

MINISTER OF RURAL DEVELOPMENT AND LAND REFORM

**THE REGULATION OF AGRICULTURAL HOLDINGS DRAFT BILL, 2017**

**LRC**

**Legal Resources Centre**

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**WRITTEN SUBMISSIONS FROM THE LEGAL RESOURCES CENTRE**

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**TABLE OF CONTENTS**

**OVERVIEW OF SUBMISSIONS..... 1**  
**PROCEDURAL FLAWS..... 4**  
**SUBSTANTIVE CONSIDERATIONS..... 8**  
**CONCLUSION / RECOMMENDATIONS..... 12**

## OVERVIEW OF SUBMISSIONS

1. The LRC is a leading public interest law centre established in 1979 as an independent, non-profit public interest law centre. In its earlier years the LRC challenged the tools of oppression used by the apartheid government to oppress millions of South Africans. Since 1994, the LRC has tried to tap the transformative potential of the new Constitution, to make it a living document for the people of South Africa. The LRC seeks to enable clients to assert and develop their rights, to build respect for the rule of law and constitutional democracy and to contribute to the development of human rights jurisprudence and the social and economic transformation of society. It uses a range of strategies including impact litigation, law reform, engaging development processes, training and networking in South Africa and beyond to find creative and effective solutions.
2. While the strength of the LRC lies in strategic impact litigation, whereby we secure precedent setting judgments for broader communities, we believe a multi-faceted approach - drawing on advocacy, strengthening the public interest legal sector, engaging in regional and international platforms, law reform and human rights awareness workshops - creates and reaffirms an enabling environment whereby marginalised and vulnerable groups are able to assert and are supported in asserting their rights. Our theory of change is rooted in the assumption that marginalised groups and communities will draw on their improved awareness about their rights and how to access these rights to engage and demand the realisation of their rights in their own lives. Where this can happen in an enabling environment, communities can access their rights and the rule of law becomes a tool through which to advance democracy, equality and development.
3. These submissions are made with a view to provide a perspective grounded in our experiences with individual and community clients respectively. It is hoped that these submissions will arouse an awareness of the lack of an integrated, considered process for land redistribution coupled with the integration of rural / small scale agrarian communities

in the nation's economy. Albeit the aims of the Draft bill are admirable and necessary, the mechanisms provided for in the Draft bill do not sufficiently empower or capacitate the communities and poor who are purportedly the beneficiaries of this Draft bill.

4. The professed aim of the Draft bill<sup>1</sup> is to reverse the legacy of colonialism and apartheid as well as ensuring a just and equitable distribution of agricultural land to Africans. As alluded to above, the tools provided in the Draft bill fall short of this aim. Specifically, the Draft bill seeks to:
  - 4.1. Create a commission of land that will be required to prepare an audit of current private and public agricultural land;
  - 4.2. A prohibition of future purchase of land by foreigners, restricting foreigners to leasehold in future, and the Minister reserving first option to purchase foreign owned land;
  - 4.3. The establishment of district based ceilings for land holdings;
  - 4.4. The creating of a category of private land, that is, redistribution of agricultural land;
  - 4.5. Black persons and thereafter the Minister reserving the first option to purchase redistribution agricultural land.
5. Despite the above, we are of the view that there should be a redirection of focus and efforts if the private country side is to be transformed. Legislative measures should rather be directed at equipping communities and poor people the right and the means to participate in planning and executing land redistribution district by district.

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<sup>1</sup> Published in the government gazette for public comment GG no 40697 Notice no 229 of 2017.

6. Aspirant farmers who are currently amongst the poor should be given enforceable property rights, access to technical assistance and developmental capacitation in order endorse / sponsor themselves. This envisioned system would also incorporate accountability and transparency measures to enable them to track their progress towards accessing, cultivating and /or breeding on the land. This would be the test of our current administration's commitment to land reform.

## PROCEDURAL FLAWS

### *a. Socio-Economic Impact Assessment System (“SEIA”) Report*

1. At the time when this submission was prepared, the Socio-Economic Impact Assessment report (“the SEIA report”) was not available. Despite two requests made through email to the Department of Rural Development and Land Reform (“the Department”) and the Department of Planning, Monitoring and Development, we were furnished with said report nearing the end of the comments period. The requests were made at the strength of the mandate and establishment of SEIA report as provided in the SEIAS guidelines. The guidelines make it mandatory that a SEIA report is drafted before the publication of draft policies, draft bills or regulations.
2. It is questionable that at the time that the Draft bill was approved by cabinet on 1 March 2017<sup>2</sup> and gazetted for comment on 17 March 2017 there was no accompanying SEIA report readily available. We note that the final report received its SEIA and quality assurance sign off from the Department of Planning, Monitoring and Evaluation on 13 May 2016.<sup>3</sup> Yet, the report was made available to us on 12 May 2017, unsigned

### *b. Law Making Process*

3. One of the main objectives of the Draft bill as it would appear, is to provide for the re-distribution of agricultural land. Such objective is not apparent in the content of the Draft

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<sup>2</sup> Statement on the Cabinet meeting of 1 March 2017 available at <http://www.gcis.gov.za/newsroom/media-releases/statement-cabinet-meeting-1-march-2017> > last accessed 15 May 2017.

<sup>3</sup> Department of Planning, Monitoring and Evaluation, Socio-Economic Impact Assessment And Quality Assurance Sign- Off Form, 13 May 2016.

bill. In fact the problems faced by land reform and land re-distribution in general are much bigger than apparent as there is a gap in the law making process.

4. There is a lack of an overarching frame for land re-distribution and land reform in the law. A framework is required to guide and provide direction for land re-distribution and land reform. The framework in the form of a White Paper that specifically deals with issues of land reform and re-distribution. This will provide guidance to the Department as implementing agents as well as affected communities as to the guiding principles and objects of land re-distribution.
5. The current land legislation and policy does not provide guidance and structure to decision makers in particular implementers of the legislation and policies. In short, the current policies such as the Comprehensive Rural Development Programme (CRDP); the Rural Transformation Model: One District, One Agri-Park, every Municipality a CRDP site and the Agricultural Landholding Policy Framework are examples of duplicative attempts at remedying the same issues, yet uncoordinated by an overarching framework. The Draft bill unfortunately is furthering the flawed system which resultantly lacks guidance and direction. This lack of coherent system and wide discretions allows for arbitrary grants of land and wide scale corruption.
6. Furthermore, although the Draft bill aims to address the wrongs of the past and reversing the legacy of colonialism and apartheid, this is not apparent in the content. The Draft bill aims to achieve this through various tools such as:
  - 6.1. the establishment of the land commission required to prepare a land audit of current private and public agricultural land;

- 6.2. prohibition of ownership of land by foreigners, restricting foreigners to leasehold in the future;
  - 6.3. providing the Minister first option to purchase foreign owned land;
  - 6.4. establishing district based ceilings for agricultural land holdings; and
  - 6.5. creating a category of private land.
7. It is submitted that none of the abovementioned tools will provide for the real change and reversal of wrongs of the past which will result in re-distribution of land in the country. As recognised in the SEIA report, the main beneficiaries of this Draft bill include black people with the capital to purchase the land themselves; beneficiaries of land redistribution<sup>4</sup>; commercial farmers able to consolidate holdings to reach ceilings as well as lawyers and land surveyors. The tools required are those that will give affected communities, the poor and marginalised the right and means to participate in planning and executing land redistribution district by district. The people should be given the enforceable rights to promote themselves and track their own progress towards access to land.
8. The Draft bill, therefore ought to be scrapped on the basis of the gap in legislative framework. A land re-distributive framework Act is required, one which seeks to provide for re-distribution and re-dress to previously disadvantaged communities. As it is seen even though the Draft bill seeks to provide for such re-dress it manifestly fails to do so. In summary the proposed the proposed statute should provide:
- a) Principled decision making;
  - b) Obligations on the State and land reform planning from bottom up;

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<sup>4</sup> From 1994 to 2016, land reform has barely altered the agrarian structure of South Africa, and has had only minimal impacts on rural livelihoods. It is estimated that 8-9% of farmland has been transferred through restitution and redistribution, and many settled restitution claims have not been fully implemented. See Cousins B.,2016, "Land Reform in South Africa is Sinking. Can it be Saved?" at p8.

- c) Rights and duties of land reform participants; and
- d) Clear procedures for applications, accountability and transparency of local registers of applicants.

## SUBSTANTIVE CONSIDERATIONS

### *a. Another Commission*

1. Section 4 of the Draft bill established the Land Commission which is intended to comprise commissioners versed or experienced in agriculture, economics, business and financial management, the law, the environment, rural development, land administration or research or possessing academic training. The level of expertise and / or experience sufficient for qualifying is dependent on the Minister. We note with some concern that the adjudication of such diverse skill sets is consigned to an exercise of discretion by the Minister. We seek further clarity on the objective benchmarks that are to be in place.
2. Ancillary to the compilation of the commission, we are concerned about the capacity and operation model for the commission. The Draft bill is sparse in detailing the operationalisation of the committee in the performance of its core function of the land audit. Further, we view the creation of such commission as a duplication of efforts. The 1994 Restitution Act authorised the Department of Rural Development and Land Reform to prepare a public land audit. The Minister was empowered to order such an audit. Such an audit was in fact completed and reported on in early 2013.<sup>5</sup> The audit was anticipated to assist with better planning for the broader land reform program. The results of that audit showed that some 14% is registered State land and 4% recently surveyed State land, while 79% is in private hands. Of this 79%, a significant percentage is owned by private individuals, companies and trusts.<sup>6</sup>

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<sup>5</sup> South African Press Association, "Land Audit Complete: Minister", 19 February 2013 available at <http://www.iol.co.za/news/politics/land-audit-complete-minister-1473275> last accessed 5 May 2017; Department of Rural Development and Land Reform, State Land Audit, effective date 29 April 2014, available at <http://www.ruraldevelopment.gov.za/phocadownload/Cadastral-Survey-management/Booklet/land%20audit%20booklet.pdf> last accessed 10 May 2017.

<sup>6</sup> Ibid.

3. The audit was deficient in details such as the extent of foreign ownership which were unavailable in the existing records at the time. Since the Report And Recommendations By The Panel Of Experts On The Development Of Policy Regarding Land Ownership By Foreigners In South Africa (“PLOF Report”)<sup>7</sup> not much has changed this position. Owing to the nature of records kept by the Deeds Registry, the nationality of non-natural persons is not documented. Thus, the Draft bill would go some way toward rationalized record keeping, yet this is explored below.

***b. Foreign Ownership***

1. The PLOF Report was published 10 years ago. There seems to have been no determinable action in the interim to decide on the preferred policy option.
2. The question of foreign ownership is a superficial distraction. The emphasis of this Draft bill is not on the extensive and comprehensive ownership of South Africa’s arable and pasturable land by the intended beneficiaries of this Draft bill.

***c. The Establishment of Ceilings***

1. The Draft bill establishes three sets of ceilings for agricultural land holdings. Any land held above the ceiling for the assigned category would be categorised as redistribution agricultural land to be sold to a black buyer, the State or subject to expropriation. Our concern lies with the efficacy and efficiency of such a measure given the capacity constraints experienced by the Department. To this end we endorse the call to increase State capacity for land and agrarian reform.<sup>8</sup>

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<sup>7</sup> Gutto S. et al, August 2007.

<sup>8</sup> Cousins B above n4 at p17. Here the issue of capacitation and coherence extends from political will, increased budgets, training and extension of staff, effective data collection and analysis systems to the prospect of amalgamating the departments of agriculture and land reform.

*d. First Option To Purchase*

1. The Draft bill envisions a process where the right of first option to purchase is reserved for the Minister within a prescribed period. The Minister then has a period of 90 days to indicate their intention, or lack thereof, to acquire the property. The property would then be offered to citizens to purchase. It is a concern that this approach may not prove practicable and may not serve the purposes of the Draft bill. Where the prescribed periods expire with the State being unable to purchase the land due to a lack of resources, process or capacity, what mechanisms are in place to retain such land in State or black hands? How was the estimated R21.3 million per annum for the acquisition of redistribution agricultural land arrived at? What percentage of funding will be sourced within the baseline of the relevant Departmental programmes? Further, is there any qualification on the 'citizens' that may purchase the property where the Minister elects not to? How would this clause further the object of ensuring redress for past imbalances in access to agricultural land and obtaining agricultural land for redistribution in order to support and promote productive employment and income to poor and efficient small scale farmers where the latter would not have access to sufficient capital in order to purchase properties.
2. Further questions pertain to the process following the purchasing of land by the Minister. Despite the SEIA highlighting that the main cost bearers would be farmworkers who would lose their employment, or that food prices would likely increase it seems the mitigation of such costs have scarcely been factored into taking this legislative step. Further, have any considerations been made regarding unintended costs to *all* implicated stakeholders. Moreover, the Draft bill is inadequately considered. This is evident in the lack of mitigation measures contemplated for the identified risks to attainment of the Draft bill's objects as per the SEIA report. Specifically, there is no mitigation for the anticipated disruption in food supplies, job losses by farmworkers, lack of support for smallholders, credit freezes due to uncertainty about farm ownership and inadequate funds to acquire

redistribution agricultural land. The latter is in turn fed by the fallacy that expropriation necessitates acquiring the excesses at market prices.<sup>9</sup>

*e. Ownership Vs Productive Use of Agricultural Land*

1. In or around 2013, the Department insightfully developed the strategy of agrarian transformation', defined as 'a rapid and fundamental change, in the use and control (patterns of ownership across race, gender, and class) of land, livestock and cropping'. This negates the prospect of bare ownership. This Draft bill does not seem to reinforce those aspirations. The availing of long term leasehold agreements to foreigners or foreign entities, without prioritising the development and up skilling of small scale farmers, may result in the unintended consequence of creating barriers to entry for the latter as well as precarious implications on their productive sustainability. Moreover, there is no clear indication of what is conceived as a small scale farmer for the purposes of this Draft bill.

*f. Definitions*

1. The definition of Agricultural Land leaves is unclear owing to the description in the negative. Further, there is no clarity regarding the exception of land declared as a township yet was formally zoned as agricultural land before the commencement of the Act. Does the exemption hold where the township was declared after such zoning? Or does the zoning definitively relegate such land, despite said declaration, as agricultural and therefore subject to this Act?
2. Similarly, does the agricultural zoning consideration extend to all land that may be subject to rezoning (other than for declaration as a township as provided for) post the commencement of the Act. There should be clarity on the trumping legislation, should

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<sup>9</sup> See *Msiza v Director-General for the Department of Rural Development And Land Reform and Others* (LCC133/2012) [2016] ZALCC 12; 2016 (5) SA 513 (LCC) (5 July 2016) at paras 29-30.

there be a conflict of provisions and what regulates competing interests in terms of the use of such land.

3. Finally, there is an incorrect reference to the interim Constitution in the definition of “public agricultural land”. Act 200 of 1993 is cited whereas the Constitution of the Republic of South Africa, 1996 is Act 108 of 1996.

### **CONCLUSION / RECOMMENDATIONS**

1. The LRC has long standing interactions with rural and what may be considered, agrarian communities. We also assist clients who have been subject to dispossession and the legacy thereof. We thus experience the effect of landlessness and loss of identity through the eyes of our clients who have known existence and subsistence primarily through the tenure and fruits of the land.
2. The need has been identified, defined and redefined given the Department of Rural Development and Land Reform’s numerous endeavours at legislative and policy reforms. Yet, the efficacy of the policy and legislative overhaul continues to fall short of the greater objective of achieving a just and equitable distribution of agricultural land to Africans. The undoing of centuries of deprivation, emasculation of personhood and subsequent systematic economic exclusion cannot be undone through disparate ill-considered attempts. It has become increasingly evident that the lack of an overarching framework guiding and facilitating redistribution has led to a proliferation of legislative and political mechanisms that feign at providing solutions or are replications of prior, ineffectual approaches.
3. We welcome the steps toward compiling an accurate register of all agricultural land, inclusive of race, gender and nationality indicators. Yet we have no clarity on how that information will place the intersections of race, gender and class at the forefront of redistribution and economic inclusion. The question of ownership extends beyond a

census just as the manifestations of dispossession extend beyond race and are particularly acute in spaces of patriarchy. Our clients - rural communities and those who were dispossessed require a substantive conceptualisation 'just and equitable' distribution of agricultural land. We are of the view that this Draft bill will not advance this agenda substantially. Instead, we are weary of the unintended consequences and unforeseen costs that may result in exacerbating precarious circumstances surrounding the use and ownership of South Africa's land.

4. Thus, we reiterate that legislative measures should rather be directed at equipping communities and poor people the right and the means to participate in planning and executing land redistribution district by district. Aspirant farmers who are currently amongst the poor should be given enforceable property rights, access to input, infrastructure and technical assistance and developmental capacitation in order endorse / sponsor themselves with adequate systems of monitoring and evaluation in place.