is entitled to:

> *"make recommendations to organs of state at all levels of government where it considers such action advisable for the adoption of progressive measures for the promotion of fundamental rights within the framework of the law and the Constitution."*

The investigative hearing on the systemic challenges affecting the land restitution process in South Africa revealed that there are a significant number of problems that have faced the land restitution programme in the countrydespite the country not only pledging its commitment to restitution of rights in land in international and regional legal instruments, but also in its attempts to implement national legislation to give effect to those commitments. The obstacles identified do not appear to stem to any significant degree from the constitutional provisions and accompanying legal framework. The SAHRC is of the view that in order to address and remedy the land restitution process in South Africa, it is necessary to deal with the challenges identified from the past 20 years and not to depend on legislative changes that fail to address issues that have been identified as needing to be addressedand remedied.

The investigative hearing also revealed that while there is some understanding by all of the respondents in land restitution matters of their roles and responsibilities, guided by their core mandates, the role of the CRLR is less clear. The SAHRC is concerned that systemic challenges affecting the land restitution process may be partly as a result of the current set-up (and subsequent understanding) of the CRLR's relation to the DRDLR. The DRDLR submitted that the CRLR is one of its branches or units. The DRDLR deferred a number of the questions posed to it by the SAHRC to the CRLR, explaining that the CRLR would be better placed to address such question given that it was a unit of the DRDLR.This is a concern for the SAHRC as it suggests that the CRLR will not construct its work in a manner that is impartial to and independent of the DRDLR. During the hearing, the DRDLR asked to provide its submissionin combination with the CRLR. The panel declined and requested to receive submissions separately.

The SAHRC's understands that the CRLR is expected to facilitate the policies of the state in relation to restitution – acting first and foremost to secure the interests of those whose lives were uprooted and destroyed through the discriminatory regimes of colonialism and apartheid. The DRDLR, though the Minister of Rural Development and Land Reform,perform certain functions in terms of the Restitution Act enabling it to review proposed restitution measures in relation to potential broader public interest considerations – for example, national security requirements that may be relevant in relation to state land. However, from its submission's it appears that the CRLR defers to the DRDLR in terms of its strategy, policy priorities and process in relation to models for the settlement of claims and implementation.

The DRDLR submitted that the strategic thrust underlying decisionsrelating to land reform – including land restitution –is that there should minimal or no disruption to food production. It is not clear how food productioncan be a valid determination for a legal claim of ownership. In addition, the issue of food production appears to be used only in cases where there is no intention to use land for mining. The DRDLR submitted that while the policy thrust is food security, this does not mean that when restitution happens, the state only deals with food production. It would depend on the type of land. The DRDLR could accept situations wherein the land-use prior to restitution would be acceptable such as mining.

The hearing revealed significant challenges in relation to the calculations and determination of the value of land from which individuals and communities werehistorically dispossessed but which today have to be seen in the context of subsequent developments and uses. Policy and possibly legislation is needed to provide greater certainty in this regard. The issue of the losses that communities face from their exclusion from the benefits of the mineral resources in and under their land, which have also rendered their surface rights to the land impossible, is also something that needs to be more clearly addressed. It does not seem right that geographic dispossession results today in a perpetuation of wealth exclusion in a democratic South Africa. To this extent, the characterisation of the restitution process by the CRLR submitted during the investigative hearing as a "political problem" has validity. However, the restitution process is also a judicial one and cannot be contingent on departmental policies that undermine the need for just and equitable and remedy of past rights violations as envisaged in the Constitution.

The SAHRC is concerned that the number of claims outstanding as publicised is not dependable as the system of counting has changed so often. The CRLR submitted that when the lodgement process happened, people submitted claims and there was no proper system in place, such as claim papers simply being submitted into a box. Some people submitted their documents twice to ensure that their claim was received. There was no reconciliation process done. There was a lag between the submission of the form and the working on the settlement of the claims. That is when the CRLR identified duplicate/triplicate forms from the same claimant; so the challenge is that the overall figure does not reconcile. Databases commenced during or about 2000. Capturing information began from this. One claim form was used for a number of rights. The CRLR moved from counting rights, to counting claim forms, to counting claims. This affects how it measured the amount of claims lodged. There are currently 8,733 claims outstanding – these claims are at different stages of the process.

A key problem is that there is no conclusive system in place at the moment that will be able to give a claimant, who dutifully lodged a claim before the 1998 deadline, more information regarding the status of the claim. This presents a challenge – including for the SAHRC given that a number of complaints lodged at the SAHRC relate to claimants not receiving information from the CRLR with regard to the status of their claim. The lodgement system was based on the geographic location of the claim through different Regional Land Claims Commission offices and was then recaptured into the *UmhlabaWethu* system. If forms have been lost, the CRLR does a condonation exercise, and goes back to re-collect the documents. The loss of documents and files submitted to the Commission has exacerbated the challenges of resolving complex claims and opened the door to actual or perceived manipulation by officials. It also appears that not all claims received have been gazetted and this will create significant confusion about which claims were lodged at which time – especially if the process of lodging claims is to be reopened.

Another major challenge that was cited by all the respondents was the issue of research. Research is one of the CRLR's responsibilities in terms of the relevant legislation and its mandate. The research stage is where the CRLR fails. Because of the CRLR's capacity constraints and the complexity of claims, there is a need to source outside research assistance. To this end, agreements with the Human Sciences Research Council (HSRC) and UNISA have been concluded. Other universities across the country have also been has approached to assist with the research.It is noteworthy that the CRLR's research phase is delayed the longest at the point of defining "community".Based on the scale of funding requests for expert assistance (such as research, valuation and surveying) in restitution cases, even with additional experts with appropriate skills and experience,their access to information in government archives and active records would need to be facilitated much more actively than is currently the case.

The CRLR has to engage with research and claimants to establish who constitutes 'the community'as defined in the Restitution Act[52]. Whether an individual has any direct link to the land claimed, or through marriage and/or succession, needs to be determined[53]. However, the right to enforce a claim does not necessarily imply that all members would want to do so given that they may have decided to live elsewhere and not seek to return to the land if this is what the majority of the claimants have decided to pursue[54]. Members of communities have families who may or may not consider themselves or be considered by others as part of the community. This also needs to be taken into account and assessed. This process which the CRLR calls 'verification' is not spelt out in the Act itself and appears to be a major challenge for the CRLR. At the time of the lodgement of a claim there may be reasonable grounds for inclusion or exclusion of people but unless there is greater clarity, the processes are likely to be drawn out. If those who are involved in reaching a settlement that involves financial compensation, what they agree to on behalf of a given number of people would be likely to look very different and possibly unsatisfactory if the number of beneficiaries (the size of 'the community') were to increase threefold. Some claims are lodged on behalf of a community and the person submitting the form claims to represent such community. The appropriate resolution or document supporting such a claim needs to be submitted at the time of lodgement. In a number of instances, parties to the resolution have died or divisions in the community have emerged and thus as time goes on, there is a need for engagement with the community in a manner that is able to provide certainty to the nature of the claim and on whose behalf it is made.

Settlements need to be made on the basis of non-discrimination and this requires a significant degree of certainty about post-settlement arrangements which the CRLR would need to confirm prior to the finalisation of the settlement[55]. In many instances such forward planning is entirely absent.

The use of land for livelihoods and productive activity was a key concern for the Department and the Commission. The CRLR's submission stated that:

> *"Restitution has not been able to ensure that the land provided is effectively utilised to sustain livelihoods...and bring prosperity to the beneficiaries of the programme. It could not have been the intention of the programme to merely restore ownership of the land without ensuring economic empowerment through sustainable use of properties"*

While securing of livelihoods is clearly a critical objective for the state, restitution itself is a legal claim concerning restoration and/or compensation once a right of ownership is recognised. The purpose of the Constitution's section 25(7) is to deal with the legal claim. Other initiatives of the state need to pursue measures – hopefully complementary measures - to ensure sustainable livelihoods or economic empowerment. Just as an existing owner of property can decide on whether to use her land for golf estate rather than farming, so a community whose land has been restored should be able to make decisions. The Recapitalisation and Development Policy (RDP)[56] is put forward as a key

52 s1(iv) "community" means any group of persons whose rights in land are derived from shared rules determining access to land held in common by such group, and includes part of any such group; s1 (viii) "person" includes a community or part thereof;

53 s2. (1) A person shall be entitled to enforce restitution of a right in landif- (a) he or she is a person or community contemplated in section 121(2) ofthe Constitution or a direct descendant of such a person;

54 s10. (1) Any person or the representative of any community who is of the opinion that he or she or the community which he or she represents is entitled to claim restitution of a right in land as contemplated in section 121 of the Constitution, may (own emphasis) lodge such claim, which shall include a description of the land in question and the nature of the right being claimed, on the form prescribed for this purpose by theChief Land Claims Commissioner under section 16.

55 s35 (3) An order contemplated in subsection (2)(c) shall be subject to such conditions as the Court considers necessary to ensure that all the dispossessed members of the community concerned shall have access to the land or the compensation in question, on a basis which is fair and non-discriminatory towards any person, including a woman and a tenant, and which ensures the accountability of the person who holds the land or compensation on behalf of the community to the members of such community.

56 The DRDLR defines the Recapitalisation and Development policy as one that focuses on human (capacity development), infra-structure development and operational inputs on properties in distress and newly acquired through the land reform redistribution, restitution and other programmes since 1994 as well as other agricultural properties in distress acquired without grant funding. The approach is to ensure that the enterprises are profitable and sustainable across the value chain in line with the Business Plan which stipulates comprehensive development requirements of targeted properties over 5 year recapitalization and development cycle.

instrument in ensuring sustainability of restored land. The SAHRC is concerned that the RDP needs to enable restitution beneficiaries to receive the financial and technical support they need to use that land restored to them in a manner that most directly accommodates their own, self-identified needs. Land will not be restored unless the government provides financial support to restitution beneficiaries. The financial support claimants receive may be combined with development plans and partnershipsthat they are part of formulating and attend to their immediate needs.

The DRDLR and the CRLR identified poor research methodology that informed the land claims process as an additional limitation to the expeditious finalisation of claims. While the CRLR acknowledged difficulties with regards to how the existing claims have been recorded and captured in a number of different ways over time and problems that have occurred as a result of documents and files being lost, there was no indication of how the CRLR intends to deal with these problems. The CRLR had a number of suggestions about how such problems would be avoided in relation to future claims should the draft amendments to legislation come into force, but was disturbingly silent on how it intends to reassure and communicate with existing claimants particularly where unique letters, agreements and other material substantiating claims have disappeared. The SAHRC is concerned that such challenges are only being considered systematically in relation to plans for potential new claims.

From an institutional perspective, the Land Reform Policy Document, compiled by the government in 2012, highlighted that the process is plagued by issues such as an ineffective monitoring system,inadequate advertising of claims and poor communication with regard to complaints received. What corrective measures are in place to deal with the existing claims was not clear.

The DRDLR and the CRLR focused on the Restitution of Land Rights Amendment Bill (LRAB), which intends to see the re-opening of the claims process for a further 5 years (i.e. to 2019). It was approved by the National Assembly on 25 February 2014; it will be sent to the National Council of Provinces for concurrence; and, once approved by Parliament, to the President for signature.

Respondents also acknowledged that during the previous land claims process, non-legitimate claims were processed based on false information. The LRAB also includes a proposed amendment that lodging fraudulent claims will be an offence under the Act. The CRLR submitted in the follow-up hearing that with the lack of standard operating procedures and the current absence of an electronic system to capture the lodgement of claims, it is unlikely to cope with new developments and new claims. The CRLR hopes to have the first phase of its automated system in place before any new claims can be lodged. It is unclear when this first phase is intended to commence, but it is the CRLR's hope that the electronic system is in place by the end of April 2014. The CRLR will need additional capacity in order "to process" remaining existing claims so that they are integrated into the system in order to be in a position to handle an influx of brand new ones. Information management is one of the CRLR's weakest points. Information needs to be reconciled on a single system that is able to interface with other systems.

Although not a key focus area of the investigative hearing, the SAHRC has concerns with the LRAB as they relate to existing claims. The additional period for submission of claims may create a possible resurgence of new land claims, with the DRDLR expecting approximately 397,000 claims.[57] The backlog of unresolved restitution claims raises concerns that claims filed under the new restitution period might further undermine the fulfilment of existing claims – even those that are already approved but where the land titles and development moneys have not yet been handed over. The reopening of claims is likely to further complicate and delay the processing of existing claims

57 Lund, T., "Land bill to benefit a select few", Financial Mail, 13 February 2014, http://www.financialmail.co.za.

outstanding. The LRAB may also open the space for claims, for example by traditional leaders, which may be in conflict with existing claims by other community-constituted structures. In addition, the LRAB intends to ban Communal Property Institution from owning redistributed land. This removes an option to existing claimants without their concurrence.

The SAHRC is further concerned that the re-opening of the claims process will mean expanding not only the claims of the people against the state, but the capacity of the state to process these claims and to find the financial and technical resources to do so. The CRLR has admitted to its major challenges in terms of capacity (a high staff turnover and inadequate research capacity) and the uncertainties around the electronic system for processing existing claims outstanding. To proceed with re-opening restitution without an undertaking from Treasury[58] that this budget to satisfy the existing incapacities in the CRLR is available risks raising unrealistic expectations that cannot be met, and in the process derailing the finalisation and settlement of existing claims. The LRAB has now been signed into law.[59]

The SAHRC also noted that there are a number of land claims in terms of the Land Reform Labour Tenants Act do not appear to have been finalised.

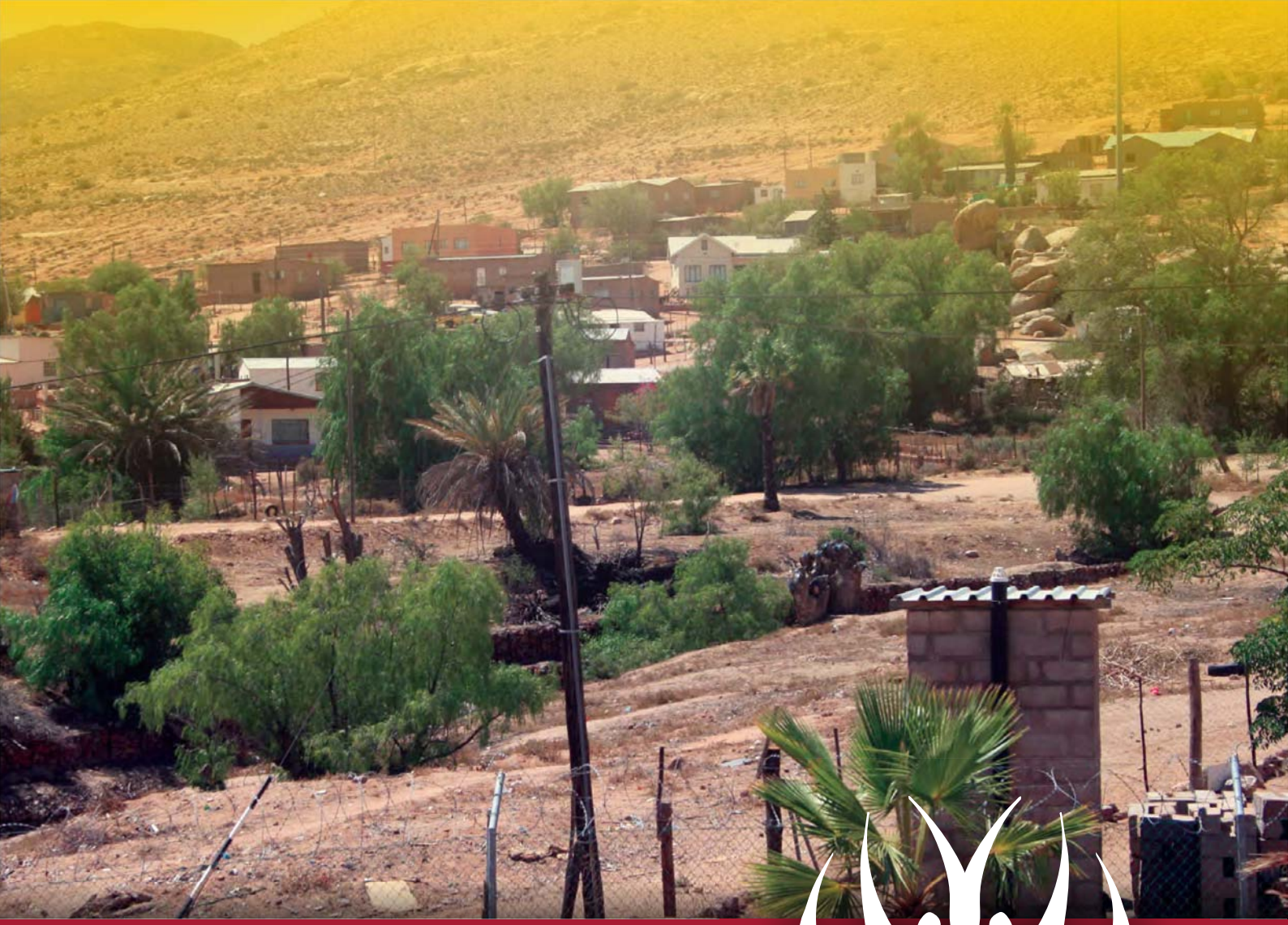
The challenges regarding the valuation and vesting of state land are a source of major concern given the fact that this comes two decades into our democracy. In addition, the fact that the DPW has no stats about parastatal and communal land creates major obstacles for the achievement of an integrated and coordinated process to manage these vital public assets. A number of complaints lodged at the SAHRC record suspicions of interference by officials. In this context, the fact that the Asset Register Management is still being finalised creates a number of uncertainties and opportunities for manipulation, corruption and accountability failures. This problem appears to be particularly pronounced at the local sphere of government which is particularly relevant for the resolution of restitution claims. In addition, the fact that there is an absence of a central set of criteria to guide all departments and spheres of government with regard to consideration over the question of the release of state land for land reform purposes clearly creates an unsatisfactory and unwieldy burden of cycles of consultations between departments.

Despite the apparent commitment and willingness of the CSG to assist with the land restitution claims processes, the SAHRC is concerned at the absence of capacity with the CSG to do historical research work and, if there is a proposal to recommend resettlement, to provide a proper survey of the land, to help the Department and community develop plans for the future.

The SAHRC is also concerned about the fact that the sub-divisions of 4 million hectares of land have not been undertaken. This is particularly relevant in cases when the same land is subject to competing claims – a phenomenon that the SAHRC believes will increase should the possibility for the lodgement of claims be reopened. As the CSG indicated, where the land is claimed twice both claims often have legitimacy and the tracing of land sub-divisions and mergers would be vital to understand this history and enable a settlement that is fair to all parties to be negotiated.

58 Over the next three years, the Government will spend R8.7 billion on the settlement of land restitution claims.

59 Since the finalisation of this report, the LRAB was signed into law on 30 June 2014. The Restitution of Land Rights Amendment Act 15 of 2014 will see the re-opening of claims for a further five years, from 30 June 2014 to 30 June 2019. The legislation also regulates the appointment and service conditions of judges of the Land Claims Court.



# Conclusion

# 9. Conclusion

In terms of Articles 26(1)(3) of the Commission's Complaints Handling Procedures the panel must:

> *"(1) (a) consider the evidence submitted at the hearing in conjunction with all other available information and evidence obtained otherwise;*
> *(b) make a finding on the facts and giving full reasons for the decision reached; and*
> *(c) make a finding regarding remedial action, if necessary.*
> *(2) The Chairperson of the Panel must, at the conclusion of the hearing, summarise the evidence contemplated in (1)(a) and state the finding, including any proposed remedial action.*
> *(3) The finding of the Panel at the hearing is final and is not subject to an appeal as provided for in Chapter 9 of the Procedures."*

The Commission is satisfied that these prescribed formalities have been complied with.

According to Article 26(3) of the SAHRC Complaints Handling Procedures, this finding is not subject to appeal. The Commission will, however, undertake to constructively engage with all parties affected by the recommendations espoused in this document so as to ensure maximum implementation of these recommendations.

It is the sincere hope of the Commission that this investigation and its findings will be of assistance in resolving some of the systemic challenges affecting the land restitution process in South Africa. The Commission will follow up with all parties in respect of whom recommendations were made, to facilitate their implementation. This report will also be sent to Parliament and, as indicated, made available to the public.

Signed at Johannesburg on the 30th day of July 2014.

Commissioner Janet Love

***NOTES***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Securing rights
Restoring dignity

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